

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

SUE ANN DOLQUIST,

Plaintiff,

vs.

Case No. 03-2150-KHV

HEARTLAND PRESBYTERY, and

LEAWOOD PRESBYTERIAN CHURCH,

Defendants.

**LEAWOOD PRESBYTERIAN CHURCH'S  
BRIEF IN SUPPORT OF ITS SECOND  
MOTION TO DISMISS OR FOR SUMMARY JUDGMENT  
BASED ON THE CHURCH AUTONOMY DOCTRINE**

Respectfully submitted,

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**LEAWOOD PRESBYTERIAN CHURCH**

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**NOTE: For exhibits in support of this Brief, Defendant Leawood Presbyterian Church directs the Court and the parties to separate pleadings filed contemporaneously with this Brief, entitled “Exhibits to Defendant Leawood Presbyterian Church’s Briefs in Support of its Second, Third, and Fourth Motions to Dismiss or for Summary Judgment.”**

1. **Original Petition**  
Filed in Johnson County District Court on October 4, 2002
2. **Second Amended Petition**  
Filed in Johnson County District Court on February 28, 2003
3. **Crippin Declaration**  
Includes Declaration Exhibit A: Pastoral Call
4. **Dolquist Deposition**
5. **Robinson Declaration**  
Includes Declaration Exhibit A: “Outline for Discussion with Sue Dolquist and Roger Harp for 9/17/02”
6. **Harp Deposition**
7. **EEOC Charge**
8. **Pretrial Order, refer to Court’s docket sheet, document #86**
9. **Tammen Affidavit**
10. **Tammen Affidavit, Exhibit I, Part 1 of 18**  
Includes *Book of Order*, pp. 1-30 -- Table of Contents and Form of Government, G-1.0000–G-1.0502 [Chapter I]
11. **Tammen Affidavit, Exhibit I, Part 2 of 18**  
Includes *Book of Order*, pp. 31-60 -- Form of Government, G-2.0000–G-9.0400 [Chapters II - IX]
12. **Tammen Affidavit, Exhibit I, Part 3 of 18**  
Includes *Book of Order*, pp. 61-90 -- Form of Government, G-9.0403–G-11.0414 [Chapters IX - XI]
13. **Tammen Affidavit, Exhibit I, Part 4 of 18**  
Includes *Book of Order*, pp. 91-105 -- Form of Government, G-11.0415–G-13.0203 [Chapters XI - XIII]

14. **Tammen Affidavit, Exhibit I, Part 5 of 18**  
Includes *Book of Order*, pp. 106-120 -- Form of Government, G-14.0000–G-14.0311 [Chapter XIV]
15. **Tammen Affidavit, Exhibit I, Part 6 of 18**  
Includes *Book of Order*, pp. 121-137 – Form of Government, G-14.0312–G-14.0701 [Chapter XIV]
16. **Tammen Affidavit, Exhibit I, Part 7 of 18**  
Includes *Book of Order*, pp. 138-152 – Form of Government, G-14.0702–G16.0401 [Chapters XIV- XVI]
17. **Tammen Affidavit, Exhibit I, Part 8 of 18**  
Includes Affidavit Exhibit I: *Book of Order*, pp. 153-180 – Form of Government, G-16.0401–G-18.0401 [Chapters XVI - XVIII; Directory for Worship, W-1.0000–W-2.4005 [Chapters I - II]
18. **Tammen Affidavit, Exhibit I, Part 9 of 18**  
Includes *Book of Order*, pp. 181-196 – Rules of Discipline, W-2.4006–W-3.3701 [Chapters II - III]
19. **Tammen Affidavit, Exhibit I, Part 10 of 18**  
Includes *Book of Order*, pp. 197-210 – Directory for Worship, W-3.3702–W-4.10002 [Chapters III - IV]
20. **Tammen Affidavit, Exhibit I, Part 11 of 18**  
Includes *Book of Order*, pp. 211-240 –Directory for Worship, W-4.10003–W-7.7001 [Chapters IV - VII]; Rules of Discipline, D-1.0000–D-6.0103 [Chapters VI - XI]
21. **Tammen Affidavit, Exhibit I, Part 12 of 18**  
Includes *Book of Order*, pp. 241-270 – Rules of Discipline, D-6.0200–D-11.0801 [Chapters VI - XI]
22. **Tammen Affidavit, Exhibit I, Part 13 of 18**  
Includes *Book of Order*, pp. 271-300 – Rules of Discipline, D12.0000–D-14.0502 [Chapters XII - XIV]; Appendix A, Forms for Judicial Process, Index–p. A-12
23. **Tammen Affidavit, Exhibit I, Part 14 of 18**  
Includes *Book of Order*, pp. 301-330 – Appendix A, Forms for Vindication, p. A-13–A-28; Appendix B, Articles of Agreement, pp. B-1--B-13
24. **Tammen Affidavit, Exhibit I, Part 15 of 18**  
Includes *Book of Order*, pp. 331-360 –Articles of Agreement, pp. B-14–B17; Appendix C, A Formula of Agreement, pp. C-1-- C10; Appendix D, A Statement of Ecumenical Consensus, pp. D-1 – D-14

- 25. Tammen Affidavit, Exhibit I, Part 16 of 18**  
Includes *Book of Order*, pp. 361-390 – Appendix D, A Statement of Ecumenical Consensus, pp. D-15 – D-17; Appendix E, About the Presbyterian Church (U.S.A.) Seal, pp. E-1 – E-5; Appendix F, Other Resources in Church Law and Policy, pp. F-1; Index (A-E) with references to section numbers
- 26. Tammen Affidavit, Exhibit I, Part 17 of 18**  
Includes *Book of Order*, pp. 391-420 – Index (E-P) with references to section numbers
- 27. Tammen Affidavit, Exhibit I, Part 18 of 18**  
Includes *Book of Order*, pp. 421-437 – Index (P-end) with references to section numbers

COMES NOW Defendant Leawood Presbyterian Church, through its Attorney Patrick E. McGrath, and in support of its Motion to Dismiss or for Summary Judgment based on the Church Autonomy Doctrine, submits the following brief:

**STATEMENT OF UNCONTROVERTED FACTS**

A. General Factual Background.

1. The Plaintiff, Rev. Sue Ann Dolquist, is an ordained minister in the Presbyterian Church (U.S.A.). (Exhibit 2, Plaintiff's Second Amended Petition For Damages, ¶¶ 2, 5, 16, 17, 18 and 22).

2. On June 5, 1995, Plaintiff accepted a "call" to be the minister at Leawood Presbyterian Church. (Exhibit 3, Crippin Declaration, ¶5).

3. The "call" is in writing and is part of Plaintiff's employment contract. (Exhibit 3, Crippin Declaration, ¶ 6).

4. The "call" references the *Book of Order*, which is Part II of the *Presbyterian Church (U.S.A.) Constitution*. (Exhibit 3, Crippin Declaration, Attachment A; Exhibit 9, Tammen Affidavit, ¶¶ 6-9).

5. Leawood Presbyterian Church is subject to, and abides by, the *Presbyterian Church (U.S.A.) Constitution*. (Exhibit 3, Crippin Declaration, ¶ 4).

6. A true and complete copy of the *Book of Order* that was applicable at all relevant times is attached hereto as Exhibit I to the Affidavit of Rev. Mark A. Tammen. (Exhibit 9, Tammen Affidavit, ¶ 68; Exhibits 10-27, Attachment I to Tammen Affidavit).

7. John Miller is a former Director of Music for Leawood Presbyterian Church. (Exhibit 4, Dolquist Depo, Vol. 1, p. 98, ll. 12-19; Exhibit 3, Crippin Declaration, ¶ 11).

8. Miller's employment as Director of Music began before Plaintiff's first day of employment. (Exhibit 3, Crippin Declaration, ¶ 8).

9. The Minister and Director of Music at Leawood Presbyterian Church are co-employees; they are both supervised by the Personnel Committee and the Session. A Director of Music at Leawood Presbyterian Church is not the employment supervisor of the minister. (Exhibit 3, Crippin Declaration, ¶¶ 14-15).

10. On January 14, 1996, John Miller was ordained as an elder at Leawood Presbyterian Church. (Exhibit 3, Crippin Declaration, ¶ 9). Miller was also a member of the Session of Leawood Presbyterian Church from January 14, 1996 to December 31, 2001. (Exhibit 3, Crippin Declaration, ¶ 10).

11. John Miller is currently a member of Leawood Presbyterian Church. (Exhibit 3, Crippin Declaration, ¶ 13).

12. John Miller could not have made any decision concerning Plaintiff's employment without the agreement of other members of the Session; Miller could not have terminated Plaintiff's employment. (Exhibit 4, Dolquist Depo, Vol. 1, p. 161, ll. 3-9; Exhibit 3, Crippin Declaration, ¶ 14; Exhibit 9, Tammen Affidavit, ¶ 39).

13. John Miller retired from his position as Director of Music for Leawood Presbyterian Church on June 11, 2000. (Exhibit 4, Dolquist Depo, Vol. 1, p. 202, l. 25 through p. 203, l. 1; Exhibit 3, Crippin Declaration, ¶ 11).

