

SUBJECT TO FINAL EDITING

## JUDICIAL COUNCIL OF THE UNITED METHODIST CHURCH

### DECISION NO. 1366

IN RE: Petition for Declaratory Decision from the Council of Bishops regarding the constitutionality of three sets of legislative petitions known as the One Church Plan, Connectional Conference Plan, and Traditional Plan.

#### DIGEST OF CASE

The Judicial Council has jurisdiction to determine the constitutionality of any proposed legislation when such declaratory decision is requested by the General Conference or by the Council of Bishops but lacks the authority to scrutinize proposed constitutional amendments under ¶ 2609.2. To trigger jurisdiction and be properly before the Judicial Council, a petition for declaratory decision must contain proposed legislation that *prima facie* requires no constitutional amendment(s) for implementation and can be tested directly against the constitutional provisions in effect at the time of filing. The Connectional Conference Plan contains proposed constitutional changes and does not pass this jurisdictional test. The One Church Plan and the Traditional Plan meet those criteria to be properly before the Judicial Council. The task of the Judicial Council is to pass upon the constitutionality of the legislative petitions without expressing an opinion as to their merits or expediency. It is up to the General Conference to determine the wisdom of each plan.

With respect to the **One Church Plan**, the Judicial Council makes the following ruling: As a primary principle in any organizational structure of The United Methodist Church, connectionalism denotes a vital web of interactive relationships—multi-leveled, global in scope, and local in thrust—that permits contextualization and differentiation on account of geographical, social, and cultural variations and makes room for diversity of beliefs and theological perspectives but does not require uniformity of moral-ethical standards regarding ordination, marriage, and human sexuality. Full legislative power of the General Conference includes the authority to adopt a uniform, standardized, or a non-uniform, differentiated theological statement. Our Constitution commands not that all church policies enacted by the General Conference be uniform but that all uniform church policies be enacted by the General Conference. It assigns the legislative function to set standards related to certification, commissioning, ordination, and marriage to the General Conference and the administrative responsibility for applying them to the annual conferences, local churches, and pastors within their missional contexts. The legislative branch of the Church is constitutionally free to set the standards for entrance into the ministry wherever and whenever it sees fit. Regardless of

where that threshold may be at any given time, the annual conference may enact additional requirements that are not in conflict with the letter or intent of the minimum standards set by the General Conference.

Petition 1 is constitutional.

Petition 2 is constitutional.

Petition 3 is constitutional.

Petition 4 is constitutional, *except* for the second sentence:

The bishop may choose to seek the non-binding advice of an annual conference session on standards relating to human sexuality for ordination to inform the Board of Ordained Ministry in its work.

This part violates the separation of powers, is contrary to ¶ 33 and, therefore, unconstitutional.

Petition 5 is constitutional.

Petition 6 is constitutional.

Petition 7 is constitutional.

Petition 8 is constitutional, *except* for the sentence:

Similarly, clergy who cannot in good conscience continue to serve a particular church based on unresolved disagreements over same-sex marriage as communicated by the pastor and Staff-Parish Relations Committee to the district superintendent, shall be reassigned.

This part is in conflict with ¶ 54 and is unconstitutional.

Petition 9 is constitutional.

Petition 10 is constitutional.

Petition 11 is constitutional.

Petition 12 is constitutional

Petition 13 is constitutional, *except* for the second sentence:

Provided, however, that any clergy session of an annual conference that votes on such matters shall not, without the consent of the presiding bishop, take up any subsequent motion on that issue during any called or special session of annual conference held within 30 full calendar months from the date of such vote regardless of the outcome.

This part infringes upon an annual conference's reserved rights under ¶ 33 and is unconstitutional.

Petition 14 is constitutional.

Petition 15 is constitutional.

Petition 16 is constitutional.

Petition 17 is constitutional.

With respect to the **Traditional Plan**, the Judicial Council makes the following decision:

Impartiality and independence of decision-making bodies are the hallmarks of due process and bedrock principles of procedural justice in our constitutional polity. No process can be fair and equitable if the body bringing the complaint is also empowered to determine its merits. The fundamental right to fair and due process of an accused bishop is denied when the complainants are also among those tasked with reviewing and making the final decision. The Council of Bishops was not designed to function as an inquisitorial court responsible for enforcing doctrinal purity among its members.

As a tenet of United Methodist constitutionalism, the principle of legality means that all individuals and entities are equally bound by Church law, which shall be applied fairly and without regard to race, color, national origin, status, or economic condition. It forbids selective or partial enforcement of Church law at all levels of the connection and demands that *The Discipline* in its entirety be followed without distinction. All decisions and actions by official bodies and their representatives must be based on and limited by the Constitution and *The Discipline*. Individuals must be informed with specificity and clarity as to what is prescribed and proscribed by Church law. No person or body can be required to act contrary to Church law or prohibited from engaging in lawful conduct. No person can be punished for actions and conduct that are permitted or required by Church law. Clergy persons whose credentials and conference membership are at stake have the right to know what to expect when they choose a course of action or take a particular stance on ordination, marriage, and human sexuality. To pass constitutional muster, any proposed legislation affecting clergy rights must define with sufficient clarity and specificity the standards to guide future actions of all concerned persons and entities.

Under the principle of legality, the General Conference can prescribe or proscribe a particular conduct but cannot contradict itself by prescribing prohibited conduct or prohibiting prescribed conduct. It can require bishops, annual conferences, nominees, and members of boards of ordained ministry to certify or declare that they will uphold *The Discipline* in its entirety and impose sanctions in case of non-compliance. But it may not choose standards related to ordination, marriage, and human sexuality over other provisions of *The Discipline* for enhanced application and certification. The General Conference has the authority to require that the board of ordained ministry conduct a careful and thorough examination to ascertain if an individual meets all disciplinary requirements and certify that such an examination has occurred. But it cannot reduce the scope of the board examination to one aspect only and unfairly single out one particular group of candidates (self-avowed practicing homosexuals) for disqualification. Marriage and sexuality are but two among numerous standards candidates must meet to be commissioned or ordained; other criteria include, for example, being committed to social justice, racial and gender equality, and personal and financial integrity, that all should be part of a careful and thorough examination.

Petition 1 is constitutional.

Petitions 2, 3, and 4 deny a bishop's right to fair and due process guaranteed in ¶¶ 20, 58 and are unconstitutional.

Petition 5 is constitutional.

Petitions 6, 7, 8, and 9 violate the principle of legality and are unconstitutional.

Petition 10:

- ¶¶ 2801.1-7 violate the principle of legality and are unconstitutional;
- ¶ 2801.8, the first sentence:  
*Clergy* who find themselves for reasons of conscience unable to live within the boundaries of ¶¶ 304.3, 341.6, 613.19, and 2702.1a-b are encouraged to transfer to a self-governing church formed under this paragraph.  
is unconstitutionally vague and violates the principle of legality;
- ¶ 2801.9 is constitutional;
- ¶¶ 2801.10-12 and the “local churches” reference in ¶ 2801.13 are in conflict with ¶ 41 and unconstitutional;
- ¶¶ 2801.14-23 are constitutional.

Petition 11 is constitutional.

Petition 12 is constitutional.

Petition 13 is constitutional.

Petition 14, the second sentence:

In cases where the respondent acknowledges action(s) that are a clear violation of the provisions of the *Discipline*, a just resolution shall include, but not be limited to, a commitment not to repeat the action(s) that were a violation.

violates ¶¶ 20, 58 and is unconstitutional.

Petition 15 is constitutional.

Petition 16 is constitutional.

Petition 17 is constitutional insofar as it refers to self-governing Methodist churches formed by annual conferences under the provisions of proposed ¶ 2801.9.

## **STATEMENT OF FACTS**

On July 10, 2018, the Council of Bishops [hereinafter COB] submitted a request asking the Judicial Council to rule “on the constitutionality of the three plans submitted by the Commission on a Way Forward to the 2019 Special Session of the General Conference.”<sup>1</sup> The Petition for Declaratory Decision, including cover letter, judicial form, the request, and five exhibits, totaled 230 pages.

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<sup>1</sup> Cover Letter of Bishop Cynthia Fierro Harvey, President Designate COB, of July 10, 2018.

In addition, four interested parties and fourteen *amici curiae* filed 28 briefs. The relevant parts of the COB request read:

The Council of Bishops of The United Methodist Church (“the Council”) respectfully requests the Judicial Council to issue a declaratory decision on the constitutionality of three sets of petitions submitted by various members of the Commission on a Way Forward, one set relating to the One Church Plan attached hereto as Exhibit A (“One Church Plan Petitions”), the next relating to the Connectional Conference Plan attached hereto as Exhibit B (“Connectional Conference Plan Petitions”), and another relating to the Traditional Plan attached hereto as Exhibit C (“Traditional Plan Petitions”). Attached hereto as Exhibit D for informational purposes is the entire report of the Commission on a Way Forward.

[...]

The Council requests the following declaratory decisions:

- (1) Is the proposed legislation known as the One Church Plan constitutional?
- (2) If any petition included within the proposed legislation known as the One Church Plan is not constitutional, may the other proposed petitions constituting the One Church Plan be enacted without violating the constitution
- (3) Do any of the petitions comprising the proposed legislation known as the One Church Plan violate other provisions of the 2016 Book of Discipline?
- (4) Is the proposed legislation known as the Connectional Conference Plan constitutional?
- (5) If any petition included within the proposed legislation known as the Connectional Conference Plan is not constitutional, may the other proposed petitions constituting the Connectional Conference Plan be enacted without violating the constitution?
- (6) Do any of the petitions comprising the proposed legislation known as the Connectional Conference Plan violate other provisions of the 2016 Book of Discipline?
- (7) Is the proposed legislation known as the Traditional Plan constitutional?
- (8) If any petition included in the proposed legislation known as the Traditional Plan is not constitutional, may the other proposed petitions constituting the Traditional Plan be enacted without violating the constitution?
- (9) Do any of the petitions comprising the proposed legislation known as the Traditional Plan violate other provisions of the 2016 Book of Discipline?

An oral hearing was conducted on October 23, 2018 at the Placid Hotel in Zurich, Switzerland. Appearing on behalf of the COB were Bishops Kenneth H. Carter and Cynthia

Fierro Harvey and William Waddell, Esq., and on behalf of the Commission on the Way Forward [hereinafter COWF], Rev. Thomas Berlin for the One Church Plan, Patricia Miller for the Connectional Conference Plan, and Rev. Thomas Lambrecht for the Traditional Plan. *Amici curiae* Rev. Keith Boyette and Thomas Starnes, Esq. requested and were granted privilege to speak at the oral hearing.

## JURISDICTION

### I. Object of Review

This Petition for Declaratory Decision was submitted by the Council of Bishops under ¶ 2609.2 of *The Book of Discipline 2016* [hereinafter *The Discipline*], which reads:

2. The Judicial Council shall have jurisdiction to determine the constitutionality of any proposed legislation when such declaratory decision is requested by the General Conference or by the Council of Bishops.

As one of two bodies expressly authorized to request a declaratory decision on proposed legislation, the Council of Bishops has standing to file this request.

An important question was raised concerning the proper object of judicial review. Specifically, do proposed constitutional amendments qualify as “any proposed legislation” under ¶ 2609.2 and can the Judicial Council determine the constitutionality of constitutional proposals?<sup>2</sup> Among the three plans, the Connectional Conference Plan [hereinafter CCP] is the only one that proposes constitutional amendments in addition to disciplinary changes. The entire plan is said to depend on the enactment and ratification of all nine amendments. “Failure to adopt any of the constitutional amendments would jeopardize the whole plan,” asserted the submitter of the CCP.<sup>3</sup> Ruling out piecemeal consideration, she emphasized that “the legislation should therefore be considered as a whole, rather than in isolated parts.”<sup>4</sup> This is an admission that it is legally and practically impossible to isolate legislative proposals requiring constitutional changes from the rest of the CCP. Her brief argues that the Judicial Council has jurisdiction to review the constitutionality of proposed constitutional amendments because they “start out as legislation and would certainly qualify as an ‘act’ of the General Conference.”<sup>5</sup>

The starting point of legal interpretation is “the text of the relevant provisions in *The Discipline*, particularly the words used therein and their plain meaning.” JCD 1328. *The Discipline* distinguishes between proposed legislation and constitutional amendment and uses the former to the exclusion of the latter. The plain meaning of “any proposed legislation” cannot be

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<sup>2</sup> See Opening Brief of Patricia Miller, p. 1 (“There may be a question whether the Judicial Council has the authority to rule on the constitutionality of proposed constitutional amendments.”) [hereinafter Miller Opening Brief]

<sup>3</sup> Reply Brief of Patricia Miller, p. 1 [hereinafter Miller Reply Brief].

<sup>4</sup> *Id.*

<sup>5</sup> The Miller brief asserted: “*Discipline* ¶ 2610.1 gives the Council the authority to rule on “the constitutionality, meaning, application, or effect of the *Discipline* or any portion thereof or of any act or legislation of a General Conference. Proposed constitutional amendments start out as legislation and would certainly qualify as an “act” of the General Conference.” Miller Opening Brief at 1.

construed to include constitutional amendment, since each requires separate processes for implementation that yield different outcomes. Under our constitutional system and polity, the legislative process is entrusted exclusively to the General Conference, which “shall have full legislative power over all matters distinctively connectional,” Constitution, ¶ 16, whereas the power to scrutinize constitutional proposals belongs to both General Conference *and* annual conferences as part of the amendment process. Constitution, ¶ 59 - 61. Contrary to the CCP proponent’s contention, it is our opinion that constitutional proposals do not start out as “legislation” and do not become “acts” of the General Conference until their enactment by two-thirds of the delegates present and voting. Constitution, ¶ 59. The Judicial Council cannot be asked to “assume that all the amendments have been adopted,”<sup>6</sup> for this would require us not only to answer hypothetical questions but also to violate the separation of powers by tacitly endorsing constitutional proposals *prior* to deliberation and action of the General Conference and ratification by the annual conferences. Consequently, we construe the term “any proposed legislation” narrowly to refer to proposed *disciplinary* changes, since they are the only appropriate object for constitutional review under ¶ 2609.2.