14. On October 7, 2001, Plaintiff resigned as minister at Leawood Presbyterian Church. (Exhibit 4, Dolquist Depo, Vol. 2, p. 295, l. 25 through p. 296, l. 4; Exhibit 3, Crippin Declaration, ¶ 17).

15. After June 2000, John Miller was never an employee of Leawood Presbyterian Church, while Plaintiff remained an employee of Leawood Presbyterian Church until October 7, 2001. (Exhibit 3, Crippin Declaration, ¶¶ 12, 17).

16. In late August 2001, there became a vacancy in the job of Director of Music at Leawood Presbyterian Church. (Exhibit 4, Dolquist Depo, Vol. 1, p. 224, ll. 15-25).

17. Some individuals on the Session expressed an interest in rehiring John Miller as Director of Music. (Exhibit 4, Dolquist Depo, Vol. 1, p. 224, l. 15 through p. 225, l. 16).

18. At a Personnel Committee meeting of the Session on either September 8, 2001 or September 10, 2001, Plaintiff first notified the personnel committee of Miller's alleged sexual harassment. (Exhibit 4, Dolquist Depo, p. 254, ll. 14-19).

19. At a Session meeting on September 17, 2001, Plaintiff discussed her concerns about being subjected to sexual misconduct by John Miller. (Exhibit 4, Dolquist Depo, p. 261, ll. 6-9; p. 262, ll. 10-13).

20. On or about September 12, 2001, the Leawood Presbyterian Church Session rejected the suggestion that John Miller return to serve as Interim Music Director, and hired a new Director of Music. (Exhibit 3, Crippin Declaration, ¶ 16).

21. At a Session meeting on September 17, 2001, Plaintiff submitted her resignation. (Exhibit 4, Dolquist Depo, Vol. 1, p. 37, ll. 7-15).

22. On October 7, 2001, the Leawood Presbyterian Church congregation accepted Plaintiff's resignation. (Exhibit 3, Crippin Declaration, ¶ 17).

23. On October 8, 2001, Plaintiff prepared a Memorandum outlining all alleged instances of Miller's alleged sexual harassment, but chose not to file formal ecclesiastical charges

against John Miller. (Exhibit 4, Dolquist Depo, Vol. 3, p. 106, ll. 6-11; p. 106, l. 23 – p. 107, l. 9).

24. In September 2001, M. John Robinson prepared a two-page outline of issues to be discussed in a meeting with Reverend Sue Dolquist and Reverend Roger Harp. This outline was provided to both Rev. Harp and Rev. Dolquist in their September 17, 2001 meeting. The outline reported that Leawood Presbyterian Church members had expressed concern that Plaintiff was in an inappropriate relationship with a married man then attending Leawood Presbyterian Church, and that there were problems with Plaintiff's administration, leadership and pastoral care. (Exhibit 5, M. John Robinson Declaration, ¶¶ 3, 4, 6, 7).

25. On September 27, 2002, a formal ecclesiastical charge that John Miller had sexually harassed women at Leawood Presbyterian Church, including Plaintiff, was filed with Heartland Presbytery by Rev. Roger Harp, a minister in the Presbyterian Church (U.S.A.). (Exhibit 6, Harp Depo, p. 219, l. 17 - p. 220, l. 7).

26. Pursuant to the governance of the Church and its *Book of Order*, an investigation of the formal ecclesiastical charge was begun. (Exhibit 9, Tammen Affidavit, ¶¶ 41, 54; Exhibit 3, Crippin Declaration, ¶ 18).

27. On June 7, 2002, some eight months after resigning, Plaintiff filed a charge with the Equal Employment Opportunity Commission, alleging that she had been subjected to sexual harassment by John Miller and subjected to retaliation by Leawood Presbyterian Church. (Exhibit 7, EEOC Charge).

28. Plaintiff's charge with the EEOC alleges that retaliation occurred "when a two-page letter was sent to Heartland Presbytery accusing [plaintiff] of sexual harassment and other misdeeds." (Exhibit 7, EEOC Charge).

29. On October 4, 2002, Plaintiff filed her lawsuit against Defendants Leawood Presbyterian Church and Heartland Presbytery in the Circuit Court of Jackson County, Missouri in Case No. 02CV227642. On October 4, 2002, Plaintiff filed her lawsuit against Defendant Leawood Presbyterian Church and Heartland Presbytery in the District Court of Johnson County, Kansas in Case No. 02CV06642. Pursuant to advice of counsel, Leawood Presbyterian Church suspended its investigation of the complaint against John Miller. (Exhibit 3, Crippin Declaration, ¶ 19).

30. Leawood Presbyterian Church stands ready and committed to continue the investigation of John Miller as soon as counsel advises it is proper to proceed. (Exhibit 3, Crippin Declaration, ¶ 20).

31. In this lawsuit, Plaintiff has alleged seventeen separate instances of retaliation. These instances of retaliation as stated by Plaintiff in the Pretrial Order are:

Threatening to terminate Plaintiff's employment; Threatening Plaintiff with disparity in the terms and conditions of her employment; Creating a hostile work environment that made it intolerable for Plaintiff to work; Falsely accusing Plaintiff of engaging in sexually inappropriate behavior including wearing see-through clothing and short skirts; Attempting to force Plaintiff to consent to the rehiring of John Miller, the perpetrator of the sexual harassment, over her objection; Falsely accusing Plaintiff of being involved with a male member of the church in an inappropriate relationship; Organizing an investigation so as to cause animosity between Plaintiff and her female co-workers by forcing them to be confronted in a large room with several witnesses in attendance; Fabricating complaints about Plaintiff's ability to provide meaningful sermons; Fabricating complaints about Plaintiff's job performance when those same complaints were absent prior to Plaintiff's sexual harassment complaints; Suggesting that Plaintiff take some course work on pastoral care or related areas when it was never an issue before Plaintiff complained; Demanding that after Plaintiff resigned, and was receiving severance pay, that she return her severance pay to fund counseling for the perpetrator of the harassment; Refusing to investigate Plaintiff's claims because the Session was more concerned with not hurting John Miller's feelings; Falsely accusing Plaintiff of not handling the matter appropriately and because of the way she handled the matter she opened a big can of worms; Manufacturing an alleged accounting scandal in an effort to undermine her credibility and to discredit her legitimate claims of sexual harassment; A telephone conference

between Plaintiff and M. John Robinson in which Robinson communicated that he would not assist Plaintiff in her claims, and said 'Now don't go getting all female on me;' Placing Plaintiff's legitimate complaints about John Miller below the consideration for John Miller and his wife, rather than investigating the charges; and Constructively discharging Plaintiff.

*See*, Pretrial Order, Plaintiff's Theories of Recovery, exhibit 8, pp. 11-13.

B. The Presbyterian Church Constitution.

32. The *Constitution of the Presbyterian Church (U.S.A.)* has, since at least 1983, consisted of the *Book of Confessions* (Part I) and the *Book of Order* (Part II). (Exhibit 9, Tammen Affidavit, ¶ 6).

33. All members, ministers, and elders of the Presbyterian Church are bound by the *Constitution of the Presbyterian Church (U.S.A.)*. (Exhibit 9, Tammen Affidavit, ¶ 7).

34. The *Book of Order* contains the Form of Government, Rules of Discipline, and Directory of Worship. As such, the *Book of Order* sets forth the ecclesiastical polity and governance of the Church. (Exhibit 9, Tammen Affidavit, ¶ 8).

35. The *Book of Order* provides that "the church universal consists of all persons in every nation, together with their children, who profess faith in Jesus Christ as Lord and Savior and commit themselves to live in a fellowship under his rule." (G-4.0101; Exhibit 11). While the Church's confessions express the faith in one holy, catholic and apostolic church, the Presbyterian Church (U.S.A.) identifies itself with the affirmations of the Protestant Reformation which occurred in Europe almost five centuries ago. Its unique religious doctrine is reflected in a form of government in which - from the perspective of ecclesiastical polity - the presbytery is the basic unit. (Exhibit 9, Tammen Affidavit, ¶ 9).

36. The biblical model for the Presbyterian system of governance comes from Acts 15, the Council at Jerusalem. There, "[t]he apostles and the elders met together to consider [the]

matter. *Holy Bible*, Acts 15:6ff (NRSV). “After there had been much debate” in that Council, a decision was made. *Id.* “Then the apostles and the elders, with the consent of the whole church, decided to choose men from among their members and to send them” to fulfill their appointed tasks. *Id.* at Verse 22. (Exhibit 9, Tammen Affidavit, ¶ 10).

37. Presbyterian polity differs from congregational polity (e.g. Baptists) where authority rests largely by the vote within each congregation and episcopal polity (e.g., Episcopalian, Roman Catholic) where authority rests largely in an individual bishop. (Exhibit 9, Tammen Affidavit, ¶ 11).