## II. Scope of Review

Paragraph 2609.2 limits the scope of review to “the constitutionality” of proposed legislation. This is markedly different from the language in ¶ 2610.1 where the Judicial Council is authorized to make a ruling “as to constitutionality, meaning, application, or effect” of *The Discipline*. Our task here is to determine *only* the constitutionality of the legislative proposals contained in the Petition for Declaratory Decision. Conversely, this means that we are not to determine their meaning, application, and effect. It is also evident from the meaning of the term “constitutionality” in ¶ 2609.2 that the legal authority against which “any proposed legislation” may be tested are the constitutional provisions *effective* at the time of filing of this request, i.e. July 10, 2018, thereby excluding constitutional proposals that have not been adopted and ratified.<sup>7</sup>

Consistent with past precedents, it is our opinion “that the Judicial Council was not set up as an interpreter of doctrine but as an interpreter of law from the strictly legal standpoint,” JCD 59, and that “the Judicial Council has no jurisdiction to pass upon the wisdom of any General Conference legislation [in the extant case, proposed legislation].” JCD 81. Ours is not the discretion to weigh the merits of each petition, nor does it behoove us to judge the expediency of each plan. For that we must defer to the full legislative authority of the General Conference.

## III. Timeliness

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<sup>6</sup> Miller Reply Brief at 1.

<sup>7</sup> The *Black’s Law Dictionary* defines *constitutional* as: “Consistent with the constitution; authorized by the constitution; not conflicting with any provision of the constitution...” Black’s Law Dictionary, p. 311 (6<sup>th</sup> ed. 1990). *Constitutionality* is the “quality or state of being consistent with the constitution” or “accordance with the provisions of a constitution.” Merriam-Webster Dictionary at <https://www.merriamwebster.com/dictionary/constitutionality>.

In JCD 1303, the Judicial Council determined that the questions presented in the petition were not "timely" and thus not appropriate for declaratory decision. We deferred ruling on the proposed legislation on the ground that "by making a declaratory decision on one item of proposed legislation prior to the time when the Church will have access to all proposed legislation, the Judicial Council potentially risks intruding into the 'full legislative authority' of the General Conference." We are not faced with such a situation in this case.

The church needs clear and cogent rulings from the Judicial Council before the delegates to General Conference commence their work. Waiting until the General Conference enacts legislation to address its constitutionality will heighten the denomination's difficulties even more. This means that, at a critical juncture like this, the Judicial Council must assume its constitutional role and assist the delegates to the special session of General Conference in the preparation of their legislative work. We, therefore, find that the facts and questions presented in this Petition are timely for declaratory decision.

#### **IV. Jurisdictional Test**

It is established precedent that the "Judicial Council has only such jurisdiction as is expressly granted to it by the Constitution and by the General Conference. Our lodestar principle has been that we may not assume jurisdiction to render a declaratory decision unless jurisdiction has been clearly vested in the Judicial Council. Our long-standing policy is to construe our jurisdiction strictly and with restraint." JCD 1354, *citing* JCD 29, 255, 535, 1160. As previously discussed, it is beyond our power to review proposed constitutional amendments, nor do we have the authority to test proposed legislation against a set of hypothetically or presumably enacted and ratified constitutional amendments in violation of the separation of powers.

For purposes of ¶ 2609.2, to trigger jurisdiction and be properly before the Judicial Council, a petition for declaratory decision must meet the following two-part test: the request must contain proposed legislation that (1) *prima facie*<sup>8</sup> requires no constitutional amendment(s) for implementation and (2) can be tested directly against the constitutional provisions in effect at the time of filing.

The One Church Plan [hereinafter OCP] contains seventeen petitions all of which seek to change disciplinary provisions only. The COWF's introduction to the OCP ends with the statement: "No Constitutional Amendments are needed for the One Church Plan as far as we can determine."<sup>9</sup> Likewise, none of the seventeen petitions of the Traditional Plan [hereinafter TP] seek constitutional changes. Since they propose only disciplinary changes, the petitions in the OCP and TP could undergo constitutional review and, therefore, pass the jurisdictional test. As mentioned above, of the fourteen petitions of the CCP, nine propose constitutional amendments. Having been advised by the submitter of this plan that its implementation depends on those

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<sup>8</sup> "Prima facie" means that the stipulations of a proposed legislation contained in the record are sufficient at first impression and accepted as correct until determined otherwise by the Judicial Council.

<sup>9</sup> Report of the Commission on the Way Forward, Exhibit D, p. 18. [hereinafter COWF Report].

amendments,<sup>10</sup> we hold that the CPP fails the jurisdictional test. Consequently, only the OCP and TP are properly before us.

## V. Questions Properly Before the Judicial Council

We will address only the following questions presented in the Petition for Declaratory Decision:

*Question 1:* Is the proposed legislation known as the One Church Plan constitutional?

*Question 2:* If any petition included within the proposed legislation known as the One Church Plan is not constitutional, may the other proposed petitions constituting the One Church Plan be enacted without violating the constitution?

*Question 7:* Is the proposed legislation known as the Traditional Plan constitutional?

*Question 8:* If any petition included in the proposed legislation known as the Traditional Plan is not constitutional, may the other proposed petitions constituting the Traditional Plan be enacted without violating the constitution?

Question 3 and 9 ask us to interpret the meaning, application, and effect of the OCP and TP.

They are not properly before us because the Judicial Council has jurisdiction to determine *only* the constitutionality of proposed legislation under ¶ 2609.2.

Questions 4, 5, and 6 concern the CCP and are not properly before the Judicial Council for the reasons stated above.

## ANALYSIS AND RATIONALE

### I. One Church Plan

#### *OCP Petition 1*

This Petition adds the following sub-paragraph to ¶ 105:

We agree that we are not of one mind regarding human sexuality. As we continue to faithfully explore issues of sexuality, we will honor the theological guidelines of Scripture, reason, tradition and experience, acknowledging that God’s revelation of truth and God’s extension of grace as expressed in Jesus Christ (John 1:14) may cause persons of good conscience to interpret and decide issues of sexuality differently. We also acknowledge that the Church is called through Christ to unity even amidst complexity. We affirm those who continue to maintain that the Scriptural witness does not condone the practice of homosexuality. We believe that their conscience should be protected in the church and throughout society under basic principles of religious liberty. We also affirm those who believe the witness of Scripture calls us to reconsider the teaching of the church with respect to monogamous homosexual relationships.

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<sup>10</sup> Miller Opening Brief at 1 (“It is necessary for the Judicial Council to consider the proposed constitutional amendments in conjunction with the whole plan, since those amendments make the plan possible.”).

The concern raised here is that the proposal, instead of developing a uniform position of the Church on human sexuality, “enacts a non-uniform statement which undercuts connectionalism.”<sup>11</sup> But this begs the question whether connectionalism requires uniformity in terms of our theological stance on marriage and human sexuality and whether diversity of beliefs and opinions is antithetical to our connectional covenant and, therefore, unconstitutional.

The Judicial Council said that the “Constitution clearly provides that the principle of connectionalism should be always primary in any organizational structure of The United Methodist Church.” JCD 411. It would, however, be a stretch and contrary to any rule of construction to say that, as a “primary” organizational principle, connectionalism hinges on uniformity of moral-ethical standards. Further, ¶ 132 of *The Discipline* provides:

¶ 132. *The Journey of a Connectional People*—Connectionalism in the United Methodist tradition is multi-leveled, global in scope, and local in thrust. Our connectionalism is not merely a linking of one charge conference to another. It is rather a vital web of interactive relationships. We are connected by sharing a common tradition of faith, including Our Doctrinal Standards and General Rules (¶ 104); by sharing together a constitutional polity, including a leadership of general superintendency; by sharing a common mission, which we seek to carry out by working together in and through conferences that reflect the inclusive and missional character of our fellowship; by sharing a common ethos that characterizes our distinctive way of doing things. [emphasis added]

If connectionalism by definition were to dictate standardization in all things theological, as some *amicus* briefs argued,<sup>12</sup> it would preclude any kind of contextualization and differentiation on account of geographical, social, and cultural variations, and, by implication, prohibit central conferences from making “such changes and adaptations of the General *Discipline* as the conditions in the respective areas may require.” Constitution, ¶ 31.5. But if connectionalism is

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<sup>11</sup> Opening Brief of Keith Boyette, p. 8 [hereinafter Boyette Opening Brief].

<sup>12</sup> *See id.* at 2 (“The implicit goal of the Constitution is to create and sustain a system which encourages, promotes, and protects the interdependence which is at the heart of connectionalism. The One Church Plan in order to advance unity in the midst of conflict compromises and undercuts the connectionalism at the heart of United Methodist polity.”) [hereinafter Boyette Opening Brief]; Brief of Nathaniel Fugate, p. 4 (“Therefore, since ordination is founded upon covenant and that covenant must be understood as connectional in nature, since it relates to ones [*sic*] connection between members of the covenant, it is the General Conference that sets both the standards of our covenant with each other as well as the process by which one enters into this covenant. These standards and processes are upheld and carried out by the annual conferences which are the basic body of the church.”) [hereinafter Fugate Brief]; Brief of Tim McClendon, p. 5 (“The paramount issue that causes constitutional problems for the One Church Plan is that it is antithetical to Connectionalism. We are not a congregational polity. The word ‘Connection’ appears 181 times in the 2016 *Discipline*. ‘Connectional’ appears 175 times, and ‘Connectionalism’ 6 times. Clearly connectionalism is both in our constitution and in the remainder of the *Discipline*.”) [hereinafter McClendon Brief]; Opening Brief of John Lomperis, p. 5 (“Many of the problems with the One Church Plan share a common theme of treating our denomination as if we had a ‘diocesan’ or ‘congregationalist’ polity, with much autonomy extended to each region and congregation, in contrast to the much more connectional polity the UMC has long had, in which our pastors and even bishops routinely itinerate, for what was historically the express purpose of ensuring and maintaining a unity of doctrine and discipline.”) [hereinafter Lomperis Opening Brief].

understood in terms of “a vital web of interactive relationships” multi-leveled and multi-faceted in nature (as expressed in ¶ 132 quoted above), it would allow room for diversity of theological perspectives and opinions.<sup>13</sup> Undoubtedly, the Constitution grants the General Conference the power to establish a uniform system of moral-ethical standards for our ministers. *See* JCD 1341. But that does not mean that the General Conference *must* do so, for this would be contrary to the “full legislative power...to define and fix the powers and duties of” clergy members. Constitution, ¶ 16.2. Our Constitution commands not that all church policies enacted by the General Conference be uniform but that all uniform church policies be enacted *by* the General Conference. Full legislative power includes the power to adopt a uniform, standardized, or a *non-uniform, differentiated* theological statement. Therefore, we conclude that Petition 1 is within the legislative discretion of the General Conference under ¶ 16 of the Constitution.

### ***OCP Petitions 2, 3, and 5***

The changes to ¶¶ 161.C, 161.G, and the footnote to ¶ 310.2(d) seek to change the definition of marriage by substituting the phrase “between two adults” for “between a man and a woman” and “heterosexual,” while affirming the traditional understanding of marriage. The issues boil down to two main arguments levelled against the constitutionality of these amendments: (1) they change the definition of marriage in violation of the first and second Restrictive Rules (¶¶ 17-18)<sup>14</sup> and, particularly, are contrary to John Wesley’s *Explanatory Notes Upon the New Testament* because the General Conference in 1972 voted to use Wesley’s *Explanatory Notes* as “a new context of interpretation” for the Articles of Religion and Confession of Faith;<sup>15</sup> (2) they delegate the authority to define marriage to civil authorities, local

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<sup>13</sup> *See* Reply Brief of Lonnie Chafin, p. 3 (“Connectionalism is a peculiarly Methodist understanding of what it means to be the church. For us, the church is defined not by formal structures or doctrine or lines of authority. It’s defined by connections between people: connections between pastor and pastor, between pastor and laity, and between laity and laity. When The United Methodist Church claims to be a ‘connectional church,’ it means we hold such interpersonal connections in so high a regard that we understand them as the essence of the church.”).

<sup>14</sup> *See* Lomperis Opening Brief at 3 (“Thus the changes of the One Church Plan would effectively constitute “new standards” [in the language of ¶17], as they would serve the basic function of any standard, of drawing lines between who or what is in and who or what is out.”); Opening Brief of Robert Zilhaver, p. 4 (“If the One Church Plan is adopted, the General Conference has unconstitutionally established new standards or rules of doctrine contrary to our present existing and established standards of doctrine by authorizing the approval rituals to solemnize same-sex unions in a wedding ceremony, to solemnize the ordination of self-avowed practicing homosexuals in an ordination service, and to solemnize the consecration of bishops in a consecration service.”) [hereinafter Zilhaver Opening Brief]; Brief of Ryan Kiblinger, p. 6 (The Petitions of “the One Church Plan also seek to change our doctrine of marriage as between one man and one woman defined by Wesley in his *Explanatory Notes On the New Testament*.”) [hereinafter Kiblinger Brief].

<sup>15</sup> *See* Zilhaver Opening Brief at 3 (“To solemnize in ritual a practice that is idolatrous is in direct conflict with The Articles of Religion of the Methodist Church and The Confession of Faith of the Evangelical United Brethren Church and are therefore unconstitutional under the provisions of ¶16.6 as in violation of the first and second Restrictive Rule.”).

*See also* Lomperis Opening Brief at 4 (“Therefore, any legislation to “affirm” homosexuality as something that may be practiced by our clergy and blessed in at least some of our churches—as the One Church Plan would do (with the only clear exceptions of Petitions #15-17 and perhaps 10)—would be contrary to important moral teachings embedded within our Doctrinal Standards.”).

churches, and pastors,<sup>16</sup> thereby creating non-uniform and inconsistent standards across the denomination.<sup>17</sup>

The Judicial Council, in JCD 1027, established a two-prong test for determining whether a question brought before it is doctrinal or legal in nature:

In addressing such challenges, the Judicial Council has applied a two-step process. First, the Judicial Council determines whether the language used in the challenged disciplinary provision revokes, alters, or changes the Articles of Religion (§ 103 of the *2004 Discipline*). In making such a determination, the Judicial Council has held that the questioned language must be placed in the Articles of Religion or must be in direct conflict with language of the Articles of Religion. *See* Decisions 86 and 142.... Second, where language used in a challenged disciplinary provision is not placed in the Articles of Religion and is not in direct conflict with language of the Articles of Religion, we have held that it does not have jurisdiction to pass on the constitutionality of such language, even though the language may be theological or doctrinal in nature, because to do so would be to engage in the interpretation of doctrine, an act which is beyond our authority. *See* Decisions 86 and 243.

We must determine first if the proposed legislation in question revokes, alters, or changes or otherwise is in direct conflict with the Articles of Religion and Confession of Faith, and second, absent modification and direct conflict, if it is theological or doctrinal in nature so as to place it beyond constitutional scrutiny. Petitions 2, 3, and 5 contain amendments to disciplinary provisions but no textual changes or “insertion of any word or phrase into one of our Articles of Religion [and Confession of Faith].” JCD 86. Nor can they be said to be in direct conflict with the language of said documents, since none of the doctrinal statements define marriage as being a “heterosexual” union “between one man and one woman.”