38. In the *Book of Order*, the Principles of Presbyterian Government are set out at G-4.0300. The special commitment to basic principles of Presbyterian polity (G-4.0301; Exhibit 11) includes: “This church shall be governed by presbyters (elders and ministers of the Word and Sacrament, traditionally called ruling and teaching elders);” (G-4.0301b; Exhibit 11); These presbyters shall come together in governing bodies (traditionally called judicatories or courts) in regular gradation;” (G-4.0301c; Exhibit 11); “Presbyters are not simply to reflect the will of the people, but rather to seek together to find and represent the will of Christ;” (G-4.0301d; Exhibit 11); Decisions shall be reached in governing bodies by vote, following opportunity for discussion, and a majority shall govern;” (G-4.0301e; Exhibit 11) (Exhibit 9, Tammen Affidavit, ¶ 12).

39. Thus, the authority and decisions of a governing body in the Presbyterian Church are no mere process of efficiency. They are ordained by God and under the guidance of the Holy Spirit: “Christ gives to his Church its faith and life, its unity and mission, its officers and ordinances. Insofar as Christ’s will for the Church is set forth in Scripture, it is to be obeyed. In the worship and service of God and the government of the church, matters are to be ordered

according to the Word by reason and sound judgment under the guidance of the Holy Spirit.”  
*Book of Order* (G-1.0100c; Exhibit 10) (emphasis added). (Exhibit 9, Tammen Affidavit, ¶ 13).

C. Church Governance Structure.

40. Pursuant to the *Book of Order*, the Church is governed by a system of four governing bodies called: Session, Presbytery, Synod, and the General Assembly, all of which are ecclesiastical bodies. The *Book of Order* mandates certain duties and responsibilities upon the governing bodies. (Exhibit 9, Tammen Affidavit, ¶ 23).

41. A local congregation, called a Particular Church - like the Leawood Presbyterian Church - can be organized only by the authority of the Presbytery. A Particular Church serves as the essential arm of the mission of the Presbytery. (Exhibit 9, Tammen Affidavit, ¶ 24).

42. Each Particular Church has a Session, which consists of a minister or co-ministers, or associate minister, and elders in active service. The Session is responsible for the mission and government of the Particular Church. There are over 11,000 Particular Churches. (Exhibit 9, Tammen Affidavit, ¶ 25).

43. All Particular Churches and ministers plus representative elders-in-active-service within a certain geographic district comprise a Presbytery. The Presbytery is responsible for the mission and government of the Church throughout its geographic district. There are 173 presbyteries. (Exhibit 9, Tammen Affidavit, ¶ 26).

44. A Synod consists of three or more Presbyteries within a larger geographic area. Each Presbytery sends a commissioner to the Synod. The Synod is an intermediate governing body responsible for the mission of the Church throughout its geographic area. There are 16 synods. (Exhibit 9, Tammen Affidavit, ¶ 27).

45. The General Assembly is a governing body of representative elders in active service and representative ministers representing each Presbytery. The General Assembly constitutes the bond of union, community, and mission of the Particular Churches and governing bodies. (Exhibit 9, Tammen Affidavit, ¶ 28).

D. Candidacy, Ordination and Call of Ministers.

46. The Presbytery alone, and no other governing body, has the power to ordain, receive, dismiss, install, remove, and discipline ministers. (G-11.0103(n); Exhibit 12). The Presbytery exercises these powers, in part, through a Committee on Ministry and a Committee on the Preparation for Ministry (G-11.0500; Exhibit 13). (Exhibit 9, Tammen Affidavit, ¶ 29).

47. The Committee on the Preparation for Ministry oversees the preparation of prospective ministers for ordination and employment. (G-14.0300; Exhibit 14). This process includes both inquirer and candidacy phases, wherein each prospective minister reports both to the Presbytery and the Presbytery's Committee on Preparation for Ministry. (G-14.0309(b); Exhibit 14). (Exhibit 9, Tammen Affidavit, ¶ 30).

48. During the period of candidacy, a prospective minister candidate is required to pass a series of examinations. One of these examinations requires the candidate to demonstrate a working knowledge of the constitutional structure of the Presbyterian Church (U.S.A.) and the method by which differences, disputes and grievances are properly resolved pursuant to the *Book of Order*, including the Rules of Discipline (G-14.0311; Exhibit 14). (Exhibit 9, Tammen Affidavit, ¶ 31).

49. All ministers are informed during training that the procedures provided by the *Book of Order* must be used to remedy any and all internal grievances. (Exhibit 9, Tammen Affidavit, ¶ 32).

50. The Presbytery decides, in its sole discretion, whether to certify that a candidate is ready for ordination and employment as a minister - known as a “call.” (G-11.0402; Exhibit 12; G-14.0500; Exhibit 16). (Exhibit 9, Tammen Affidavit, ¶ 33).

51. Calls are issued by a Particular Church. (G-14.0500; Exhibit 16). However, the Presbytery has sole authority to authorize ministers to accept a call issued by a Particular Church. (Id.) Hence, only a Presbytery may install a minister in a local church. (Exhibit 9, Tammen Affidavit, ¶ 34).

52. The relationship between a minister and a Particular Church is solely governed by the *Book of Order* and the terms of the minister’s call, which are subject to the recommendation by the nominating committee of the Particular Church (G-14.0502(b); Exhibit 16). (Exhibit 9, Tammen Affidavit, ¶ 35).

53. Once a call is accepted, all control over the terms and conditions of a minister’s employment is vested in the Session of the Particular Church who issued the call, in conjunction with the Presbytery that approved the call. (Exhibit 9, Tammen Affidavit, ¶ 36).

E. Selection and Role of Elders in the Local Church.

54. Elders must be active members of a Particular Church, and are nominated and elected by the congregation of the Particular Church. (G-14.0200; Exhibit 14). They are ordained by the Session. (G-14.0206; Exhibit 14). (Exhibit 9, Tammen Affidavit, ¶ 37).

55. Elders exercise leadership, government and disciplinary functions within the Particular Church. (G-6.0302; Exhibit 11). Specific responsibilities of Elders include the duty “to strengthen and nurture the faith and life of the congregation committed to their charge[;]. . . encourage the people in the worship and service of God, equip and renew [the people] for their tasks within the church and for their mission in the world, visit and comfort and care for the

people, with special attention to the poor, the sick, the lonely, and those who are oppressed[;]. . . inform the pastor and Session of those persons and structures which may need special attention” and “assist in worship.” (G-6.0304; Exhibit 11). (Exhibit 9, Tammen Affidavit, ¶ 38).

56. Individual Elders have no control over the call/employment relationship between the minister and the Particular Church. Individual elders are not a supervisor of the minister. As stated in paragraph 24, Elders only have authority in such call/employment matters as a member of the Session governing body. (G-10.0102n; Exhibit 12). (Exhibit 9, Tammen Affidavit, ¶ 39).

F. Disciplining Ministers and Elders.

57. Only the Presbytery has jurisdiction over disciplinary matters involving ministers. (D-3.0101(b); Exhibit 20). The *Book of Order* sets forth detailed disciplinary proceedings in the nature of trials by a Presbytery’s Permanent Judicial Commission in its Rules of Discipline. (D-11.0000.0202; Exhibit 21). The Presbytery is the appropriate entity, through its Permanent Judicial Commission (an ecclesiastical court), to discipline ministers. (G-11.0103(r); Exhibit 12). (Exhibit 9, Tammen Affidavit, ¶ 40).

58. The Session has jurisdiction over disciplinary matters involving elders, deacons, and members. (D-3.0101(a); Exhibit 20). The Session likewise follows the processes described in D-11.000. (Exhibit 9, Tammen Affidavit, ¶ 41).

G. Rules of Discipline Generally.

59. The Rules of Discipline specify formal procedures for preserving the purity and purposes of the Church. (D-1.0103; Exhibit 20). (Exhibit 9, Tammen Affidavit, ¶ 42).

60. The Rules of Discipline afford procedural safeguards to members including ministers and elders, seeking to correct or restrain wrong-doing in order to bring members, including ministers and elders, to repentance and restoration; to restore the unity of the Church

by removing the causes of discord and division; and to secure the just, speedy, and economical determination of proceedings. (D-1.0101; Exhibit 20). (Exhibit 9, Tammen Affidavit, ¶ 43).

61. The exercise of Church discipline, a power that Jesus Christ has vested in his Church, is exercised as a dispensation of mercy so that the ends of the Church may be achieved. (D-1.0102; Exhibit 20). (Exhibit 9, Tammen Affidavit, ¶ 44).

62. Pursuant to the Book of Order of the Church, the Rules of Discipline are intended as the sole and exclusive remedy for resolving disputes among ministers and elders of the Church. As a matter of doctrine, Christians are not to sue one another. (I Corinthians 6:1-6). (Exhibit 9, Tammen Affidavit, ¶ 45).

63. The Rules of Discipline are used to prevent and correct offenses by church members, elders, and ministers. (D-2.0100; Exhibit 20). (Exhibit 9, Tammen Affidavit, ¶ 46).

64. The Rules of Discipline provide several processes by which elders and ministers may seek correction of offenses by other elders and ministers. These processes include a Request for Vindication and Disciplinary Cases. (D-9.000; Exhibit 21). (Exhibit 9, Tammen Affidavit, ¶ 47).

65. A minister, as part of his/her training, must know of these procedures and the polity of the Presbyterian Church (U.S.A.). (Exhibit 9, Tammen Affidavit, ¶ 48).

66. Chapter IX of the Rules of Discipline provides a process whereby a member, including ministers and elders, of the Presbyterian Church (U.S.A.) may request vindication if the member, minister or elder feels injured by rumor or gossip: "A member of the Presbyterian Church (U.S.A.) who feels injured by rumor or gossip may request an inquiry for vindication by submitting to the clerk of session or stated clerk of the presbytery a clear narrative and statement

of alleged facts.” (D-9.0101; Exhibit 21). This process is known as a “Request for Vindication.” (Exhibit 9, Tammen Affidavit, ¶ 49).

67. Chapter X of the Rules of Discipline provides the process whereby a member, minister, or elder may be censured for an offense. An offense is any act or omission by a member, minister, or elder, that is contrary to the *Constitution of the Presbyterian Church (U.S.A.)*. (D-2.0203b; Exhibit 20). (Exhibit 9, Tammen Affidavit, ¶ 50).

68. Sexual harassment is contrary to the *Constitution of the Presbyterian Church (U.S.A.)*. (D-10.0401; Exhibit 21). (Exhibit 9, Tammen Affidavit, ¶ 51).

69. The Church has jurisdiction over any minister or elder of the Church, for purposes of exercising its powers under the Rules of Discipline. (D-3.0101; Exhibit 20). (Exhibit 9, Tammen Affidavit, ¶ 52).

#### H. The Disciplinary Process.

70. The disciplinary process may be invoked by an accuser, a member of a governing body receiving information that an offense may have occurred, or an offender coming forward in self-accusation. (D-10.0102; Exhibit 21). (Exhibit 9, Tammen Affidavit, ¶ 53).

71. A disciplinary case is initiated by submitting a statement of the alleged offense to the clerk of Session or the stated clerk having jurisdiction over the member, elder, or minister. (D-10.0101; Exhibit 21). (Exhibit 9, Tammen Affidavit, ¶ 54).

72. The clerk of Session or the stated clerk of the Presbytery receiving the written statement then refers the matter to an Investigating Committee. (D-10.0103; Exhibit 21). (Exhibit 9, Tammen Affidavit, ¶ 55).

73. The Investigating Committee then makes a thorough inquiry into the facts and circumstances of the accusation, and determines whether charges will be filed. If charges are to

be filed, the Investigating Committee prepares these charges, and designates a prosecuting committee to prosecute the case. (D-10.0202; Exhibit 21). (Exhibit 9, Tammien Affidavit, ¶ 56).

74. The decision of the Investigating Committee not to file charges may be reviewed by the Session or the permanent judicial commission. (D-10.0303; Exhibit 21). (Exhibit 9, Tammien Affidavit, ¶ 57).

75. All charges are tried by either the Session or Presbytery. (D-10.0404; Exhibit 21). (Exhibit 9, Tammien Affidavit, ¶ 58).

76. Chapter XI of the Rules of Discipline specifies detailed procedures for conducting trial in a disciplinary case. (Exhibit 9, Tammien Affidavit, ¶ 59).

77. Chapter XII of the Rules of Discipline provides the procedure for censure and restoration in a disciplinary case. When an accused has been found guilty, the church may censure the guilty party by publicly rebuking the party, publicly rebuking the party and mandating a period of supervised rehabilitation, temporarily excluding the guilty party from the exercise of ordained office or membership, or removing the guilty party from office or membership. (Exhibit 9, Tammien Affidavit, ¶ 60).

78. A person found guilty may be removed from membership, which removes the individual from all roles and sets aside the person's ordination and election to all offices. (D-12.0105; Exhibit 22). (Exhibit 9, Tammien Affidavit, ¶ 61).

79. Chapter XII of the Rules of Discipline provides the procedure for appeal in a disciplinary case. (Exhibit 9, Tammien Affidavit, ¶ 62).

I. Request for Vindication.

80. Any member, elder, or minister of the Presbyterian Church (U.S.A.) who feels injured by rumor or gossip may request vindication. (Exhibit 9, Tammien Affidavit, ¶ 63).

81. A request for vindication is invoked by submitting to the clerk of Session or stated clerk of the Presbytery a written statement of alleged facts. (D-9.0101; Exhibit 21). (Exhibit 9, Tammen Affidavit, ¶ 64).

82. The Clerk of Session or stated clerk of the Presbytery then determines whether the request for vindication shall be submitted to an investigating committee. (D-9.0101(a); Exhibit 21). (Exhibit 9, Tammen Affidavit, ¶ 65).

83. The Investigating Committee receiving a request for vindication conducts an inquiry to determine the facts and circumstances of the matter. The Investigating Committee issues a report, in writing, to the governing body. (D-9.0101(b); Exhibit 21). (Exhibit 9, Tammen Affidavit, ¶ 66).

84. The Investigating Committee may determine that charges are to be filed against the person requesting vindication. If charges are filed, the matter proceeds in the same manner as a disciplinary case under Chapters X, XI, and XII of the Rules of Discipline. (Exhibit 9, Tammen Affidavit, ¶ 67).

### **QUESTIONS PRESENTED**

- 1. Do the First Amendment and the Church Autonomy Doctrine preclude Plaintiff's Title VII claims for sexual harassment and retaliation?**
- 2. Do the First Amendment's Religion Clauses bar common law torts sounding in negligence that implicate the Church-Minister relationship?**

### **ARGUMENT AND AUTHORITIES**

This brief begins by setting forth those cases decided by the United States Supreme Court that give rise to the doctrine of church autonomy. In Part II, the brief notes that the lower courts, federal and state, have arranged claims or causes of action into three types: (a) those claims or causes of action where a minister has sued the church which had employed him or her; (b) those

claims or causes of action where a non-ministerial employee (an employee of a church who is not a minister) has sued the church which had employed him or her; and (c) those claims or causes of action where a so-called “third-party” (*i.e.*, someone attending the church or receiving pastoral counseling) has sued the church where he or she had some dealings. The doctrine of church autonomy has its strictest application to the first of these types of claims or causes of action, namely, where a minister, such as Plaintiff Rev. Dolquist, has sued the church, such as Leawood Presbyterian Church, which employed her.

In Part III, the brief surveys those cases where a minister suing his or her church alleges wrongful conduct by church officials in relation to a decision to hire or retain the minister. These claims are without fail prohibited by the First Amendment. Very similar to the hiring/retention cases are those where a minister suing his or her church alleges a hostile environment or some other ill treatment, such as discipline or retaliation, by church officials. Nearly all courts find these latter claims are also barred by the First Amendment. This is especially so where a church, as a matter of its governance and ecclesiastical discipline, has an internal complaint and judicatory process for addressing a minister's grievances and other disputes. This internal process must be utilized when required as a matter of ministerial status or employment contract. As a matter of church autonomy, a religious denomination may insist of its ordained ministers that the rules of governance and discipline of their church be honored (including internal dispute resolution processes), for it is through its ministers that a church represents itself to the world.

In Part IV, the brief collects cases dismissing tort claims sounding in negligence. Negligence claims inevitably involve the civil court and jury in the second-guessing of church officials who took actions (or failed to act) concerning the hiring, retention, or discipline of one

of its ministers. The government via its common law has no authority to decide what is normative for an “American religion” or to decide the behavior of a “reasonably prudent bishop,” and then forcing all religious bodies to conform to that standard (as applied by a jury) or suffer ruinous liability. Such negligence claims cannot be squared with the doctrine of church autonomy.

**1. The U.S. Supreme Court’s Doctrine of Church Autonomy Does Far More Than Shield Doctrinal Disputes From Secular Adjudication; Church Autonomy Bars Judicial Interference In Matters of Church Governance And The Application Of Its Rules Concerning The Hiring And Retention Of Clergy And The Discipline Of Clergy.**

Unlike voluntary organizations generally, religious organizations are acknowledged to have a level of autonomy from governmental intrusions that would otherwise compromise and hence alter the organization’s religious character. This is a natural application of the venerable principle of separation of church and state. *Watson v. Jones*, 80 U.S. 679 (1872), was the first U.S. Supreme Court case to define the scope of the doctrine. In *Watson*, the Supreme Court said that civil courts should exercise no jurisdiction in “a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them.” *Id.* at 733. Any doubt that the principle extends to a church’s employment relationship with its clergy was erased in *Gonzalez v. Roman Catholic Archbishop of Minila*, 280 U.S. 1 (1929). Under the terms of a testamentary trust involving the Roman Catholic Church in the Philippines, Gonzalez claimed a legal right to receive an appointment to an ecclesiastical office that had become vacant. When the desired appointment was refused, Gonzalez brought suit seeking a court order directing the archbishop to make the appointment. The Supreme Court refused, stating that it is the function of church

authorities to determine the qualifications of clergy — here a matter of canon law — and which candidates possess them. *Id.* at 16.

The Supreme Court in *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94 (1952), elevated the principles in *Watson* and *Gonzalez* to a requirement of the First Amendment. *Id.* at 116. The Court said that the doctrine of church autonomy announced in *Watson* “radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.” *Id.* Thus church autonomy does not just pertain to doctrinal disputes, but also to questions of church governance and internal administration.