Upon closer look at JCD 468, the claim that the General Conference’s adoption of Wesley’s *Explanatory Notes* as “a new context for interpretation” of the Articles of Religion and Confession requires legislative changes of the marriage definition to be consistent with the *Explanatory Notes* does not hold up to scrutiny. The phrase “a new context of interpretation” in JCD 468 is part of an extended quotation from the *Daily Christian Advocate* and refers to the report of the Theological Study Commission on Doctrine and Doctrinal Standards, *not* Wesley’s *Explanatory Notes*, as providing a new context for reading the doctrinal documents, since the purpose of the report was “to clarify the contextual relationships between the Articles, the

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<sup>16</sup> *See* Lomperis Opening Brief at 16-17 (The OCP “would effectively delegate authority for defining United Methodist marriages, in the first instance, to *civil* governmental authorities *outside* of the church” and “essentially transfer the authority for defining ‘marriage,’ and particularly for deciding whether or not the Church recognizes and affirms same-sex ‘marriages,’ from the General Conference to each local church.”).

<sup>17</sup> *See* Boyette Opening Brief at 8-9 (“This creates an environment in which different standards with respect to human sexuality will be defined and applied by the several annual conference [*sic*] resulting in a lack of uniformity across the church on a distinctively connectional matter”).

Confession, and Wesley's Sermons and Notes and Rules.”<sup>18</sup> This cannot be construed as saying that Wesley’s *Explanatory Notes* “are included among our ‘established standards of doctrine’ covered by the First Restrictive Rules,” and effectively given constitutional status.<sup>19</sup> Nor does this directly support the assertion that the *Explanatory Notes* “establish the contextual meaning for same-sex practice” as far as the Articles and the Confession are concerned.<sup>20</sup>

“On the basis of a narrowly construed interpretation of the question,” JCD 358, we find that there is nothing concerning traditional marriage or homosexuality in the Articles and Confession and that the amended ¶¶ 161.C, 161.G, and footnote to ¶ 310.2(d) do not alter, revoke, or change, nor are they in direct conflict with the language of those foundational documents. As to whether the proposed legislation in question may be theological or doctrinal in nature, any endeavor to legislatively define marriage or human sexuality draws on beliefs, convictions, and *a priori* positions that clearly fall outside the traditional realm of jurisprudence. Since Petitions 2, 3, and 5 propose “language which, even though doctrinal or theological in nature, is not placed in the Articles of Religion and which does not directly conflict with the Articles of Religion, only the General Conference is competent to determine whether its enactment establishes a new standard or rule of doctrine contrary to our present existing and established standards of doctrine.” JCD 1027, *citing* JCD 243. For this reason, Petitions 2, 3, and 5 pass the Restrictive Rules test.

The second argument (“lack of uniformity and inconsistent standards”) uses JCD 1185 as authority. In that case, the Judicial Council struck down a New York Annual Conference policy allowing same-sex marriage for clergy and upheld ¶ 2702.1 of *The Discipline 2008* on constitutional grounds. The briefs advancing this position quote the following statement in support:

The recognition or non-recognition of same sex marriage by civil authorities has no effect on our analysis. The Church has a long tradition of maintaining its standards apart from those recognized or permitted by any civil authority. The

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<sup>18</sup> The relevant portion of JCD 468 reads:

To the 1972 General Conference was presented the report of the Theological Study Commission on Doctrine and Doctrinal Standards. At the outset of that *report the General Conference was told*: The most obvious feature of this Report is what it is not. It is not a new creed, nor a new set of Articles of Religion, nor a Confession of Faith, nor a new set of General Rules. The old ones are still retained in the middle of our text, in their original versions. This is by design, of course—for the next most obvious thing about the Report is that it is not a simple reaffirmation of the old Part II, either. The old Articles and Confession and Rules have been set in a new context of interpretation,... (1972 DCA pg. 218)

*At page 219 we read*: We hope that you have noticed that we have tried to clarify the contextual relationships between the Articles, the Confession, and Wesley's Sermons and Notes and Rules in order to clarify the reference in the First Restrictive Rule about “our present and existing and established standards of doctrines”. We have not altered these standards, as much (sic) but we have proposed a genuinely new principle for doctrinal self-understanding in The United Methodist Church.

JCD 468 [emphases in original].

<sup>19</sup> Lomperis Opening Brief at 4.

<sup>20</sup> Zilhaver Opening Brief at 3.

Church's definition of marriage as contained in the *Discipline* is clear and unequivocal and is limited to the union of one man and one woman.

Consequently, the Church's definition of marriage must take precedence over definitions that may be in operation in various states, localities and nations or that may be accepted or recognized by other civil authorities. To do otherwise would allow the Church's polity to be determined by accident of location rather than by uniform application. JCD 1185 [emphasis added]

But they also conveniently skip over the preceding portion of the opinion, which reads:

Though not explicitly stated, the New York Annual Conference resolution and policy is aimed at permitting clergy who wish to enter into a same sex marriage to do so at their discretion. Paragraph 604.1 provides that an annual conference, "for its own government, may adopt rules and regulations not in conflict with the Discipline of The United Methodist Church." The action of the New York Annual Conference in adopting Resolution 2010-305 is a violation of ¶ 604.1 of the *Discipline*. [...] An annual conference has no authority to offer clergy immunity from administrative or judicial complaint processes by adopting a resolution and policy that is clearly contrary to the *Discipline*. Judicial Council jurisprudence has long held that an annual conference may not legally negate, ignore, or violate provisions of the *Discipline*, even when the disagreements are based upon conscientious objections to those provisions. JCD 1185, citing JCD 96, 886, and 911.

The overlooked excerpt of JCD 1185 makes it abundantly clear that annual conferences are constitutionally prohibited from enacting policies contrary to the standards established by the General Conference. JCD 7. The problem of disharmony is tied to annual conferences passing inconsistent regulations, *not* civil authorities defining marriage on behalf of and for the Church. Put differently, permitting annual conferences to adopt their own policies on same-sex marriage would lead to lack of uniformity and inconsistent standards, and it is *this* scenario (*i.e.* conflicting annual conference legislation in the area of marriage) that "would allow the Church's polity to be determined by accident of location rather than by uniform application." JCD 1185. Contrary to the assertion in *amicus* briefs, this opinion has no bearing on the issue of Church-State separation. At its core, JCD 1185 restated the constitutional division of powers between General Conference and annual conferences by affirming the former's full and exclusive authority to set uniform standards for marriage, a distinctly connectional matter.

Petitions 2, 3, and 5 are also alleged to delegate the power to define marriage to local churches and pastors. Yet, nowhere does the language of the proposed legislation suggest that local churches and ministers are authorized to do so. On the contrary, the rationale of the proposed legislation is to honor the "traditional understanding of marriage" and protect the "Religious liberty...for those whose consciences would be impinged if they celebrated a same-

sex union in societies where it is allowed.”<sup>21</sup> As was said above, the General Conference has full legislative power to establish uniform moral-ethical standards for our clergy members. But it can also choose, under the same constitutional warrant, to enact non-uniform, differentiated standards. These petitions fall under the latter category. It cannot be said that the proposals delegate the power to define marriage to local churches and ministers because they lack any standards. They *do* define marriage and establish standards, albeit non-uniform and differentiated in nature, and entrust churches and pastors with their application. Therefore, this unconstitutional-delegation argument is without merit.

#### ***OCP Petition 4***

Petition 4 seeks to amend ¶ 304.3 as follows:

3. While persons set apart by the Church for ordained ministry are subject to all the frailties of the human condition and the pressures of society, they are required to maintain the highest standards of holy living in the world. The responsibility for determining how standards, including standards related to human sexuality, may apply to certification or ordination in a given annual conference falls to the Conference Board of Ordained Ministry and the clergy session of the annual conference. The bishop may choose to seek the non-binding advice of an annual conference session on standards relating to human sexuality for ordination to inform the Board of Ordained Ministry in its work. ~~The practice of homosexuality incompatible with Christian teaching. Therefore self-avowed practicing homosexual persons are not to be certified as candidates, ordained as minister or appointed to serve in the United Methodist Church.~~

It retains the first sentence of the current provision but removes the prohibition on ordaining, certifying and appointing self-avowed practicing homosexual persons. The legislation assigns the responsibility for determining how to apply the disciplinary standards, including those concerning human sexuality, to boards of ordained ministry and the clergy members of annual conferences. The same provision also creates the bishop’s authority to seek the non-binding advice of an annual conference regarding the ordination of self-avowed practicing homosexuals for the benefit of the board of ordained ministry. The COWF Report explains that the “One Church Plan removes the language from *The Book of Discipline* used in the United States that

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<sup>21</sup> For OCP Petition 2 the following rationale is given: “The traditional understanding of marriage is honored. Religious liberty is intentionally protected for those whose consciences would be impinged if they celebrated a same-sex union in societies where it is allowed.” OCP Petition 2, Exhibit A, p. 4.

The rationale for Petition 3 reads: “Sexuality is affirmed as a good gift to all people. Sexual relations are bound by the covenant of monogamous marriage between two adults. The elimination of this language is in recognition that we are not of one mind. OCP Petition 3, Exhibit A, p. 6.

The rationale for Petition 5 states: “This footnote is adjusted to reflect proposed changes to ¶ 161.C and ¶ 161.G”

restricts...annual conferences from ordaining self-avowed practicing homosexual persons” and that this “plan provides United Methodists the ability to address their missional contexts in different ways.”<sup>22</sup>

The crucial issue here is whether the Petition improperly transfers the authority to set minimum standards on ordination, certification, and appointment of ministers from the General Conference to the board of ordained ministry and clergy session of a given annual conference, thus effectuating an unconstitutional delegation of powers.<sup>23</sup> The COB Brief defends Petition 4 on the grounds that, with the deletion of the last sentence of the current ¶ 304.3, “there will be no statement by the General Conference on the issue of human sexuality as it relates to certification or ordination.”<sup>24</sup> The removal of this prohibitive language results in “the absence of any standard by the General Conference,” which essentially means that “there is no distinctively connectional issue that an annual conference Board of Ordained Ministry cannot address regarding human sexuality” within its authority under ¶ 33.<sup>25</sup>

Most frequently cited authorities on this issue are JCD 542 and 544. The relevant portion of JCD 542 reads:

...the General Conference under Par. 15 of the Constitution has the power to establish standards, conditions and qualifications for admission to the ministry. Under Par. 37 of the Constitution, however, it is the Annual Conference, as the basic body of the church, that decides whether those standards have been met. Reserved to it is the right to vote on all matters relating to the character and conference relations of its ministerial members and on the ordination of ministers.

Decision 544 states in relevant part:

The Constitution, Par. 15, [now ¶ 16] gives the General Conference the power to fix the basic requirements for ministry, while it becomes the responsibility of the Annual Conference, as set forth in Par. 36 [now ¶ 33], to measure, evaluate, and vote upon candidates, as regards the minimum standards enacted by the General Conference. Ordination in The United Methodist Church is not local, nor provincial, but worldwide. While each Annual Conference is a door through which one may enter the ministry of the entire church, the Annual Conference cannot

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<sup>22</sup> COWF Report at 11.

<sup>23</sup> See Lomperis Opening Brief at 6 (Petition 4 “would violate these constitutional limits, by delegating the essentially *legislative* responsibility of setting ordination standards related to sexuality”); McClendon Brief at 6 (“This is an unconstitutional delegation of the legislative power of the General Conference.”); Fugate Brief at 6 (“This petition delegates to the annual conferences the power to determine how standards apply for ordination and not just if the standards have been met.”); Boyette Opening Brief at 8 (“A fatal flaw in the legislation implementing the One Church Plan is that the General Conference would delegate the ability to legislate on distinctively connectional matters to the annual conferences and thus adopt potentially conflicting policies on such matters, rather than administering the policies adopted by the General Conference.”).

<sup>24</sup> COB Reply Brief at 11.

<sup>25</sup> *Id.* [emphasis added].

reduce nor avoid stipulations established by the General Conference which must be met by the church's ministry everywhere. An Annual Conference might set specific qualifications for its ministerial members, but does not have the authority to legislate in contradiction to a General Conference mandate or requirement.

In those two leading cases, the Judicial Council, reading ¶ 16 in conjunction with ¶ 33, distinguished between *legislative* and *administrative* functions. The legislative function belongs to the General Conference (*i.e.* “the power to establish standards, conditions and qualifications for admission to the ministry” and “the power to fix the basic requirements for ministry”), whereas the administrative responsibility is given to the annual conference (*i.e.* “decides whether those standards have been met” and “to measure, evaluate, and vote upon candidates, as regards the minimum standards”). Unauthorized delegation of powers occurs when the legislative function is assigned to annual conferences, namely the power to establish standards, conditions, and qualifications for admission to the ministry. But this is not the case with Petition 4. What Petition 4 does is codify the controlling principle in JCD 542 and 544 by giving the board of ordained ministry and clergy session the “responsibility for determining how standards, including standards related to human sexuality, may apply to certification or ordination in a given annual conference.” [underlines omitted]. In other words, Petition 4 reaffirms the administrative role of the annual conference in regard to the General Conference’s full legislative authority to establish minimum standards on ordination and human sexuality and is, therefore, within the boundaries set by ¶¶ 16 and 33 of the Constitution.

Further, eliminating the prohibitive language in ¶ 304.3 does not lead to a lack of standards, nor does it create a legislative “vacuum” the annual conferences have to fill.<sup>26</sup> The Petition removes only *one* among numerous requirements a clergy person must meet for ordination, certification, and appointment, leaving *all* other standards intact for annual conferences to apply. The ban on the ordination of self-avowed homosexual persons was added to the *Discipline* in 1984. If the General Conference had the power to enact the ban in 1984, it will certainly have the authority to repeal it in 2019 if it so wishes. The legislative branch of the Church is constitutionally free to set the standards for entrance into the ministry *wherever* and *whenever* it sees fit. Regardless of where that threshold may be at any given time, the “annual conference may enact additional requirements that are not in conflict with the letter or intent of” the minimum standards set by the General Conference. JCD 1341. By striking the prohibitive language, Petition 4 brings the threshold back to the pre-1984 level.

The sentence authorizing a bishop “to seek the non-binding advice of an annual conference session on standards relating to human sexuality for ordination to inform the Board of Ordained Ministry in its work” is constitutionally problematic. It was argued that there is no constitutional basis for this kind of authority.<sup>27</sup> The issue here is not the creation

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<sup>26</sup> *But see* Lomperis Opening Brief at 7 (“...this would make the lack of any such restriction the *default* standard of every annual conference around the world.” [emphasis in original]).