That the Supreme Court was serious about civil courts being without jurisdiction over disputes concerning the governance of clergy, even in the face of a finding that the church authorities were not following their own rules, was confirmed in *Serbian Eastern Orthodox Diocese of the United States of American and Canada v. Milivojevich*, 426 U.S. 696 (1976). The case involved a complex dispute between the “Mother Church” in Serbia and highly placed ecclesiastics in America. The dispute led to the Mother Church removing the American bishop — because of his defiance of headquarters — and radically reorganizing the dioceses geographically in America and Canada. We need not grasp the full details of the dispute to understand the resulting principle of law and the resoluteness of the Supreme Court that it be followed in the lower courts. Quoting *Watson v. Jones*, the *Serbian Eastern* Court said:

The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. **All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it.** But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their

decisions could appeal to the secular courts and have them reversed. **It is of the essence of these religious groups, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions would be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.**

426 U.S. at 711 (emphasis added). So the Plaintiff Rev. Dolquist, as an ordained minister of the Presbyterian Church (U.S.A.), like the American ecclesiastic in *Serbian Eastern*, is deemed to have consented to following the detailed grievance and judicatory processes set out in the *Book of Order*. (See Uncontroverted Facts, ¶¶ 32–84). The Supreme Court further enlarged on the scope of the church autonomy doctrine as follows:

We have concluded that whether or not there is room for “marginal civil court review” under the narrow rubrics of “fraud” or “collusion” when church tribunals act in bad faith for secular purposes, no “arbitrariness” exception — in the sense of an inquiry whether the decisions of the highest ecclesiastical tribunal of a hierarchical church complied with church laws and regulations — is consistent with the constitutional mandate that civil courts are bound to accept the decision of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom or law.

*Id.* at 713. The Court went on to note that a church’s rules do not have to follow modern legal notions of procedural due process. *Id.* at 715. Further, the Illinois Supreme Court had applied “neutral principles” of law in overturning the highest church judicatory. On appeal that approach was overturned by the United States Supreme Court because “the Supreme Court of Illinois substituted its interpretation of the Diocesan and Mother Church constitutions for that of the highest ecclesiastical tribunals in which church law vests authority to make that interpretation.”

*Id.* at 721.

- 2. In Dealing With Claims Against A Church Involving Employment Discrimination And/Or Tortious Conduct, The Church Autonomy Doctrine Has Been Applied With The Strictest Scrutiny In Instances Where A Minister Is Suing His or Her Own Church.**

The broad principles of the Supreme Court as set out in *Watson*, *Gonzalez*, *Kedroff*, and *Serbian Eastern* have been applied with greater or lesser vigor depending on the character of the Plaintiff suing the church. The claims or causes of action fall into three types: (a) those claims or causes of action where a minister has sued the church which had employed him or her;<sup>1</sup> (b) those claims or causes of action where a non-ministerial employee (an employee who is not a minister) has sued the church which had employed him or her;<sup>2</sup> and (c) those claims or causes of action where a so-called “third-party” (*i.e.*, someone attending the church or receiving pastoral counseling) has sued the church where he or she had some dealings.<sup>3</sup> The doctrine of church autonomy has its strictest application to the first type of claim or cause of action, namely, where a minister, such as Plaintiff Rev. Dolquist, is suing the church, such as Leawood Presbyterian Church, which had previously employed him or her. This greater scrutiny makes sense, in the oft-quoted words of *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972), because: “The relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern.” *Id.* at 558-59 (dismissing for First Amendment reasons a Title VII claim by female minister against her church

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<sup>1</sup>*See, e.g., Schmoll v. Chapman University*, 83 Cal. Rptr. 2d 426, 429 n.4 (Cal. App. 1999) (dismissing for First Amendment reasons claim by female chaplain against religious college alleging sex discrimination resulting in constructive discharge, as well as retaliation against her for reporting alleged sexual harassment of students by faculty), explaining why a non-ministerial employee suing the church is treated differently from a minister suing the church.

<sup>2</sup>*See, e.g., Smith v. Raleigh District of the North Carolina Conference of the United Methodist Church*, 63 F. Supp. 2d 694 (E.D.N.C. 1999) (permitting Title VII claims for sexual harassment brought by a church receptionist and a pastor’s secretary, both non-ministerial employees).

<sup>3</sup>*See, e.g., Van Osdol v. Vogt*, 908 P.2d 1122, 1132 n.17 (Colo. 1996) (distinguishing cases involving so-called third-party claims from claim by female minister brought against her church).

alleging sex discrimination in her salary and benefits). A parallel way of explaining this three-part typology is that the Supreme Court in *Serbian Eastern* held that ecclesiastics, having chosen to pursue their vocation within the church, are deemed to have consented to its rules of governance and judicatory processes. It is simply more fair to hold ordained ministers suing their church to a strict application of the church autonomy doctrine than non-ministerial employees suing their church — and still more fair in comparison to so-called third-party claims.

There are hundreds of reported decisions, federal and state, where a plaintiff has sued a church alleging employment discrimination, various torts, breach of contract, or some combination of these three. In many of these reported decisions the church asserts the First Amendment as a defense. This three-part typology assists greatly in quickly focusing on the far fewer number of cases that are most like the one before this Court.

**3. Where A Minister Is Suing His Or Her Own Church For Alleged Employment Discrimination, The Case Must Be Dismissed On First Amendment Grounds Whether The Claim Involves Hiring Or Retention, Or Whether The Claim Involves A Hostile Environment.**

In the present situation, Plaintiff, Rev. Sue Ann Dolquist, an ordained minister in the Presbyterian Church (U.S.A.) (Uncontroverted Fact, ¶ 1), is suing her own local church, Leawood Presbyterian Church, and her presbytery, Heartland Presbytery. Her federal question claims (28 U.S.C. § 1331) are brought pursuant to Title VII of the Civil Rights Act of 1964. They are designated as Count II (sexual harassment) and Count III (retaliation).

The alleged sexual harassment of Plaintiff was by Mr. Miller. Mr. Miller was never Plaintiff's supervisor.<sup>4</sup> (Uncontroverted Fact, ¶¶ 9, 12). Rather, Mr. Miller was a co-employee

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<sup>4</sup>The showing required to prove sexual harassment under Title VII is higher when the alleged perpetrator is a co-employee as opposed to the victim's supervisor. *See Joens v. John Morrell & Co.*, 354 F.3d 938 (8th Cir. 2004). An employer is liable for the sexual harassment of an employee by a co-employee only if the employer "knew or should have known of the conduct

of Plaintiff from her starting date of June 5, 1995, until Mr. Miller retired as Director of Music in June 2000. (Uncontroverted Fact, ¶¶ 2, 13, 15). As an ordained minister, Plaintiff has a duty under the *Book of Order* to file a complaint of sexual harassment with the Church and thereby invoke its investigatory and judicatory processes and procedures. (Uncontroverted Fact, ¶¶ 49, 64, 65). She did not do so.<sup>5</sup> (Uncontroverted Fact, ¶ 23). That failure is fatal under the First Amendment, for Leawood Presbyterian Church as a matter of ecclesiastical governance insists that its ordained ministers submit to the procedures and judicatories of the Presbyterian Church (U.S.A.). (Uncontroverted Facts, ¶¶ 5, 33). This is also a duty under Plaintiff's employment contract, the terms of which incorporate the *Book of Order*. (Uncontroverted Fact, ¶ 4). If this seems harsh, Leawood Presbyterian Church would point out that there are two very similar rules of law applicable to the secular commercial world: (a) where an employee alleging

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and failed to take proper remedial action." *Id.* at 940. For a court (assisted by a jury) to attempt to determine what Leawood Presbyterian Church "knew or should have known" about Mr. Miller's conduct toward Plaintiff is a textbook definition of excessive entanglement. Just who is Leawood Presbyterian Church? One might initially answer that the Church's front-line representative is its senior minister. But that's Rev. Dolquist! Next one might say the Church is the Session. But what should the Session "know, or should have known" as to its Director of Music? The Session is made up of unpaid volunteers. They don't go to work at Leawood Church and are thus unable to observe Mr. Miller's conduct. What should the Session "know, or should have known" as to one of its elders? The Session does not oversee the separate and individual activities of its elders, which in any event is an ecclesiastical question as to the authority of a Session over an individual elder. All of these machinations serve to demonstrate the wisdom of the Presbyterian Church (U.S.A.) in requiring its ministers to follow through on the duty to formally report instances of sexual harassment (whether of themselves or others) to the Church pursuant to the *Book of Order*.