<sup>27</sup> *See* Brief of William B. Lawrence Brief at 9 (“...it would grant an authority to the bishop for which there is no established warrant in Division Three of the Constitution.”) [hereinafter Lawrence Brief].

of a special episcopal authority *per se*, since the General Conference has the constitutional warrant to “define and fix the powers, duties, and privileges of the episcopacy,” Constitution, ¶ 16.5, but the purpose for which it may be exercised, namely *to inform* the board of ordained ministry *in its work*. The manifest objective of soliciting a non-binding annual conference opinion by the bishop on issues related to the ordination and certification of self-avowed practicing homosexual persons is to *help* the board of ordained ministry make *informed* decisions. This arrangement bears the risk of crossing the line between episcopal and administrative functions, thus violating the doctrine of separation of powers. “The operative principles of United Methodist polity and law include the authority of the Annual Conference; the separation of powers of the Episcopacy, the Superintendents, and the Board of Ordained Ministry; and due process.” JCD 689 [emphasis added]. Further, the Judicial Council held that “the bishop has no authority to make substantive rulings on judicial or administrative matters...To do otherwise would violate the principle of separation and balance of powers between the legislative, executive and judicial branches as set forth in the Constitution.” JCD 799, *aff’d*, JCD 1092. The separation of powers prevents bishops not only from ruling on administrative matters but also exerting improper influence over the administrative process. In JCD 1156, the Judicial Council stated the principle of non-interference as follows:

The separation of authority and decision making is integral to the United Methodist Constitution and law. Procedures that govern action with respect to matters of conference relations are carefully set forth in the *Discipline* and are to be followed by the Board of Ordained Ministry without interference from the bishop or the district superintendents acting individually in that role or collectively through the cabinet. [emphasis added]

By allowing a bishop to inform the work of the board of ordained ministry, the proposed legislation promotes precisely the kind of interbranch contact JCD 1156 prohibits, *i.e.* “interference from the bishop or the district superintendents acting individually in that role or collectively through the cabinet.” Needless to say, the General Conference is free to authorize the use of non-binding opinions by bishops to inform the work of the cabinet and district superintendents. The special episcopal authority may be granted and exercised for *any* but unconstitutional purposes. In other words, the grant of this special authority expressly for the purpose of informing the work of the board of ordained ministry is constitutionally objectionable. For this reason, we conclude that Petition 4 is constitutional, *except* for the added sentence: “The bishop may choose to seek the non-binding advice of an annual conference session on standards relating to human sexuality for ordination to inform the Board of Ordained Ministry in its work.” [underlines omitted].

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*See also* Opening Brief of Lonnie Brooks, p. 4 (The “bishop has no role in that process other than to preside over the annual conference whether in full session or clergy session.”) [hereinafter Brooks Opening Brief].

### ***OCP Petitions 6 and 7***

Under *The Discipline*, elders and deacons have the freedom to perform or not perform marriage, union or blessing ceremonies for *heterosexual* couples. By adding new ¶¶ 329.4 and 334.6, Petitions 6 and 7 would extend this freedom to these services for same-sex couples where they are legal. An elder's or deacon's "right to refuse such a service due to conscience is expressly protected."<sup>28</sup> Objections to these proposals concern the lack of uniformity and unconstitutional delegation of the power to define the boundaries of marriage to ministers.<sup>29</sup> There is no delegation of policy-setting authority involved because standards on marriage, human sexuality, and ordination have already been established and covered by Petitions 1-5. To recall, the General Conference is free to enact non-uniform, differentiated standards and entrust local churches as well as clergy members to exercise their religious liberty in the application of those standards.

Another concern is that Petitions 6 and 7 allow pastors to officiate worship services not included in *The Book of Worship* and rituals not sanctioned by the Church.<sup>30</sup> Paragraph 16.6 of the Constitution reads:

6. To provide and revise the hymnal and ritual of the Church and to regulate all matters relating to the form and mode of worship, subject to the limitations of the first and second Restrictive Rules. [footnote omitted]

The Judicial Council, in Memorandum 694, dealt with the issue of whether a Minnesota Annual Conference resolution allowing reconciling congregations to offer services of blessing and celebration of committed relationships of same-sex couples was out of order. It came to the following conclusion:

The General Conference is the legislative body which has prerogative over matters distinctively connectional (Par. 15) [now ¶ 16], as well as the Hymnal and Ritual of the Church (Par. 15.6) [now ¶ 16.6]. The Annual Conference does not have authority either to establish or to alter the official rites and rituals of The United Methodist Church. It is the responsibility and duty of the pastor to "oversee the total ministry of the local church in its nurturing ministries and in fulfilling its mission of witness and service in the world ..." (Par. 439) [now ¶ 340]. Par. 439.1(a) [now ¶ 340.2(a)] further states it is the responsibility of the pastor "to preach the Word, oversee the worship life of the congregation, read and teach the Scriptures, and engage the people in study and witness." It is the responsibility of pastors in charge to perform their duties in compliance with the Discipline and be obedient to the Order and Discipline of the Church. [emphasis added]

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<sup>28</sup> OCP Petition 6, Exhibit A at 10; OCP Petition 7, Exhibit A at 11.

<sup>29</sup> See Lomperis Opening Brief at 17 ("Petitions # 6, 7...would even further delegate the General Conference's constitutional authority for defining the Church's meaning of marriage down to each individual minister.").

<sup>30</sup> See Boyette Opening Brief at 11 ("...they would create a process by which the deacon or pastor and the local church could be permitted to offer a service not included in the Book of Worship or approved as a ritual of the Church.").

Memorandum 694, however, has no direct bearing on this case because in that case the resolution in question was adopted by an annual conference. By passing that policy, the Minnesota Annual Conference intruded upon General Conference’s full legislative authority under then ¶ 15.6 of the Constitution. Since the annual conference lacked the authority to pass the resolution in the first place, local churches and ministers would contravene *The Discipline* if they acted in accordance with the resolution by offering those services to same-sex couples. In the extant case, however, the policy permitting those services will be a legislation of the General Conference if it votes to enact it in 2019. Local churches and clergy persons who choose to conduct those services will be in compliance with *The Discipline* because they will simply select from among available options offered by the General Conference legislation. For those reasons, Petitions 6 and 7 pass constitutional muster.

### ***OCP Petition 8***

Similar to Petition 7, this Petition affirms a clergy person’s “right to exercise his or her conscience when requested to perform such marriages, unions or blessings as a matter of his or her individual religious liberty.” Amended ¶ 340.3(a) [underlines omitted]. Under this provision, no pastor shall be required or compelled to perform services for same-sex couples or prohibited from doing so. But it goes further in guaranteeing the right of a clergy member “who cannot in good conscience continue to serve in a conference based upon that conference’s standards for ordination regarding practicing homosexuals” to transfer to a different annual conference. Amended ¶ 340.3(b) [underlines omitted]. The second sentence of amended ¶ 340.3(c) states:

Similarly, clergy who cannot in good conscience continue to serve a particular church based on unresolved disagreements over same-sex marriage as communicated by the pastor and Staff-Parish Relations Committee to the district superintendent, shall be reassigned.

If clergy persons “shall be reassigned” in the event of irreconcilable differences with the local church, the question arises as to whether this provision infringes upon a bishop’s appointment authority.<sup>31</sup> Constitution, ¶ 54. Defending this provision, the submitter of the OCP maintained that “it remains the bishop—the bishop alone—who retains the constitutional mandate and prerogative both to ‘make and fix’ the departing pastor’s new assignment.”<sup>32</sup> A distinction must be made, the brief argued, between the bishop’s constitutional authority to appoint ministers under ¶ 54 and the General Conference’s power to determine the process leading up to pastoral appointments, namely the power to “define and fix the powers, duties, and

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<sup>31</sup> Brooks Opening Brief at 4 (“The mandatory language, “shall be”... is a clear violation of the appointment authority of the bishop conveyed in ¶ 54.”); Fugate Brief at 11 (Petition 8 “restricts this authority by creating cases where the bishop must or must not appoint a clergyperson to a particular charge.”); Lomperis Opening Brief at 20 (“Can such a restriction of the bishop’s appointment power...be reconciled with the broad constitutional mandate for bishops’ appointment power in ¶ 54?”); McClendon Brief at 10 (referring to Petition at as “a slippery slope to a congregationalist call system rather than a connectional UM sent-system of clergy appointments.”).

<sup>32</sup> Opening Brief of Thomas Berlin, p. 24 [hereinafter Berlin Opening Brief].

privileges of the episcopacy” under ¶ 16.5. “In other words, just as our bishops’ constitutional powers include the power to ‘make and fix’ pastoral appointments, that same power is among the ‘episcopal powers’ that the General Conference has complementary constitutional authority to ‘define and fix.’”<sup>33</sup> This provision is touted as striking the proper balance between episcopal authority and the full legislative authority of the General Conference.

This argument, however, ignores the fact that, although the General Conference may “determine what must happen *before* the bishop exercises that power,”<sup>34</sup> it must also ensure that the process leading up to the appointment decision be *outcome-neutral*. In JCD 1307, the Judicial Council said:

This authority grants the General Conference the right to shape the nature of the consultation process that must be followed as bishops carry out their constitutional responsibility to make and fix appointments, as long as this does not alter the necessity of consultation with superintendents and the final authority of bishops to make and fix pastoral appointments. [emphasis added]

By prescribing a particular *outcome* (reassignment) for a particular *instance* (unresolved disagreements) determined by particular *persons* (pastor and local church SPRC), the legislation makes the exercise of the appointment power contingent on certain factors and actors and, by the same token, restricts the bishop’s “final authority” to only one possible choice.<sup>35</sup> Under this mandatory-reassignment arrangement, a bishop would have no alternative if he or she had reason to believe that the SPRC of a local church under the cover of “unresolved disagreements” discriminates against a pastor on account of race, culture, ethnicity, age, or gender. Even where the involved parties disagree over what the disagreement is actually about, a bishop has no choice but to move the pastor to a different church. One way or another, he or she is limited to one option only. To fully preserve a bishop’s final authority, *any* process established by the General Conference prior to the appointment decision must (1) avoid predetermining the outcome and (2) leave room for alternatives. For this reason, the language in amended ¶ 340.3(c) mandating reassignment (“shall be reassigned”) violates ¶ 54 and is unconstitutional.

We must now determine whether the remainder of Petition 8 can be upheld if one part of it is declared invalid. In other words, the question is whether amended ¶¶ 340.3(a), (b), and (c) can be separated from and enacted without the invalid part. For constitutional purposes, separation is inappropriate when the remaining part is so inextricably connected to the part declared invalid that what remains cannot independently survive. In such event, the operative

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<sup>33</sup> *Id.*

*See also* COB Reply Brief at 20, (“In this one limited instance, the General Conference would be enacting such a definition of the power of the bishop by requiring a reassignment of the pastor, with the bishop making the actual appointment to a new charge.”)

<sup>34</sup> Berlin Opening Brief at 24. *Compare* JCD 1307 (“Constitutional authority is granted to General Conference to address issues relating to the nature and scope of appointment consultation.”).

<sup>35</sup> *See* Lawrence Brief at 11 (“The content of this proposed legislation seizes the constitutional authority of the bishop and assigns it to the outcome of discussions regarding disagreements over same-sex marriage.”).

presumption is that the author of the legislation would not have proposed the remaining part by itself.

The invalid portion of ¶ 340.3 deals with a substantively different, though similar, subject. Sub-paragraph (a) protects the freedom of clergy persons to perform or not perform services for same-sex couples; sub-paragraph (b) affirms the principle that no clergy shall be compelled, required to or prohibited from performing those services; and sub-paragraph (c), first sentence, gives clergy persons the option to transfer for reasons of conscience. All these parts can stand alone and be separated from the impugned sentence in ¶ 340.3(c). Consequently, we come to the conclusion that Petition 8 is constitutional, *except* for the following sentence:

“Similarly, clergy who cannot in good conscience continue to serve a particular church based on unresolved disagreements over same-sex marriage as communicated by the pastor and Staff-Parish Relations Committee to the district superintendent, shall be reassigned.” [underlines omitted]

### ***OCP Petition 9***

Petition 9 seeks to amend ¶ 341.6 as follows:

6. Ceremonies that celebrate ~~homosexual unions~~ same-sex marriage shall not be performed ~~conducted by clergy our ministers and shall not be conducted in our churches~~ on church-owned property unless the church decides by a majority vote of a Church Conference to adopt a policy to celebrate same-sex marriage on church property.

*Amicus* briefs raised here the same concerns as in Petitions 6 and 7. We already addressed them there. *See supra* OCP Petitions 6 and 7. Another question is whether the General Conference can allow a church to conduct same-sex wedding services if the majority of a “Church Conference” votes to adopt such policy, when the constitutional provision expressly speaks of “charge conference.”

The Constitution, in ¶¶ 43 and 44, provides:

¶ 43. **Article I.**—There shall be organized in each charge a charge conference composed of such persons and invested with such powers as the General Conference shall provide.

¶ 44. **Article II.** Election of Church Officers—Unless the General Conference shall order otherwise, the officers of the church or churches constituting a charge shall be elected by the charge conference or by the professing members of said church or churches at a meeting called for that purpose, as may be arranged by the charge conference, unless the election is otherwise required by local church charters or state or provincial law. [footnote omitted]

These constitutional paragraphs stipulate the existence of the charge conference and establish the election of church officers by the charge conference as a *default* mode, leaving the

details for General Conference to determine. Under Constitution, ¶ 16.3, the full legislative power of the General Conference includes the authority to “define and fix the power and duties...of charge conferences, and congregational meetings,” and this means, also the power to adopt regulations for the governance of local churches, *provided that there be a charge conference for each charge*, and to establish a different process for electing church officers. Short of eliminating the charge conference, the General Conference can do whatever it pleases when it comes to the organization and administration of the local church. Nowhere does the Constitution explicitly prohibit the use of church conferences in lieu of charge conferences for a limited and specific purpose such as voting on a same-sex wedding policy. The amended provision does not change, restrict, or repeal in any way the powers and duties of the charge conference.<sup>36</sup> Consequently, we find that Petition 9 is within General Conference’s legislative authority under ¶¶ 43 and 44 of the Constitution.

### ***OCP Petition 10***

This Petition protects the religious liberty of bishops who cannot in good conscience commission, license, or ordain self-avowed practicing homosexuals. The addition to ¶ 415.6 reads:

No bishop shall be required to ordain an elder or deacon, commission a deaconess, home missionary, or missionary, or license a local pastor who is a self-avowed practicing homosexual. The Jurisdictional College of Bishops shall provide for the ordination, commissioning, and licensing of all persons recommended by the Board of Ordained Ministry and the clergy session of the annual conference in the bounds of its jurisdiction. All clergy with security of appointment shall continue under appointment by the bishop of the annual conference.

Similar concerns were raised against Petitions 1-4. We addressed them there. *See supra* OCP Petitions 1-4. Further, it was asserted that this Petition improperly allows bishops to preside outside their assigned area without direction from the COB and without permission from a resident bishop in violation of ¶ 52 of the Constitution.<sup>37</sup> This argument is without merit. The first and second sentences are interdependent in the sense that the second is preconditioned by the first, while the effectiveness of the first depends on the implementation of the second one. The protection of a bishop’s right to religious liberty requires that provision be made by the respective college of bishops for the ordination and commissioning of self-avowed practicing

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<sup>36</sup> *But see* Lawrence Brief at 12 (“The proposed legislation in Petition 9 of 17, uses the word ‘shall,’ however, and it would impose a requirement for which there is no constitutional warrant.”).

<sup>37</sup> Fugate Brief at 12-13 (“...this violates the sovereignty of the episcopal area, undermines the authority of the resident bishop, and is rightly considered a chargeable offense.”); McClendon Brief at 13 (“This is in conflict with the constitutional authority of bishops to do the work of general superintendency [¶ 19].”).

clergy candidates in the event that one or more of its members exercise that right,<sup>38</sup> with the implicit understanding that a bishop from outside the episcopal area will come and preside *only if* the residential bishop (1) indicates his or her intention to exercise that right *and* (2) consents to such an arrangement. Even in that scenario, the bishop is not giving up his or her constitutionally assigned role but remains the presider over the annual conference session for purposes of ¶ 52. The General Conference has the power to “define and fix the powers, duties, and privileges of the episcopacy” under ¶ 16.5 of the Constitution. This Petition affirms one of the “privileges” and at the same time establishes new “powers, duties” for bishops acting individually or as members of a jurisdictional college of bishops. It is not in conflict with ¶ 52 because this constitutional provision speaks to the presidential role of bishops in the broadest terms and leaves plenty of room for the General Conference to legislate. The Constitution does not require the direction of the COB for any plan set up by a college of bishops for the ordination and commissioning of self-avowed practicing homosexual persons, nor does it prohibit bishops from outside the episcopal area to preside upon the consent of a residential bishop who exercises his or her religious right under amended ¶ 415.6. We, therefore, conclude that Petition 10 is in harmony with the Constitution.

### ***OCP Petitions 11 and 12***

Nearly identical in wording, these Petitions seek to amend ¶¶ 416 and 419 by setting boundaries for bishops and district superintendents who shall not:

- require any pastor to perform or prohibit any pastor from performing any marriage, union, or blessing for same-sex couples on church property;
- require any church to hold or prohibit any church from holding a same-sex marriage service on church property.

Petition 12 is different from Petition 11 in that it adds a clause to the district superintendents’ prohibited conduct that reads: “or otherwise coerce, threaten, or retaliate against any pastor who exercises his or her conscience to perform or refuse to perform a same-sex marriage.”<sup>39</sup>

Arguments against these Petitions were also made against Petitions 4, 6, 7, and 8, which we addressed above. *See supra* OCP Petitions 4, 6, 7, and 8. The concern raised here is that these proposals are unconstitutional because they interfere with the work of bishops as general superintendents and of district superintendents as the extension of the episcopacy and effectively destroy “the plan of our itinerant general superintendency” protected by the Third Restrictive Rule (Constitution, ¶ 19).<sup>40</sup>

While bishops acting individually or collectively do their work as itinerant general superintendents, it is the role of the General Conference to “define and fix the powers, duties,

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<sup>38</sup> The amendment’s stated rationale is to ensure that provision “is made for such persons in annual conferences where they are deemed to be duly qualified and approved candidates.” OCP Petition 10, Exhibit A at 15.

<sup>39</sup> OCP Petition 12, Exhibit A at 17.

<sup>40</sup> *See, e.g.,* McClendon Brief at 14 (“Petition 12...is unconstitutional because it restricts District Superintendents in their role as extensions of the general superintendency of bishops.”).

and privileges of the episcopacy.” Constitution, ¶ 16.5. In the exercise of this broad power, the General Conference can dictate what bishops and superintendents must *not* do to local churches and pastors who decide one way or another with regard to same-sex weddings. Whenever the General Conference has spoken *legislatively* on matters distinctively connectional, the COB is responsible “for carrying into effect the rules, regulations, and responsibilities prescribed and enjoined by the General Conference,” Constitution, ¶ 47 [emphasis added], and a “bishop presiding over an annual, central, or jurisdictional conference shall decide all questions of law coming before the bishop in the regular business of a session,” Constitution, ¶ 51 [emphasis added], and “ensure that the annual conference and general church policies and procedures are followed” as well as “ensure fair process for clergy and laity...in all involuntary administrative and judicial proceedings.” *The Discipline*, ¶ 415.2-3 [emphasis added]. Far from a *carte blanche* for episcopal authority, the plan of itinerant general superintendency is circumscribed by constitutional and disciplinary law. Therefore, Petitions 11 and 12 are within those constitutional boundaries.

### ***OCP Petition 13***

This Petition adds a new sub-paragraph to ¶ 605 that reads:

10. At any clergy session of an annual conference, the chairperson of the Board of Ordained Ministry shall, if directed by a vote of the Board of Ordained Ministry, present a motion regarding certification, ordination, and appointment of self-avowed practicing homosexuals. Provided, however, that any clergy session of an annual conference that votes on such matters shall not, without the consent of the presiding bishop, take up any subsequent motion on that issue during any called or special session of annual conference held within 30 full calendar months from the date of such vote regardless of the outcome.

The constitutionality of this proposed legislation is questioned on the grounds that it (1) unlawfully delegates authority concerning the certification, ordination, and appointment of self-avowed practicing homosexuals to the board of ordained ministry and clergy session of annual conferences,<sup>41</sup> and (2) allows a bishop to determine the frequency of an annual conference’s discussion and decision on matters related to the certification, ordination, and appointment of

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<sup>41</sup> See Fugate Brief at 7 (“This petition delegates to the annual conferences the power to define if self-avowed practicing homosexuals may be approved as elders, deacons...”); Lomperis Opening Brief at 6 (Petition 13 “would violate these constitutional limits, by delegating the essentially legislative responsibility of setting ordination standards related to sexuality...”); Boyette Opening Brief at 10 (“Petition 13 of the One Church Plan permits diverse and conflicting provisions concerning the certification, ordination, and appointment of self-avowed practicing homosexuals from one annual conference to another...”) and McClendon Brief at 14 (Petition 13 “is also unconstitutional because it leaves open the possibility that annual conference Boards of Ordained Ministry may act in a way that contravenes the constitutional authority of the General Conference...”).

self-avowed practicing homosexuals.<sup>42</sup>

The first concern is unfounded because it is the General Conference, in exercising its full legislative authority over a distinctively connectional matter, “that is permitting change and the potential for non-uniformity in regard to human sexuality.”<sup>43</sup> As said above concerning OCP Petition 1, the Constitution does not require that all church policies enacted by the General Conference be uniform but that all uniform church policies be enacted by the General Conference. Its constitutional authority includes the power to adopt non-uniform, differentiated standards regarding human sexuality. Similar to Petition 4, the first sentence of this Petition codifies the controlling principle in JCD 542 and 544 by affirming the administrative role of annual conferences in determining how to apply non-uniform, differentiated disciplinary standards by way of a motion of the board of ordained ministry presented to the clergy session regarding certification, ordination, and appointment of self-avowed practicing homosexuals.

We find, however, that the second sentence of this Petition is constitutionally flawed. Under the amended provision, the annual conference is barred from considering and voting on any motion regarding certification, ordination, and appointment of self-avowed practicing homosexuals within thirty months, unless this time period is waived by the presiding bishop.<sup>44</sup> Whether labeled “waiver” or “consent,” this special episcopal authority amounts to a veto power. If bishops are constitutionally prevented from seeking the non-binding advice of the annual conference for the purposes of informing the board of ordained ministry in its work (*See supra* OCP Petition 4), they should not be in the position to disallow any motion brought by the clergy session within that time period. In allowing the bishop to control the agenda, discussion, and decision of an annual conference by withholding his or her consent, this legislation essentially turns an annual conference’s autonomous right to vote on all matters relating to the character and conference relations and the ordination of clergy into a *conditional right*, depending on the consent of the bishop, in violation of ¶ 33 of the Constitution. Immaterial is the question of *whether* and *why* a bishop might actually exercise this veto power, for the constitutional guarantee of an annual conference’s reserved rights does not tolerate speculations about episcopal actions and their underlying motives. We conclude that the second sentence of Petition 13, to the extent that it authorizes the bishop to waive the thirty-month period, infringes upon an annual conference’s reserved rights and is, therefore, unconstitutional.

### ***OCP Petition 14***

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<sup>42</sup> *See* Lawrence Brief at 16 (“There is no provision in the Constitution that grants such authority to the bishop for controlling the conversation, discussion, or agenda of the annual conference.”) and Lomperis Opening Brief at 14 (“Allowing bishops to effectively enjoy such power to influence and even determine legislative outcomes cannot be reconciled with the principle of separation of powers or with the broad authority ¶ 33 grants to annual conferences to exercise their rights without episcopal interference.”).

<sup>43</sup> COB Reply Brief at 27.

<sup>44</sup> *Id.* (OCP Petition 13 “authorizes the bishop, as the presiding officer, to waive that time period.”).

This Petition seeks to strike language from ¶ 2702.1 to reflect proposed changes in ¶¶ 161.C, 161.G, 304.3, and 341.6.<sup>45</sup> The legislation would change the definition of *immorality* to “not being celibate in singleness or not faithful in a monogamous marriage” and strike “being a self-avowed practicing homosexual” as well as “conducting ceremonies which celebrate homosexual unions; or performing same-sex weddings” from the chargeable offense of *practices declared by The United Methodist Church to be incompatible with Christian teachings*. The prohibitive language first appeared in *The Discipline 2004* and went into effect on January 1, 2005. In May 2004, prior to the entry into effect of the legislation, the Judicial Council ruled that ¶ 304.3 “of *2000 Discipline* was a declaration of the General Conference...that ‘the practice of homosexuality is incompatible with Christian teaching’” and construed it to be “a chargeable offense under ¶ 2702.1(b) of the *2000 Discipline*.” JCD 984, *aff’d*, JCD 1027, 1341.

The concerns raised against this Petition were discussed in connection with Petitions 1-5 above. The objective of Petition 14 is to roll back the legislative changes to the pre-2004 status. If the General Conference had the constitutional authority to enact those chargeable offenses in 2004, it will certainly have the full legislative power to repeal them in 2019, should it decide to do so. Consequently, Petition 14 passes constitutional muster.

### ***OCP Petition 15***

This Petition proposes to amend ¶ 543.17 by extending the time for central conferences to enact adaptations and translate legislation passed by a General Conference from 12 to 18 months. According to the rationale, “[a]n additional six months give the central conferences the appropriate time to meet, translate the legislation and consider whether they want to make adaptations.”<sup>46</sup> Importantly, Petition 15 does *not* say that the central conferences shall meet within 18 months after the close of the General Conference, for this would be clearly in conflict with ¶ 30, which provides that “central conferences shall meet within the year succeeding the meeting of the General Conference.”<sup>47</sup> The language of the proposed change only provides that legislation passed by a General Conference “shall not take effect” until 18 months after the close of that General Conference and essentially is an exception to the rule that all “legislation of the General Conference of The United Methodist Church shall become effective January 1 following the session of the session of the General Conference at which it is enacted.” *The Discipline*, ¶ 508. Under ¶ 16.3, the General Conference has full legislative power to “define and fix the powers and duties of...central conferences.” Consequently, Petition 15 is authorized by that

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<sup>45</sup> See OCP Petition 14, Exhibit A at 20.

<sup>46</sup> OCP Petition 15, Exhibit A at 22.

<sup>47</sup> We note that the *practical* application of this proposed legislation could pose constitutional problems. Since the stated purpose of this Petition is to allow central conferences sufficient time to make adaptations, which can be properly enacted only at a session, a central conference could make use of the extended deadline under amended ¶ 543.17 and, thereby, act contrary to the mandate of ¶ 30. Under ¶ 2609.2, the Judicial Council has jurisdiction to determine the constitutionality of a proposed legislation, *not* its meaning, effect, or application. It is up to the General Conference to fix this problem.

constitutional provision.

### ***OCP Petition 16***

This Petition adds a new § 23 to ¶ 1504, which reads as follows:

If a local church or charge in the United States changes its relationship to The United Methodist Church through closure, abandonment, or release from the trust clause pursuant to ¶2548, ¶2549, or otherwise, notwithstanding whether property with title held by the local church is subject to the trust (under the terms of ¶2501), the local church shall contribute a withdrawal liability in an amount equal to its pro rata share of any aggregate unfunded pension obligations to the annual conference. The General Board of Pension and Health Benefits shall determine the aggregate funding obligations of the annual conference using market factors similar to a commercial annuity provider, from which the annual conference will determine the local church's share.

The stated purpose of this legislation is to have local churches intending to exit the Church

pay a proportional fair share of the annual conference's aggregate unfunded pension liability using market factors similar to a commercial annuity provider to account for the investment, longevity, and other risks they leave to the Church.<sup>48</sup>

The General Conference has full legislative power to “enact such other legislation as may be necessary, subject to the limitations and restrictions of the Constitution of the Church.” Constitution ¶ 16.16 [emphasis added]. Under this “necessary-legislation” power, it can set the financial terms and conditions, including a calculation basis, for local churches desiring to exit the Church, subject to the limitations and restrictions of ¶ 41, which regulates the process for transferring local churches. Petition 16 does not change the process but defines the financial obligations of transferring local churches and is a proper exercise of General Conference's necessary-legislation power under ¶ 16.6. It is, therefore, constitutional.