<sup>5</sup>Plaintiff points out that she did eventually complain about Mr. Miller's sexual harassment. This occurred in September 2001 when the Session was considering rehiring Mr. Miller as Director of Music. But complaining to the Session so as to prevent Mr. Miller from being rehired is not the same as filing a complaint with the Church pursuant to the *Book of Order*. The Session reasonably believed Mr. Miller's harassment, if it occurred, was by a former employee, not a current on-going problem for Plaintiff. The information offered to the Session by Plaintiff was relevant to why Mr. Miller should not be rehired. The Session decided not to rehire Mr. Miller. It was thought that not rehiring Mr. Miller assuaged Plaintiff's concerns and thus ended the matter.

discrimination has entered into an employment contract, a term of which is to arbitrate such disputes with his or her employer;<sup>6</sup> and (b) where the employer has adopted a preventative and complaint process for dealing with sexual harassment, that employer has an affirmative defense when an employee, one who did not seek to utilize the complaint process, later sues alleging a hostile environment.<sup>7</sup> As additional proof that Leawood Presbyterian Church takes seriously both the sexual harassment and the procedural rules in its *Book of Order*, Leawood Presbyterian Church points out that a formal complaint was filed by Rev. Harp against Mr. Miller on September 27, 2002, and was being investigated. (Uncontroverted Facts, ¶¶ 25, 26). That investigation was suspended, on the advice of counsel, only when Plaintiff filed the instant lawsuit. (Uncontroverted Fact, ¶ 29). Leawood Presbyterian Church stands ready and committed to continue the investigation as soon as counsel advises it is proper to proceed. (Uncontroverted Fact, ¶ 30).

The alleged retaliation against Plaintiff for her giving voice to Mr. Miller's sexual harassment is a two-page letter that was provided to Heartland Presbytery accusing Plaintiff of sexual harassment and other misdeeds. (Uncontroverted Fact, ¶ 28). It was reported that Rev. Dolquist was in an inappropriate relationship with a married man then attending Leawood Presbyterian Church. (Uncontroverted Fact, ¶ 24). It was also reported that there were problems with Plaintiff's administration, leadership, and pastoral care. (Uncontroverted Fact, ¶ 24). The First Amendment does not permit this type of incident to be actionable retaliation. As required by the governance of the Church and its *Book of Order*, the Church has to investigate a

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<sup>6</sup>See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (holding that Federal Arbitration Act permits compelled arbitration of age discrimination in employment dispute).

<sup>7</sup>See *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998).

report of this sort. (Uncontroverted Facts, ¶¶ 53, 57, 58, 60, 61, 62, 63). A minister's impropriety with a member of the church is very serious. If the report proved to be true, it would likely lead to Plaintiff being disciplined by the Church. (Uncontroverted Facts, ¶¶ 70, 71, 77, 68, 62, 63). In addition to the religious and moral implications of the reported impropriety, there is incalculable harm to the ministry of the Church should such matters become well known or reported in the news media. And such improprieties by ministers can damage the Christian fellowship of the congregation, as well.

The more numerous reported cases are where a minister's lawsuit against his or her church has arisen directly out of a hiring or retention decision adverse to the minister. Citing First Amendment concerns, the courts dismiss. The issues of hiring and retention of clergy determine who speaks for the church — an inherently religious question. Many of Rev. Dolquist's allegations of retaliation go directly to the issue of her job performance, and hence, retention: *e.g.*, threats to terminate Plaintiff's employment; threatening Plaintiff with disparity in the terms and conditions of her employment; complaining of Plaintiff engaging in sexually inappropriate behavior including wearing see-through clothing and short skirts; complaining of Plaintiff being involved with a male member of the church in an inappropriate relationship; complaining about Plaintiff's ability to provide meaningful sermons; complaining about Plaintiff's job performance; suggesting that Plaintiff take some course work on pastoral care and related areas; criticizing Plaintiff for not handling the rehiring of John Miller as the Choir Director appropriately, consequently "opening up a can of worms"; and concerns over an accounting scandal that implicated Plaintiff. (Uncontroverted Fact , ¶ 31).

Indeed, the only claims for retaliation properly before this Court are the discrete allegations of retaliation that occurred "when a two-page letter was sent to Heartland Presbytery

accusing [Plaintiff] of sexual harassment and other misdeeds.” See EEOC charge, Exhibit 7. The two-page memo referred to in the EEOC charge is attached to the Declaration of M. John Robinson, Exhibit 5. As the memo makes clear, there were very serious concerns about Plaintiff’s job performance that were discussed with her and with Reverend Harp. (Uncontroverted Fact, ¶ 24). These issues go directly to her job performance, and hence, her retention as Leawood Presbyterian Church’s minister.

The first case to involve a claim by a minister suing her own church alleging a Title VII claim for sex discrimination was *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972). Despite the contrary, plain language of the then-recently amended Title VII of the Civil Rights Act of 1964, the Fifth Circuit held that the First Amendment (citing, *inter alia*, *Watson*, *Gonzalez*, and *Kedroff*) required autonomy for the church. *Id.* at 559-61. Next in line was *Rayburn v. General Conference of Seventh-day Adventists*, 772 F.2d 1164 (4th Cir. 1985), also turning away for First Amendment reasons a female pastor’s Title VII claim for sex discrimination. *See also Scharon v. St. Luke’s Episcopal Presbyterian Hospitals*, 929 F.2d 360 (8th Cir. 1991) (dismissing for First Amendment reasons claim by female priest suing church-related hospital for sex and age discrimination leading to her dismissal in alleged violation of Title VII and Age Discrimination in Employment Act); *Young v. Northern Illinois Conference of United Methodist Church*, 21 F.3d 184 (7th Cir. 1994) (rejecting for First Amendment reasons female minister’s claim against her church alleging sex and race discrimination in her dismissal as probationary minister); *EEOC v. Catholic University*, 83 F.3d 455 (D.C. Cir. 1996) (dismissing for First Amendment reasons claim by Catholic nun who brought Title VII claim alleging sex discrimination in the denial of tenure at a religious college); *EEOC v. Roman Catholic Diocese of Raleigh, North Carolina*, 213 F.3d 795 (4th Cir. 2000) (dismissing for First

Amendment reasons claim by Director of Music against the church where she was employed alleging sex discrimination in her termination contrary to Title VII).

Cases by ministers suing their own church that allege a hostile environment or other ill treatment by church officials (*e.g.*, retaliation or discipline) are also dismissed when the claimed ill treatment implicates a matter of church governance or ecclesiastical discipline. The leading case in this circuit is *Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648 (10th Cir. 2002). Ms. Bryce was a lay youth pastor and had filed various claims against the church where formerly she had been employed. Joined as a co-plaintiff was Bryce's domestic partner, Ms. Smith, with whom Bryce was in a long-term lesbian relationship. Indeed, it was discovery of this relationship which set in motion events leading to Bryce's loss of employment at the church. The claims by Bryce and Smith against the church, which included sexual harassment, were all dismissed by the district court as claims barred by the First Amendment. The Tenth Circuit Court of Appeals affirmed, relying on the doctrine of church autonomy. *Id.* at 657-59. The character of the alleged sexual harassment was a series of fora held for the benefit of members of the church to be told of the problem with Bryce's employment as youth pastor and to answer questions by the members. During the fora some members criticized plaintiffs' sexual behavior. This was said by Bryce and Smith to be offensive and harassing, but the Tenth Circuit held it was nonetheless communication within the church protected by the doctrine of church autonomy. *Id.* 657-58. Also protected were church letters about Bryce's situation sent to church leaders prior to the fora. *Id.* at 659.

Like the church communication in *Bryce*, Rev. Dolquist's duty to utilize the internal complaint and investigation process for resolving disputes and grievances is a matter of "discipline, faith, internal organization, or ecclesiastical rule, custom or law." *Bryce*, 289 F.3d at

657 (quoting *Bell v. Presbyterian Church*, 126 F.3d 328, 331 (4th Cir. 1977)). This is especially so where Rev. Dolquist's complaint is against an elder and the Director of Music (a "ministerial" position under Title VII and First Amendment law<sup>8</sup>) at her local church. Disputes between a minister and an elder, as well as between two ministers, within the same local church is naturally of greater ecclesiastical concern than a situation where one of the disputants is far removed from the ministry of the local church. Stated differently, it is of far greater ecclesiastical concern when the alleged sex abuser holds an ecclesiastical office (elder) and is a local minister (the Director of Music).

The Eleventh Circuit faced a situation involving the sexual harassment of a female minister by another minister in *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299 (11th Cir. 2000). The plaintiff, a male minister, was approached by a female minister with a request to assist her in stopping harassment she was receiving at the hands of her supervisor. Plaintiff came to her assistance, which earned him an unwanted reassignment to a church over 800 miles away. This forced plaintiff to resign. He sued under Title VII alleging that this ill treatment was retaliatory for having assisted the female minister to obtain her civil rights. When the church asserted the First Amendment as a defense, plaintiff responded that the retaliation was not based on issues of church doctrine or ecclesiastical concern. This was of no avail, said the court in *Gellington*, for the relationship between organized church and its ministers was its lifeblood. The court was not going to be the initiator of church-state entanglement. *Id.* at 1304.

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<sup>8</sup>See *EEOC v. Roman Catholic Diocese of Raleigh, North Carolina*, 213 F.3d 795 (4th Cir. 2000) (lay choir director is "minister" for purposes of First Amendment); *Starkman v. Evans*, 198 F.3d 173 (5th Cir. 1999) (same).

In *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698 (7th Cir. 2003), the plaintiff was a female employed by a church to communicate with the Hispanic community in greater Chicago and promote within this community the activities of the Catholic Church. Although not ordained, plaintiff was found to be a “minister” for purposes of Title VII and the First Amendment. The plaintiff had a long series of disagreements with church officials over how and what the church should do to best reach Hispanics. Eventually she filed charges alleging sex and national origin discrimination, as well as retaliation for asserting her civil rights, all resulting in a constructive discharge. Once again the church raised the First Amendment defense and again the plaintiff argued that doctrinal disputes need not be looked into by the court in order to adjudicate the question of discrimination. The Seventh Circuit dismissed, declining to inquire into whether the church had a secular or religious reason for the alleged mistreatment of Ms. Alicea-Hernandez that caused her to resign her position. *Id.* at 703.