### ***OCP Petition 17***

This last Petition intends to change the Clergy Retirement Security Program “so active clergy who change their covenant are removed from the defined benefit and annuity risk pools for their

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<sup>48</sup> OCP Petition 16, Exhibit A at 24.

former annual conference and the Church, and are provided an actuarially equivalent account balance benefit.”<sup>49</sup> Although “Clergy Retirement Security Program” is not expressly listed among the enumerated powers in ¶ 16, it certainly constitutes a distinctively connectional matter over which the General Conference has full legislative authority. In regard to bishops, the legislative branch of the Church is authorized “to adopt a plan for the support of the bishops, to provide a uniform rule for their retirement,” Constitution, ¶ 16.5, and with respect to clergy persons, to “define and fix the powers and duties of elder, deacons, supply preachers, local preachers, exhorters, deaconesses, and home missionaries.” Constitution, ¶ 16.2. The regulation and definition of clergy retirement benefits may also be regarded as “other legislation as may be necessary” under ¶ 16.16 of the Constitution. For this reason, we conclude that Petition 17 is constitutional.

## II. Traditional Plan

### *Is the Traditional Plan “in harmony”?*

Several *amici curiae* challenged the constitutionality of the TP on the basis that it is neither “in harmony” with the purpose of the amended call letter of the COB nor is it the work of the COWF.<sup>50</sup> One particular *amicus* brief asserted that the TP “pays no heed to the clearly stated purpose and objective of the Way Forward process as it was defined in the Council of Bishops’ ‘Offering on a Way Forward’,” and, for that reason, is “fundamentally out of harmony—flatly *inconsistent*—with the purpose of upcoming called session of the General Conference.”<sup>51</sup>

First, we find no evidence in the amended call letter indicating that the purpose of the special session of General Conference “was to consider and act on proposals that would aim to preserve the unity of The United Methodist Church notwithstanding its diverse perspectives on human sexuality issues.”<sup>52</sup>

Second, in JCD 1360, we ruled on the question of “in harmony” under ¶ 14:

Petitions to the special session of the General Conference 2019 may be filed by any organization, clergy member and lay member of the United Methodist Church as long as the business proposed to be transacted in such petition is in harmony with the purpose stated in the call. It is the obligation of the General Conference to determine, in the first instance, through its committees, officers and presiders, acting in accordance with *The Discipline* and the rules and procedures of the General Conference, whether any such petition is “in

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<sup>49</sup> OCP Petition 17, Exhibit A at 26.

<sup>50</sup> *See, e.g.*, Opening Brief of Mark Holland, Evelyn Caterson, and Jay Brim, p. 1 (“1. The proposed Traditional Plan is not ‘in harmony’ with the purpose stated in the amended Call, as required by ¶ 14 of the Constitution, nor is it ‘the work’ of the Commission on the Way Forward as noted in JCD 1360.” [underlines omitted]) [hereinafter Holland Caterson Brim Opening Brief].

<sup>51</sup> Opening Brief of Group of Chancellors, p. 3 [emphasis in original] [hereinafter Chancellors Brief].

<sup>52</sup> *Id.*

harmony.” However, business not in harmony with the purpose as stated in the call is not permitted unless the General Conference by a two-thirds vote shall determine that other business may be transacted. See ¶ 14. [emphasis added]

Whether all petitions submitted or, particularly, the ones concerning the TP are in harmony with the purpose stated in the amended call is not a matter for constitutional adjudication, but content-based evaluation expressly assigned to the “committees, officers and presiders, acting in accordance with *The Discipline* and the rules and procedures of the General Conference.” *Id.* It is immaterial that, “judged strictly by the terms of Bishop’s call, or by the terms of that call as amplified by the clearly expressed intent of the 2016 General Conference (as drawn from the record of those proceedings),” the Traditional Plan is alleged to be inconsistent “with the intended purpose of the Called Special Session scheduled for 2019.”<sup>53</sup> The question was asked and answered in JCD 1360 and remains for the appropriate committees to make a final determination.

### ***TP Petition 1***

This Petition seeks to add language to footnote 1 of ¶ 304.3 as follows:

*“Self-avowed practicing homosexual”* is understood to mean that a person openly acknowledges to a bishop, district superintendent district committee of ordained ministry, Board of Ordained Ministry, or clergy session that the person is a practicing homosexual; or is living in a same-sex marriage, domestic partnership or civil union, or is a person who publically [sic] states she or he is a practicing homosexual. See Judicial Council Decisions 702, 708, 722, 725, 764, 844, 984, 1020, 1341.

The *Rationale* states:

The added language identifies other means by which an individual openly acknowledges that they are engaged in the practice of homosexuality and can be determined by access to public records or declarations made in public forums. It incorporates Judicial Council Decision 1341 in the Discipline.<sup>54</sup>

The 1996 General Conference added this footnote to ¶ 304.3 in response to JCD 702. If the General Conference had the power to enact the footnote in 1996, it will certainly have the authority to add language to it in 2019 if it so wishes. As we noted above under OCP Petition 4, the legislative branch of the Church is constitutionally free to set the standards for entrance into the ministry *wherever* and *whenever* it sees fit. This proposed legislation falls within General Conference’s full legislative power over distinctively connectional matters and is, therefore, constitutional.

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<sup>53</sup> *Id.* at 4.

<sup>54</sup> TP Petition 1, Exhibit C, p. 2.

### *TP Petitions 2, 3, and 4*

These legislative petitions propose to amend ¶¶ 408, 410, and 422 by establishing “a process by which the Council of Bishops may hold one another accountable, based on the constitutional amendment to ¶ 50 that was ratified in 2017.”<sup>55</sup> The centerpiece of this new process are the proposed changes to ¶ 422, particularly, the new additional § 5, which reads in relevant part:

¶ 422.5. The Council of Bishops shall establish from its membership a Council Relations Committee of at least three persons to hear requests for involuntary leave of absence, involuntary retirement, as may be referred to it by the Council of Bishops or any seven active bishops.

- a) When there is a recommendation for an involuntary status change to be referred to the Council Relations Committee, the Council Relations Committee shall conduct an administrative hearing following the provisions of fair process. The Council of Bishops shall designate the person to present the recommendation to the committee. The respondent shall be given an opportunity to address the recommendation in person, in writing, and with the assistance of a clergy person in full connection, who shall have voice. Once the committee has heard the person designated to represent the recommendation, the respondent, and others as determined by the chairperson of the committee, it shall report its decision to the Council of Bishops. The Council of Bishops may affirm or reverse the decision of the committee. The Council of Bishops shall refer to the Council Relations Committee any bishop who is unwilling to certify that he or she is willing to uphold, enforce and maintain *The Book of Discipline* relative to self-avowed practicing homosexuals. When the Council Relations Committee reaches a positive finding of fact that the bishop has not so certified, the Council Relations Committee shall recommend either involuntary leave or involuntary retirement to the Council of Bishops after conducting a Fair Process Hearing.

Under this provision, the Council Relations Committee [hereinafter CRC], composed of three members of the COB, receives complaints referred to it by the COB or by seven active members, conducts administrative hearings, and reports its decision to the COB, which may affirm or reverse the decision. Although it may be warranted by ¶ 50 under a broad construction of the phrase “hold its individual members accountable for their work,”<sup>56</sup> this process runs afoul

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<sup>55</sup> COWF Report, Exhibit C, p. 3.

<sup>56</sup> In 2016, the following language was added to ¶ 50 of the Constitution:

These provisions shall not preclude the adoption by the General Conference of provisions for the Council of Bishops to hold its individual members accountable for their work, both as general superintendents and as presidents and residents in episcopal areas.

Section 2 of amended ¶ 422 seeks to mirror the constitutional language with the following addition: “The Council of Bishops is also a body in which its individual members are held accountable for their work, both as general

of other provisions in the Constitution. There is no separation of prosecutorial and adjudicative functions because they are combined in one and the same body. The same body that refers the complaint to the CRC is also the final arbiter in administrative matters. This is underscored by the provisional nature of the CRC's decision as shown in the sentence: "The Council of Bishops may affirm or reverse the decision of the committee." [emphasis added]. It does not make any difference that the language is permissive (i.e. "may" as opposed to "shall"), for the committee's "decision" (§ 422.5(a)) or "recommendation" (§§ 408.3(c), 410.5) is subject to affirmation or reversal by the COB. In any event, the COB has complete control over the outcome of the administrative process, which *it* initiates. The COB was not designed to function like an inquisitorial court tasked with enforcing doctrinal purity within its ranks.

This arrangement poses significant dangers to a person's right to a fair and unbiased determination of her or his case. There are no safeguards put in place to guarantee an impartial process carried out by an independent body. Not only is the CRC elected *by* and composed *of* members of the COB, but also the legislation does not explicitly bar a CRC member from voting on a COB motion to refer a complaint or from joining six other active members to recommend involuntary leave of absence or involuntary retirement; nor does the provisions contain any regulations regarding conflict of interests and recusal of CRC members. The equivalent would be to allow bishops to send cabinet members to bring administrative matters before the conference relations committee and, simultaneously, appoint district superintendents to serve on that body contrary to § 635.1(d).<sup>57</sup> Petition 4 adds a sub-paragraph (b), which establishes fair process rights of bishops in administrative proceedings: the right to be heard, to be notified of any hearing, to be accompanied by a clergyperson, to have access to records as well as the prohibition of *ex parte* communication. However, these procedural guarantees are ineffective without structural protections to ensure the right to have one's case heard and decided by an impartial and independent body. The closeness of the CRC to the COB, and *vice-versa*, makes them practically indistinguishable and inseparable.

There are similar concerns with the Administrative Review Committee [hereinafter ARC], created under amended § 422.6, whose "only purpose shall be to ensure that the disciplinary procedure for any involuntary action recommended by the council relations committee are properly followed." [underlines omitted]. Although ARC members are expressly

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superintendents and as presidents and residents in episcopal areas." [underlines omitted] However, this declaration is not sufficient to resolve the constitutional problems identified below.

<sup>57</sup> See JCD 917:

The doctrine of separation of powers and the provisions of fair process in administrative hearings prohibit the district superintendent named by the bishop as a representative of the cabinet from participating in the deliberations of the board of ordained ministry, and its committees, and voting in such bodies, on the administrative processes under § 318.6 (involuntary discontinuation of probationary membership), § 356.3 (involuntary retirement), and § 359.3 (administrative complaint). In any such matter, the district superintendent shall not be present for the deliberations and the vote, and shall not discuss with the board of ordained ministry and its committees substantive issues in the absence of the responding clergyperson.

prohibited from serving on the CRC and Executive Committee, they are still voting members of the COB, the body responsible for initiating *and* resolving complaints.<sup>58</sup> Absent provisions barring ARC members from voting on COB referral motions or at the least requiring them to recuse on account of conflict of interests, the neutrality of the ARC is questionable at best and compromised at worst.

Impartiality and independence of decision-making bodies are the hallmarks of due process and bedrock principles of procedural justice in our constitutional polity. No process can be fair and equitable if the body bringing the complaint is also empowered to determine its merits. “The United Methodist Church has a heritage of concern with the rights of persons. That concern has repeatedly made provision for the protection of the rights of its members and of its ministers.” JCD 351, *aff’d*, JCD 459, 462, 522, 524, 852, 1226. “The separation of authority and decision making is integral to the United Methodist Constitution and law. While the boundaries can become hazy in any particular situation, the preservation of the separation of powers must be observed.” JCD 689, *aff’d*, JCD 917. The fundamental right to fair and due process of an accused bishop enshrined in ¶¶ 20 and 58 is denied when the complainants are also among those tasked with reviewing and making the final decision. “Fair process is a constitutional, as well as a disciplinary, right and is protected by the judicial process. Fair process applies to administrative action as well as judicial process.” JCD 830.

We also note the conspicuous lack of any provision granting a bishop the right to appeal the findings of the COB. The finality of the COB’s decision is a clear violation of the constitutional guarantee of “a right to trial by a committee and an appeal.” Constitution, ¶ 58. “It is a long-standing policy in The United Methodist Church to handle any administrative and judicial process within the guidelines of fair and due process. Fair process can never be presumed, but it must be clearly demonstrated at all times. The concept of fair process is one that has been engrafted upon the constitutional standards of our Church.” JCD 1230. “At all times, a bishop’s constitutional right to fair and due process must be protected.” JCD 1341. We find Petition 4, particularly proposed ¶¶ 422.5(a) and 422.6, to be in conflict with ¶¶ 20 and 58, and, therefore unconstitutional.

We must now determine whether Petitions 2 and 3 can be upheld if the main part of Petition 4 is declared invalid. In other words, the question is whether Petitions 2 and 3 can be separated from and enacted without the invalid part. As said above, separation is inappropriate when the remaining part is so inextricably connected to the part declared invalid that what remains cannot independently survive. In such event, it may be presumed that the author of the legislation would not have proposed the remaining part by itself. The rationale of the proposals in those petitions states: “Additions to ¶¶ 408, 410, and 422 go together and create a process by which the Council of Bishops may hold one another accountable.”<sup>59</sup> Amended ¶ 408.3(c)

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<sup>58</sup> Its counterpart in the annual conference does not suffer from this problem. Although elected from the clergy of the annual conference, the members and alternates of the conference ARC “are not members of the cabinet, the Board of Ordained Ministry, or immediate members of the above.” *The Discipline*, ¶ 636.

<sup>59</sup> COWF Report, Exhibit C at 3, 5, and 9. [emphasis added]

authorizes the COB upon majority vote to place any bishop in the retired relation if such a relation is recommended by the CRC. Likewise, amended ¶ 410.5 provides that the COB by majority vote may place any bishop in an involuntary leave status if such a relation is recommended by the CRC, and approve annually after review and recommendation of the CRC. For all intents and purposes, these provisions relate to the administrative process proposed in ¶ 422.5(a), without which they would lose their meaning. Establishing a comprehensive procedural scheme, they build a coherent unit and cannot be separated from the constitutionally defective part. Since they are inextricably connected to Petition 4, Petitions 2 and 3 are unconstitutional.

### ***TP Petition 5***

This Petition proposes to amend ¶ 415.6 by stating that bishops are prohibited (1) from consecrating bishops who are self-avowed practicing homosexuals, even if they have been duly elected by the jurisdictional or central conference, and (2) from commissioning or ordaining deacons and elders determined by the board of ordained ministry to be self-avowed practicing homosexuals, even if they have been recommended by the board and approved by the clergy session of the annual conference.

The *Rationale* reads:

*Rationale:* Clarifies that bishops are not allowed to consecrate, ordain, or commission persons who are not qualified under ¶304.3, even if they are elected or approved by the relevant jurisdictional conference or clergy session. This enhances the bishop's role in upholding the Discipline and makes him/her individually responsible to do so. Resolves a tension identified by Judicial Council Decision 1341 holding such acts illegal.”<sup>60</sup>

Under ¶ 16.5, the General Conference has the full legislative power to “define and fix the powers, duties, and privileges of the episcopacy.” We find that this Petition is authorized by that constitutional grant of power.