In *Combs v. Central Texas Annual Conference of the United Methodist Church*, 173 F.3d 343 (5th Cir. 1999), a female pastor sued her church alleging sex and pregnancy discrimination in violation of Title VII. Over a long period Rev. Combs came to believe that her benefits were not equal to males with similar work, her supervisor wrongly criticized her job performance and honesty, and she was denied full maternity benefits. Matters finally culminated when her status as a member of the clergy was challenged. Upon her termination she sued. When the church raised the First Amendment, Rev. Combs argued that resolution of her claim did not require an evaluation or interpretation of religious doctrine. *Id.* at 350. The Fifth Circuit granted a dismissal because there was just no way to unentangle the issues surrounding the alleged discrimination from religious matters. *Id.*

Like the prior case, *Starkman v. Evans*, 198 F.3d 173 (5th Cir. 1999) involved a female employee of a church that was unhappy over a long period with many aspects of her treatment at work and, upon being terminated, claimed retaliation. Ms. Starkman was Choirmaster and Director of Music. She alleged she suffered various disabilities and that her repeated requests for accommodation were unreasonably denied. Ms. Starkman sued alleging a violation of the Americans with Disabilities Act. Upon finding that Ms. Starkman's job description and tasks made her choir director position "ministerial" for First Amendment purposes, the Fifth Circuit granted a dismissal. This was warranted, said the court, notwithstanding that the alleged ill treatment by church officials was a failure to alter work schedules to accommodate plaintiff's asthma and similar maladies, additional time to recover from knee surgery, and allowances for sensitivity to chemicals suffered from exposure to cleaning supplies.<sup>9</sup>

A series of four state law cases all entailed a female minister suing her employer, a religious organization, alleging a hostile environment at the workplace that in some way related to her gender. Despite the allegations of sexual harassment, retaliation, or other ill treatment, all four courts dismissed citing the doctrine of church autonomy. *See, Schmoll v. Chapman University*, 83 Cal. Rptr.2d 426 (Cal. App. 1999) (dismissing claim by female chaplain at

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<sup>9</sup>There is a series of circuit court opinions, similar to *Starkman*, where there was a period of hostile environment or other ill treatment of a minister while he or she is on the job leading to eventual termination or forced retirement. Thus the cases are mixed hostile environment and hiring/retention cases. All were dismissed for First Amendment reasons. *See EEOC v. Roman Catholic Diocese of Raleigh, North Carolina*, 213 F.3d 795 (4th Cir. 2000) (dismissing female director of music at cathedral who alleged sex discrimination in violation of Title VII; plaintiff also alleged retaliation for having filed four different charges with the EEOC over several months prior to her final demotion and termination); *Simpson v. Wells Lamont Corporation*, 494 F.2d 490 (5th Cir. 1974) (male pastor suing church, among others, which terminated him because of racially discriminatory objections to his preaching and his racially mixed marriage); *Bell v. Presbyterian Church (U.S.A.)*, 126 F.3d 328 (4th Cir. 1997) (dismissing male minister's claim for breach of contract and various torts; he had been hired to lead a multi-denominational outreach program that he alleged was now being closed on pretext of a funding shortage in order that program could be appropriated by one of the participating denominations).

religious college alleging, *inter alia*, retaliation for having reported complaints by female students that faculty had sexually harassed them); *Williams v. Episcopal Diocese of Massachusetts*, 766 N.E.2d 820 (Mass. 2002) (dismissing hostile environment claim by female priest alleging that over long period of time her superiors did not support and value her work, and excluded her from important decisions); *Van Osdol v. Vogt*, 908 P.2d 1122 (Colo. 1996) (dismissing claim by female minister against other ministers and her church alleging sexual harassment and retaliation in violation of Title VII and various tort prohibitions); and *Weaver v. African Methodist Episcopal Church, Inc.*, 54 S.W.3d 575 (Mo. App. 2001) (dismissing tort claims by female pastor against her church for church's failure to prevent her sexual harassment by supervisor).

A fifth state court opinion read the doctrine of church autonomy as permitting a limited claim against a church for sexual harassment of a female associate pastor by a senior pastor, while agreeing that the First Amendment did require dismissal of the female pastor's claims of discriminatory discharge and retaliation. *See Black v. Snyder*, 471 N.W.2d 715 (Minn. App. 1991). The retention of the sexual harassment claim in *Black* is different from the situation between Plaintiff and Leawood Presbyterian Church. In *Black*, the surviving claim of sexual harassment stood separate and independent, whereas Rev. Dolquist's claim of a hostile environment is entangled with her claim of retaliation and with her duty to file a complaint or grievance under the *Book of Order*. An excessive entanglement violation states a serious problem under the Establishment Clause, whereas in *Black* only the Free Exercise Clause was pleaded in defense of the church. *Id.* at 723 (finding that state's compelling interest in eradicating sexual harassment overrode what would otherwise be violation of Free Exercise

Clause). Compare footnote 4, *supra*, discussing excessive entanglement as a result of Rev. Dolquist's claim of sexual harassment.<sup>10</sup>

Although the state court in *Black* discussed the First Amendment, there, the church failed to raise the Establishment Clause as a defense. *Id.* at 719-21. That was a serious mistake. And it is reason enough for this Court not to rely on *Black*. Unlike the church in *Black*, Leewood Presbyterian Church has asserted the Establishment Clause of the First Amendment, as well as the Free Exercise Clause. Additionally, the state court in *Black* erroneously held that *Oregon Employment Division v. Smith*, 494 U.S. 872 (1990) prevented a Free Exercise Clause defense on behalf of a church. *Black* at 718-19. The Tenth Circuit, as well as four other Circuit Courts of Appeal, have said that *Smith* is not to be read as overturning the Doctrine of Church Autonomy. See *Bryce*, 289 F.3d at 656-57 (following holdings in the Fourth, Fifth, Eleventh and D.C. Circuits to the effect that the Doctrine of Church Autonomy was not discredited by *Smith*.)

It is common for religious denominations to expect their ordained ministry to utilize the dispute resolution process internal to the church. See, e.g., Code of Canon Law, applicable to Roman Catholic priests. This is not the first time that such a duty has become a topic of litigation. The more widely known instance arose in *Dayton Christian Schools, Inc. v. Ohio Civil Rights Commission*, 766 F.2d 932 (6th Cir. 1985), *rev. on other grounds*, 477 U.S. 619

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<sup>10</sup>Whether a minister's suit against his or her own church involves hiring or retention, or whether it involves an alleged hostile environment, the courts hold that "neutral principles" of law to resolve the dispute simply cannot be devised. See, e.g., *Hutchison v. Thomas*, 789 F.2d 392, 396 (6th Cir. 1986) (in action by minister alleged to have been forced into retirement in violation of the church's own rules, the court held: "[T]his case does not involve a dispute over church property. The 'neutral principles' doctrine has never been extended to religious controversies in the areas of church government, order and discipline, nor should it be. The claim here relates to appellant's status and employment as a minister of the church. It therefore concerns internal church discipline, faith, and organization, all of which are governed by ecclesiastical rule, custom, and law."); *Singleton v. Christ the Servant Evangelical Lutheran Church*, 541 N.W.2d 606, 612 (Minn. App. 1996) (same; dismissing claims of wrongful discharge and various torts brought by minister against his church).

(1986) (abstention). The case involved a claim of sex discrimination in employment brought under the Ohio human rights act by a female elementary teacher employed at a religious school. Believing she was being unlawfully discriminated against because of her sex, the teacher obtained a lawyer who sent a demand letter to school authorities. The religious school had written rules, to which all teachers agreed to be bound, for resolving disputes according to Scripture, that is, within the church and the biblical “chain-of-command.” The import of the lawyer’s demand letter violated both rules: it threatened to take the dispute before the civil authorities and it violated the internal rules concerning who had authority to resolve such disputes (“chain-of-command”). 766 F.2d at 939-40. The Sixth Circuit held that both the Free Exercise Clause (*Id.* at 952, 955) and the Establishment Clause (*Id.* at 961) were violated by the state assuming pervasive power over the religious school and other heavy-handed actions by the Ohio Civil Rights Commission. *See also Simpson v. Wells Lamont Corporation*, 494 F.2d 490, 494 (5th Cir. 1974) (stating that church’s Book of Discipline outlined procedures for resolution of a pastor’s grievance concerning his termination alleged to be for reasons of racial discrimination, and a pastor’s sole remedy was via those procedures internal to the United Methodist denomination); *Williams v. Episcopal Diocese of Massachusetts*, 766 N.E.2d 820, 826 n.5 (Mass. 2002) (noting that the diocese had policies and mechanisms whereby a female priest was free to pursue her claim of constructive discharge because of an alleged hostile environment); *Brazauskas v. Fort Wayne-South Bend Diocese, Inc.*, 714 N.E.2d 253, 257 (Ind. App. 1999) (in action by female pastor-associate against her diocese alleging her termination was in breach of contract and a tort, the court noted that church judicatories were available to resolve disputes and the firing of a pastor is properly a matter for such ecclesiastical tribunals).