### ***TP Petition 6***

This Petition seeks to amend ¶ 635.1(a) by addition:

Members shall be nominated by the presiding bishop after consultation with the chairperson of the board, the executive committee, or a committee elected by the board of the previous quadrennium, and with the cabinet. Prior to being nominated for membership on The Board of Ministry by the bishop, any individual must certify that he or she will uphold, enforce and maintain *The Book of Discipline* related to commissioning, ordination and marriage of self-avowed practicing homosexuals. Additionally, the bishop must certify that he or she only has nominated individuals who will uphold, enforce and maintain *The Book of Discipline* related to ordination and marriage of self-avowed practicing

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<sup>60</sup> TP Petition 5, Exhibit C at 11.

homosexuals. To ensure adequate board membership ...

A concern raised here is that the Petition uses the term “certify” without providing clarity as to what constitutes proper certification for bishops, candidates and members of the board of ordained ministry and is, therefore, unconstitutionally vague.<sup>61</sup> Referring to the dictionary meaning of the term “certify,” the submitter of the TP contended that there “is nothing mysterious about attesting authoritatively to something, presenting something in formal communication...or attesting to something being true” and, therefore, there is no reason to explicitly define the term.<sup>62</sup>

However, the arguments of both opponent and defender of the plan miss the point. The problem with this legislation is not the vague but *incomplete* and *selective* nature of the certification. Under this amendment, individuals nominated by the bishop to the board of ordained ministry are required to certify that they will abide by the disciplinary provisions related *only* to commissioning, ordination, and marriage of self-avowed practicing homosexuals. By the same token, bishops must certify that they have nominated persons who will maintain *The Discipline* related *only* to commissioning, ordination and marriage of self-avowed practicing homosexuals. The certification is incomplete and selective because it relates to *some but not all* applicable standards of *The Discipline* and targets one particular group of candidates for disqualification, when there are other disqualifying factors that ought to be considered. Incomplete or selective certification is in direct conflict with the principle of legality.

“Under the long-standing principle of legality, *The Discipline* contains the law of The United Methodist Church governing the conduct of lay and clergy members and regulating all aspects of Church life. No individual member or entity shall violate, ignore, or negate Church law.” JCD 1341, *citing* JCD 96, 886, 920, 980, 1120, 1185. As a tenet of United Methodist constitutionalism, the principle of legality means that all individuals and entities are equally bound by Church law, which shall be applied fairly and without regard to race, color, national origin, status, or economic condition. It demands that all decisions and actions by official bodies and their representatives be based on and limited by the Constitution and *The Discipline*. To guide their actions, individuals must be informed with specificity and clarity as to what is prescribed and proscribed by Church law. No person or body can be required to act contrary to Church law or prohibited from engaging in lawful conduct. No person can be punished for actions and conduct that are permitted or required by Church law.

Under ¶ 16, the General Conference can require that bishops, members, and nominees to boards of ordained ministry certify their commitment to uphold *The Discipline* in its entirety and impose sanctions in case of non-compliance. But it may not choose some over other provisions

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<sup>61</sup> Opening Brief of Paul A. Fleck, p. 1 (Petition 6 “provides no guidance as to what constitutes proper certification as to codes of conduct with respect to the Bishops, ...Boards of Ordained Ministry, members of Boards of Ordained Ministry...for which certification would be required by the legislation proposed.”) [hereinafter Fleck Opening Brief].

<sup>62</sup> Lambrecht Reply Brief at 17.

of *The Discipline* for special certification. The principle of legality forbids selective or partial enforcement of Church law at all levels of the connection.

In JCD 1343, the Judicial Council ruled with respect to the application of disciplinary standards for candidates:

The Board's examination must include all paragraphs relevant to election of pastoral ministry, including those provisions set forth in paragraphs that deal with issues of race, gender, sexuality, integrity, indebtedness, etc. ¶¶ 304.2, 305, 306, 310. Candidates for licensed or ordained ministry in the United Methodist Church should be treated fairly and denial of entry must be based upon the evidence received from the results of the full examination. [emphases added]

The Judicial Council required a careful and thorough examination and investigation in JCD 1344:

Paragraph 635.2h of *The Discipline* imposes on the Board the duty “to examine all applicants as to their fitness for the ordained ministry and make full inquiry as to the fitness of the candidates...” (Emphasis supplied). This provision obviously aims to ensure that the Disciplinary standards are met. The duty of the Board is to conduct a careful and thorough examination and investigation, not only in terms of depth but also breadth of scope. There are a variety of methods to accomplish this investigative responsibility, ranging from evaluating written exams, conducting personal interviews, to reading social media postings of candidates. We recognize that the members of the Board often work with limited personnel, financial resources, and time. They are, nevertheless, required to fulfill the disciplinary mandate.

Under the rationale of those decisions, marriage and sexuality are but two among numerous standards candidates must meet to be commissioned or ordained; other criteria include, for example, being committed to social justice, racial and gender equality, and personal and financial integrity that should be part of a full examination. In other words, the board of ordained ministry is mandated to apply and enforce all relevant disciplinary provisions, not just those related to marriage and sexuality. Requiring the certification for standards related only to self-avowed practicing homosexuals is tantamount to selective and partial application of *The Discipline*, leading to a less than careful and thorough board examination as mandated by JCD 1343 and 1344. For those reasons, we determine that Petition 6 violates the principle of legality as well as judicial precedents and is unconstitutional.

### ***TP Petition 7***

This proposed legislation seeks to amend ¶ 635.2(h) as follows:

To examine all applicants as to their fitness for the ordained ministry and

make full inquiry as to the fitness of the candidate for: (1) annual election as local pastor; (2) election to associate membership; (3) election to provisional membership; and (4) election to full conference membership. The Board of Ministry shall conduct an examination to ascertain whether an individual is a practicing homosexual, including information on social media, as defined by The Book of Discipline. The board shall certify that such an examination has occurred and its results. If it is determined as a matter of fact that an individual is a practicing homosexual, the board shall not recommend the individual to the Clergy Session of the Annual Conference for commissioning or ordination.

The *Rationale* explains that this Petition “[i]ncorporates Judicial Council Decisions 1343, 1344, and 1352 in the Discipline, requiring boards of ordained ministry to fully examine candidates’ qualifications under ¶304.3.”<sup>63</sup>

This is a misreading of those rulings. In JCD 1352, we said that “Decisions 1341, 1343 and 1344 prevent a Board of Ordained Ministry from ignoring statements of self-disclosure about any action that violates any portion of church law as is the case of the candidate who acknowledged that she is a lesbian and married to another woman.” But this statement must be placed in the context of the requirement of a careful and thorough board examination:

[JCD 1343 and 1344] held that the Board of Ordained Ministry is mandated to examine all applicants as to their fitness for the ordained ministry, and make full inquiry as to the fitness of the candidate for: (1) annual election to local pastor, (2) election to associate membership, (3) election to provisional membership, (4) election to full conference membership. The Board’s examination must include all paragraphs relevant to election of pastoral ministry, including those provisions set forth in paragraphs that deal with issues of race, gender, sexuality, integrity, indebtedness, etc. [...]

In JCD 1344 the Judicial Council stated that it is the duty of the Board to conduct a careful and thorough examination and investigation, not only in terms of depth but also breadth of scope to ensure that disciplinary standards are met. *Id.* [emphasis added]

This Petition suffers from the same constitutional defect as Petition 6. The General Conference can require that the board of ordained ministry conduct a careful and thorough examination to ascertain if an individual meets *all disciplinary requirements* and certify that such an examination has occurred. But it cannot reduce the scope of the board examination to one aspect only and unfairly single out one particular group of candidates for disqualification in violation of the principle of legality. Directing the board to focus its examination on standards related to self-avowed practicing homosexuals, when it ought to scrutinize *all* candidates on *all* applicable disciplinary standards, and to certify that such focused examination has occurred is tantamount to selective and partial enforcement of Church law, leading to a less than careful and

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<sup>63</sup> TP Petition 7, Exhibit C at 15.

thorough board examination as mandated by the Judicial Council. Consequently, we conclude that Petition 7 is in conflict with the principle of legality and, therefore, unconstitutional.

### ***TP Petitions 8 and 9***

Identically worded, these Petitions seek to amend ¶¶ 806.9 and 613.19 by adding the following language

“Every Annual Conference shall certify that the bishop has nominated only members of the Board of Ministry who will uphold, enforce and maintain *The Book of Discipline* related to ordination and marriage of practicing homosexuals. Failure to do so shall result in The General Council on Finance and Administration withholding all funds from the United Methodist Church and withdrawing the annual conference’s ability to use the denominational cross and flame logo.”

The first sentence of these two Petitions suffers not from the vague but *incomplete* and *selective* nature of the certification requirement. *See supra* TP Petition 6. In exercising its full legislative power over distinctively connectional matters, the General Conference can demand from every annual conference certification that the bishop has nominated members of the board of ordained ministry who will uphold, enforce and maintain *The Discipline* in its entirety and impose sanctions in case of non-compliance. But it cannot require them to provide certification solely “related to ordination and marriage of practicing homosexuals” to the exclusion of all other aspects that are integral part of a careful and thorough board examination. *Compare* JCD 1343, 1344, and 1352. The principle of legality forbids selective or partial enforcement of Church law at all levels of the connection. Here the certification requirement is incomplete and selective because it extends to some but not all parts of *The Discipline* and makes one particular group (“practicing homosexuals”) the focal point of disciplinary fidelity in violation of the principle of legality, and, therefore, unconstitutional. The second sentence, which imposes sanctions for non-compliance is equally flawed since the General Conference cannot punish annual conferences for failure to do something that is constitutionally prohibited. We conclude that both sentences of Petitions 8 and 9 are unconstitutional.

### ***TP Petition 10***

Entitled “Implementing Gracious Accountability,” the new ¶ 2801, considered the “heart of the Traditional Plan,”<sup>64</sup> establishes a new comprehensive system to ensure compliance with the doctrine, moral teachings, and requirements of *The Discipline* on the issues of human sexuality.

**Section 1** of said paragraph imposes the following requirement on annual conferences:

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<sup>64</sup> *Id.* at 31 (“*Rationale*: The heart of the Traditional Plan, this paragraph provides a mechanism for ensuring that annual conferences and bishop will uphold the Discipline, while also providing for a gracious exit for those conscience-bound not to do so. Definitively, resolving the impasse requires releasing from the church those unwilling to live by its requirements.”)

1. Before March 31, 2020, each *annual conference* shall vote to approve one of the following two statements:

a. “The \_\_\_\_\_ Annual Conference and its subsidiary units will support, uphold, and maintain accountability to the United Methodist standards found in ¶ 304.3 ‘Qualifications for Ordination,’ ¶ 341.6 ‘Unauthorized Conduct,’ ¶ 613.19 ‘Responsibilities of the Council on Finance and Administration,’ and ¶ 2702.1a-b ‘Chargeable Offenses’ of *The Book of Discipline of the United Methodist Church (2016)* in their entirety.”

b. “The \_\_\_\_\_ Annual Conference and its subsidiary units will not support, uphold, and maintain accountability to the standards of The United Methodist Church found in ¶ 304.3 ‘Qualifications for Ordination,’ ¶ 341.6 ‘Unauthorized Conduct,’ ¶ 613.19 ‘Responsibilities of the Council on Finance and Administration,’ and ¶ 2702.1a-b ‘Chargeable Offenses’ of *The Book of Discipline of the United Methodist Church (2016)* in their entirety.”  
[emphasis in original]

Basically, an annual conference must choose among two options: (1) declare that it will comply with specific provisions of *The Discipline* or (2) declare that it will not comply with specific provisions of *The Discipline*. By selecting the first option, it attests that it will uphold *those*, but not other parts of *The Discipline*. Conversely, by selecting the second option, the annual conference affirms that it will ignore *those*, but not other parts of *The Discipline*. In either scenario, the annual conference is forced to make a declaration of compliance or non-compliance in regard to *some but not all* portions of Church law.

Both options are constitutionally flawed because they are repugnant to the principle of legality. *See supra* TP Petitions 6-9. Under ¶ 16.3, the General Conference can require annual conferences to declare that they will uphold *The Discipline* in its entirety and impose sanctions in case of non-compliance. But it may not choose some over other provisions of *The Discipline* for enhanced application. The principle of legality forbids selective or partial enforcement of Church law at all levels of the connection. If, as claimed by the proponent of the TP, “[t]he effect of this provision is not to permit an annual conference to negate or ignore the *Discipline*, but to discipline an annual conference that is determined to do so,”<sup>65</sup> the same objective can be achieved without reference to particular disciplinary provisions under the fundamental rule that Church law *in its entirety* must be followed without distinction. The General Conference may not pursue constitutional ends by unconstitutional means. We find that amended ¶ 2801.1 violates the principle of legality and, therefore, is unconstitutional.

**Section 7** of amended ¶ 2801 establishes the following requirement for bishops:

1. By June 30, 2020, each *bishop* of The United Methodist Church

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<sup>65</sup> Opening Brief of Thomas Lambrecht, p. 8 [hereinafter Lambrecht Opening Brief].

shall return one of the following two statements to the President of the Council of Bishops and the General Council on Finance and Administration:

a. I, (Name), certify that I will uphold United Methodist standards on marriage and sexuality in their entirety (§ 414.5). I will enforce the requirements of the *Book of Discipline* forbidding same-sex weddings and the ordination of self-avowed practicing homosexuals (§§ 304.3, 341.6, 2702.1a-b, 414.9). I will further hold all those under my supervision accountable to those standards (§ 415.2, 613.19).

b. I, (Name), certify that for reasons of conscience, I cannot uphold United Methodist standards on marriage and sexuality in their entirety (§ 414.5). I am unwilling or unable to enforce the requirements of the *Book of Discipline* forbidding same-sex weddings and the ordination of self-avowed practicing homosexuals (§§ 304.3, 341.6, 2702.1a-b, 414.9), or to hold all those under my supervision accountable to those standards (§ 415.2, 613.19).

Bishops who submit the second option (in whole or in part), fail to respond, are unclear in their response, or qualify their commitment to the first option in any way shall be subject to review by the Council of Bishops' Council Relations Committee for possible action.