It is anticipated that Plaintiff will argue that a claim of “sexual harassment” is somehow different from all of these other types of claims. That argument makes no sense. The First Amendment concerns of church/state entanglement and judicial interference in the internal affairs of church governance do not go away simply because the allegation of employment discrimination is sexual harassment. If “distance” from a church’s creed or core religious doctrines were the test, discrimination in the form of denial of pregnancy benefits (*e.g.*, *Combs*) or lay-offs of older workers (*e.g.*, *Scharon*) are as “distant from core doctrine” as a claim of sexual harassment. The First Amendment concern here is not doctrine in that narrow sense. The issue is interference in internal church governance and administration, of which the most crucial and sensitive aspect is the employment relationship between a church and its minister.

With respect to *Bollard v. California Province of the Society of Jesus*, 196 F.3d 940 (9th Cir. 1999), it is simply not credible that the Tenth Circuit Court of Appeals will reject like decisions in the Fifth, Seventh and Eleventh, only to follow an outlier from a panel of the Ninth Circuit. Moreover, the panel decision in *Bollard* is distinguishable in four respects. First, it did not involve the minister of a church. Rather, it involved a person in training in hopes of qualifying for the priesthood. 196 F.3d at 944. A church/cleric relationship protected from interference did not yet exist. Accordingly, the case is like the second type of claim, *to wit*: an employment discrimination claim by a non-minister against his or her church. Indeed, the panel in *Bollard* expressly relied on two Ninth Circuit cases, both of the second type, namely non-ministerial employees suing for employment discrimination. 196 F.3d at 947.

Second, the panel in *Bollard* relied on a comparison not legitimate here. The panel opinion reasoned that if a tort claim of negligent supervision against a church did not violate the First Amendment then a statutory claim of employment discrimination by a seminary student did

not violate the First Amendment. *Id.* at 947-48. Kansas, however, has never allowed a claim of negligent supervision to be brought against a church, let alone a claim of negligent supervision by a minister against her own church. Perhaps Kansas will only permit a claim of intentional failure to supervise. *See Gibson v. Brewer*, 952 S.W.2d 239 (Mo. 1997) (*en banc*, holding that First Amendment does not allow tort claims for negligent hiring, supervision, or retention against church for conduct of clergy, but does permit claim of intentional failure to supervise). In any case, this is a matter of state law and thus one which for reasons of comity and federalism this Court should not reach unnecessarily.

Third, the panel in *Bollard* found that there would be no excessive entanglement violative of the Establishment Clause because the plaintiff only sought damages. 196 F.3d at 950. But that rationale has already been rejected by this Court,<sup>11</sup> and properly so.

Fourth, the plaintiff's Title VII claim in *Bollard* was limited to sexual harassment and nothing more. Rev. Dolquist's claim is not so limited. She also claims retaliation arising out of her having complained that she was being harassed. But the retaliation claim opens the door to her retention by the Church in the job of minister. The issues of hiring and retention of clergy determine who speaks for the church — an inherently religious question. Many of Rev. Dolquist's allegations of retaliation go directly to the issue of her job performance, and hence, retention: *e.g.*, threats to terminate Plaintiff's employment; threatening Plaintiff with disparity in the terms and conditions of her employment; complaining of Plaintiff engaging in sexually

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<sup>11</sup>The distinction was rejected by this Court in *Knuth v. Lutheran Church Missouri Synod*, 643 F. Supp. 444, 448 (D. Kan. 1986) (holding that in pastor's claim for breach of contract it makes no difference that only damages were sought). Damage claims alone are chilling to the religious freedom of church organizations. And avoidance of claims for damages disrupt the work of the church, its governance and administration, especially in its relationship to its pastors. "Secular aspects may conceivably exist in the relationship between a minister in the organized church, but the minister plays a particularly sensitive role in any church organization." *Id.* at 448-49.

inappropriate behavior including wearing see-through clothing and short skirts; complaining of Plaintiff being involved with a male member of the church in an inappropriate relationship; complaining about Plaintiff's ability to provide meaningful sermons; complaining about Plaintiff's job performance; suggesting that Plaintiff take some course work on pastoral care and related areas; criticizing Plaintiff for not handling the rehiring of John Miller as the Choir Director appropriately, consequently "opening a can of worms"; and concerns over an accounting scandal that implicated Plaintiff. *See* Pretrial Order, § 6(a) Plaintiff's Theories of Recovery, Count III Retaliation, a through q. Unlike *Bollard*, the "can of worms" over job retention and the attendant entanglement is directly presented here.

**4. Torts Sounding In Negligence Against A Church That Implicate the Church-Minister Relationship Are Barred By The First Amendment.**

Plaintiff's supplemental claims are three torts: Count IV (intentional failure to supervise), Count V (negligent infliction of emotional distress), and Count VI (outrage). As to the two intentional torts, Defendant Leawood Presbyterian Church requests that they be remanded to the state trial court. The applicability of these two torts to the situation here are questions of first impression in Kansas. However, the claim of negligent infliction of emotional distress should be dismissed as barred by the First Amendment.

Negligence claims inevitably involve the civil court and jury in the second-guessing of church officials who took actions (or failed to act) concerning the hiring, retention, or discipline of one of its ministers, or concerning questions of church governance and ecclesiastical discipline. The government via its common law has no authority to decide what is normative for an "American religion" or to decide the behavior of a "reasonably prudent bishop," and then forcing all religious bodies to conform to that standard (as applied by a jury) or suffer ruinous liability (financially and in its reputation). Such negligence claims cannot be squared with the

doctrine of church autonomy. Cf. *Gibson v. Brewer*, 952 S.W.2d 239 (Mo. 1997) (dismissing negligent hiring and supervision claims that alleged priest sexually molested minor, but allowing claim of intentional failure to supervise). *Gibson* is not directly on point as it is a so-called third-party claim, that is: where a parishioner of a church or someone receiving pastoral counseling is the victim of abuse by a cleric. As noted above, the First Amendment is applied far less stringently in third-party claims. Such cases raise issues more distant from the core of the First Amendment and separation of church and state. Far stricter scrutiny is applied where a minister is suing her own church alleging various torts. Cases of the latter sort involving state law claims of tort and breach of contract are collected in the note.<sup>12</sup> Nonetheless, even in the situation of third-party actions, *Gibson* limited state law claims to intentional torts. Leawood Presbyterian Church urges that this Court follow the rationale of *Gibson* and dismiss Plaintiff's Count V for negligent infliction of emotional distress as barred by the First Amendment.

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<sup>12</sup>See *Bell v. Presbyterian Church (U.S.A.)*, 126 F.3d 328 (4th Cir. 1997) (dismissing male minister's claim for breach of contract and various torts; he had been hired to lead a multi-denominational outreach program that he alleged was now being closed on pretext of a funding shortage in order that program could be appropriated by one of the participating denominations); *Van Osdol v. Vogt*, 908 P.2d 1122 (Colo. 1996) (dismissing claim by female minister against other ministers and her church alleging sexual harassment and retaliation in violation of Title VII and various tort prohibitions); *Weaver v. African Methodist Episcopal Church, Inc.*, 54 S.W.3d 575 (Mo. App. 2001) (dismissing tort claims by female pastor against her church for church's failure to prevent her sexual harassment by supervisor); *Schmoll v. Chapman University*, 83 Cal. Rptr.2d 426 (Cal. App. 1999) (dismissing claim by female chaplain at religious college alleging, *inter alia*, retaliation for having reported complaints by female students that faculty had sexually harassed them, sex discrimination, and state claims for breach of contract and violation of public policy); *Brazauskas v. Fort Wayne-South Bend Diocese, Inc.*, 714 N.E.2d 253, 257 (Ind. App. 1999) (in action by female pastor-associate against her diocese alleging her termination was in breach of contract and a tort, the court noted that church judicatories were available to resolve disputes and the firing of a pastor is properly a matter for such ecclesiastical tribunals); *Singleton v. Christ the Servant Evangelical Lutheran Church*, 541 N.W.2d 606, 612 (Minn. App. 1996) (same; dismissing claims of wrongful discharge and various torts brought by minister against his church).

WHEREFORE Defendant Leawood Presbyterian Church respectfully prays that this Court dismiss or grant summary judgment with respect to Count II (sexual harassment), Count III (retaliation), and Count V (negligent infliction of emotional distress) of Plaintiff's Second Amended Petition, because each is prohibited by the doctrine of church autonomy, and further that this Court remand back to the state trial court the remaining state law intentional tort claims which are designated as Count IV (intentional failure to supervise) and Count VI (outrage).

Respectfully submitted,

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**Certificate of Service**

I hereby certify that service of Leawood Presbyterian Church's Brief in Support of Its Second Motion to Dismiss or for Summary Judgment Based On the Church Autonomy Doctrine was accomplished through the Notice of Electronic Filing on counsel who are Filing Users listed below, this 20th day of May, 2004, to:

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