Complaints against bishops who are alleged to have not fulfilled their commitment under § 2801.7a above, or who are alleged to have committed one of the chargeable offenses under § 2702.1a- b, shall be automatically and immediately forwarded to the Council of Bishops Council Relations Committee, which shall administer the complaint. [emphasis in original]

Parallel to § 1 discussed above, bishops are mandated to choose one of two options: (1) certify that they will uphold *those* standards and provisions of *The Discipline*, or (2) certify that they will not uphold *those* standards and provisions of *The Discipline*. By selecting the first option, bishops attest that they will uphold *those*, but not other standards and provisions of *The Discipline*. Conversely, by selecting the second option, they affirm that they dissent from *those*, but not other standards and provisions of *The Discipline*. Here too, bishops are required to certify compliance or non-compliance in regard to *some but not all* portions of Church law in violation of the principle of legality. As presiders in annual conferences, bishops have the duty “to ensure that the annual conference and general church policies and procedures are followed.” *The Discipline*, § 415.2. Needless to say, this episcopal responsibility extends to all parts and aspects of *The Discipline*, not just the standards on marriage, ordination, and human sexuality.

However, this proposed legislation creates another serious problem. Under amended § 2801.7(b), bishops who declare their support for certain parts risk being accused of neglecting other parts of *The Discipline*, and those who “fail to respond, are unclear in their response, or qualify their commitment to the first option” are considered “to have not fulfilled their commitment under § 2801.7a,” and will be subject to complaints. On the other hand, “[b]ishops

who submit the second option” by declaring their conscientious objection to certain disciplinary provisions will be subject to complaint as well. Whichever option they choose, bishops will face an inescapable dilemma because they must openly declare their support for or objection to some but not all parts of *The Discipline*, and, by implication, their intention to *selectively* and *partially* fulfill their episcopal obligations, and, in doing so, risk being charged with contravening ¶ 2702.1(d) (disobedience to the order and discipline of The United Methodist Church), which “prohibits a [bishop] from violating a corresponding obligation to perform certain acts required or to refrain from conduct prohibited by Church law.” JCD 1341. To be sure, the General Conference can prescribe or proscribe a particular conduct. But it cannot contradict itself by prescribing *prohibited* conduct or prohibiting *prescribed* conduct. This is in effect what subparagraph (b) of § 7 seeks to accomplish.<sup>66</sup> The principle of legality requires that standards of conduct be formulated in a way that allows the individuals concerned to comply without contradicting or violating other standards of Church law. We are of the opinion that ¶ 2801.7 does not satisfy this requirement and is, therefore, unconstitutional.

**Section 8** is also constitutionally flawed. This proposed section reads in full:

8. Clergy who find themselves for reasons of conscience unable to live within the boundaries of ¶¶ 304.3, 341.6, 613.19, and 2702.1a-b are encouraged to transfer to a self-governing church formed under this paragraph. Clergy who remain United Methodist but do not maintain their conduct within the boundaries established by *The Book of Discipline* shall be subject to chargeable offenses. [emphasis in original]

Unlike bishops who disagree with the TP’s stance on marriage and human sexuality, pastors are not required to sign a declaration but are encouraged to leave the denomination. The ambiguity of the language used in the first sentence of ¶ 2801.8, particularly the passive voice “clergy are encouraged,” poses interpretive difficulties. The plain meaning of “to encourage” (*i.e.* “to attempt to persuade, urge”<sup>67</sup> or “to make someone more likely to do something”<sup>68</sup>) leads to two different readings: non-complying clergy persons are (1) *urged* or (2) *made* to leave

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<sup>66</sup> The second and last sentences of proposed ¶ 2801.7b read:

“Bishops who submit the second option (in whole or in part), fail to respond, are unclear in their response, or qualify their commitment to the first option in any way shall be subject to review by the Council of Bishops’ Council Relations Committee for possible action. Complaints against bishops who are alleged to have not fulfilled their commitment under ¶ 2801.7a above, or who are alleged to have committed one of the chargeable offenses under ¶ 2702.1a-b, shall be automatically and immediately forwarded to the Council of Bishops Council Relations Committee, which shall administer the complaint.”

<sup>67</sup> Merriam-Webster Online Dictionary at <https://www.merriam-webster.com/dictionary/encourage>.

<sup>68</sup> Cambridge Online Dictionary at <https://dictionary.cambridge.org/us/dictionary/english/encourage>.

voluntarily.<sup>69</sup> Though at first impression innocuous, the first reading lacks specifics as to *who* does the urging/persuading (*e.g.* bishop, district superintendents, board of ordained ministry, local church SPRC?), *when* it will happen (*e.g.* upon suspicion, social media posting, public statement, or initiation of administrative/judicial process?), and *how* it will happen (*e.g.* verbal, non-verbal, written, or online communication?), thus leaving the interpretation of such a consequential provision to a host of undefined factors and actors.

The second reading is more troublesome as it carries coercive connotations. If this phrase is understood to mean that non-complying pastors are *made* to leave (*i.e.* forced or pushed out), it would raise fair and due process concerns. *The Discipline* already provides for a process to review a clergy person's ordination and conference membership and to hold him or her accountable for misconduct. This is what the second sentence of amended ¶ 2801.8 refers to when it speaks of "Clergy who...do not maintain their conduct within the boundaries established by *The Book of Discipline* shall be subject to chargeable offenses." [underlines omitted] But if the first sentence is designed to merely repeat what the second prescribes, it is redundant at best and contrary to the welcoming ethos of The United Methodist Church at worst. However, there is no reason to presume that the author of the legislation intended redundancy. For this reason, the first sentence can also be read as saying: short of filing a complaint, *other less drastic means* (ranging from advice, persuasion, pressure tactics to open threats) can be used to "encourage" non-complying pastors to voluntarily exit the denomination, creating essentially a *carte blanche* to purge the denomination of undesirable ministers.

All of this is to say that any reasonable attempt at construing ¶ 2801.8 has to overcome a constitutionally unacceptable degree of ambiguity and vagueness. Clergy persons whose credentials and conference membership are at stake have the right to know what to expect when they choose a course of action or take a particular stance on ordination, marriage, and human sexuality. To pass constitutional muster, any proposed legislation affecting clergy rights must define with sufficient clarity and specificity the standards to guide future actions of all concerned persons and entities. Since it "encourages" the transfer (voluntary or otherwise) of clergy persons without providing clear standards and procedural safeguards, the first sentence of proposed ¶ 2801.8 is unconstitutionally vague and violates the principle of legality.

**Section 9** raises the fundamental question of whether an annual conference can leave The United Methodist Church. The argument raised against this proposed legislation is that it violates the right of jurisdictional and central conferences to determine the boundaries of their annual conferences (¶¶ 27.4 and 31.4) and that annual conferences are not authorized to create or dissolve themselves.<sup>70</sup> The submitter of this proposal defended it on the basis that (1) there is

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<sup>69</sup> The Lambrecht Brief appears to suggest the first reading: "Clergy who could not abide by the requirements of the Discipline would be encouraged to transfer to the new self-governing Methodist church, and if they did not, would be subject to the current disciplinary/complaint/trial process." Lambrecht Opening Brief at 4 [emphasis added].

<sup>70</sup> See Brooks Opening Brief at 5-6 ("Annual Conferences have no role in creating themselves, and therefore they may have no role in dissolving themselves or changing their status.").

historical precedent (*i.e.* the 2012 General Conference voted to approve the withdrawal of the Swedish Annual Conference to merge with the Baptist Church of Sweden and the Mission Covenant Church of Sweden to form a new denomination) and (2) the Constitution neither allows nor expressly prohibits an annual conference from voting to exit the denomination.<sup>71</sup>

With respect to the first argument, an historical precedent may have symbolic and moral force for practical considerations but can hardly serve as legal authority to determine the validity of future decisions. If past actions of the General Conference are precedent-setting in the sense that they supply the constitutional justification for similar actions in the future, it would enable the General Conference to unilaterally modify the Constitution without going through the amendment process of ¶ 59 in violation of the separation of powers. Thus, any past, current, and future decision of the legislative branch of the Church is not a decisive factor in constitutional adjudication.

As to the second argument, the silence of the Constitution on this subject matter does not inevitably mean that the framers intended to legally bar an annual conference from leaving the denomination, nor does it lead to the automatic inference that the topic has been exclusively assigned to the General Conference under the umbrella of “all matters distinctively connectional.” If a particular subject matter is not expressly listed under ¶ 16 or elsewhere in the Constitution, the inference under our system of “enumerated powers”<sup>72</sup> must be that it falls under the category of “such other rights as have not been delegated to the General Conference under the Constitution” in ¶ 33. An annual conference has the right to vote to withdraw from The United Methodist Church. This reserved right, however, is not absolute but must be counterbalanced by the General Conference’s power to “define and fix the powers and duties of annual conferences” in ¶ 16.3. The last sentence in ¶ 33 reaffirms this authority by stating that the annual conference “shall discharge such duties and exercise such powers as the General Conference under the Constitution may determine.” Constitution, ¶ 33 [emphasis added]. We agree with the submitter’s argument that the “withdrawal of an annual conference does not negate the constitutional powers of jurisdictional or central conferences.”<sup>73</sup> Here too, a jurisdictional and central conference’s right is not isolated and unfettered but juxtaposed with the legislative authority of the General Conference, as indicated by the identical phrase “shall have the following powers and duties and such others as may be conferred by the General Conference” contained in the constitutional provisions granting powers to jurisdictional and central conferences. Constitution, ¶¶ 27 and 31 [emphasis added].

While the General Conference, under the authority of ¶ 16.3, may regulate the process and set the conditions for an annual conference to leave The United Methodist Church, the annual conference, having “reserved to it...such other rights as have not been delegated to the

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<sup>71</sup> Lambrecht Opening Brief at 8.

<sup>72</sup> See JCD 5 (“The powers of a General Conference are enumerated in Paragraph 15 [now ¶ 16] of the Constitution.”).

<sup>73</sup> Lambrecht Opening Brief at 8.

General Conference under the Constitution,” exercises autonomous control over the agenda, business, discussion, and vote on the question of withdrawal. Consequently, we find that amended ¶ 2801.9 is constitutional.

**Sections 10 and 11** establish a procedure for groups of local churches and individual local churches to form new or join existing self-governing Methodist churches in the United States that requires a 55 percent majority vote by the church conference of each involved local church. If requested by a local church’s pastor or church council, the “bishop and district superintendent shall facilitate the change of affiliation and shall preside over a church conference within 120 days” of such request. ¶ 2801.10b. Further, § 12 provides that any local church voting to join a new or existing self-governing church under §§ 10-11 “shall enter into a written agreement with the bishop setting an effective date and resolving any financial obligations to The United Methodist Church.” The proposed ¶¶ 2801.10-12 are in direct conflict with the process established by the Constitution for the transfer of local churches from one annual conference to another. The relevant constitutional paragraph states:

¶ 41. *Article V. Transfer of Local Churches*—1. A local church may be transferred from one annual conference to another in which it is geographically located upon approval by a two-thirds vote of those present and voting in each of the following:

- a) the charge conference;
- b) the congregational meeting of the local church;
- c) each of the two annual conferences involved.

The vote shall be certified by the secretaries of the specified conferences or meetings to the bishops having supervision of the annual conferences involved, and upon their announcement of the required majorities the transfer shall immediately be effective.

2. The vote on approval of transfer shall be taken by each annual conference at its first session after the matter is submitted to it.

3. Transfers under the provisions of this article shall not be governed or restricted by other provisions of this Constitution relating to changes of boundaries of conferences. [emphases added]

The proposed legislation improperly substitutes the 55-percent majority for the two-thirds supermajority requirement. It completely omits the annual conference as the body ratifying any local church vote to change affiliation. The role of bishop and district superintendent in facilitating the change of affiliation and presiding over the church conference is not sufficient to make up for the annual conference’s involvement. By sidestepping the mandatory annual conference ratification, the proposed legislation infringes upon “such other rights [of the annual conference] as have not been delegated to the General Conference under the Constitution.” Constitution, ¶ 33. While the process of local church transfer comes under the General

Conference’s legislative authority to “define and fix the powers and duties of annual conference,” Constitution, ¶ 16.3, its constitutional power is restricted by ¶ 41, which expressly requires that the annual conference vote to approve such transfers “at its first session after the matter is submitted to it.” Under ¶ 41, the change of affiliation becomes effective *immediately* upon certification “by the secretaries of the specified conferences or meetings to the bishops having supervision of the annual conferences involved, and upon their announcement of the required majorities” not, as stipulated by proposed ¶ 2801.12, by a *specific date* set by the bishop and each involved local church.

**Section 12** creates the authority of a bishop to enter into a binding legal agreement with a transferring local church for which there is no constitutional warrant.<sup>74</sup> “The bishops of the several jurisdictional and central conferences shall preside in the sessions of their respective conferences,” Constitution, ¶ 52, but this presidential role does not extend as far as to include the power to sign “any contract, deed, bill of sale, mortgage, or other necessary written instrument needed to implement any resolution regarding annual conference property,” ¶ 2512.3d, and to “intervene and take all necessary legal steps to safeguard and protect the interests and rights of the annual conference,” ¶ 2512.4. This authority has already been assigned to the Conference Board of Trustees and its officers by the General Conference. We find that the proposed changes concerning the transfer of local churches (¶ 2801.10-12) fail the constitutional test.

Having found §§ 1, 7, 8, 10, 11, and 12 of ¶ 2801 to be unconstitutional, we proceed to determine whether separation is improper, particularly whether the remaining parts of ¶ 2801 are so inextricably bound up to the part declared invalid that they cannot be upheld and enacted independently. **Section 2** grants an extension from the deadline in § 1. **Section 3** deals with annual conferences that choose the second option or fail to respond, requiring the GCFA to place them on “a list of conferences ideally suited for the self-governing status.” **Section 4** prohibits the General Council on Finance and Administration [hereinafter GCFA] from receiving and sending funds to annual conferences listed under ¶ 2801.3 and is, thus, linked to § 1. **Section 5** permits annual conferences that are not placed on the list in ¶ 2801.3 to vote to enter the self-governing status, and is also substantively connected to § 1. **Section 6** mandates that the GCFA shall offer and facilitate a timeline for annual conferences moving into self-governing status and authorizes it to “grant a one-time delay to the restrictions in ¶ 2801.4” upon request, thereby establishing a direct connection to § 1. **Section 13**, which allows annual conferences and local churches outside the United States to join a self-governing Methodist church, refers to §§ 10-12 insofar as “local churches” are concerned.

The foregoing analysis has demonstrated that §§ 2 – 6 are inextricably connected to § 1

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<sup>74</sup> Proposed ¶ 2801.12 states: “**12. Conditions.** A local church electing to join a new or existing self-governing church through the provision of ¶ 2801.10-11 shall enter into a written agreement with the bishop setting an effective date and resolving any financial obligations to The United Methodist Church.” [emphasis in original]

and the “local churches” portion of § 13 linked to § 10-12, and, therefore, cannot be upheld and enacted independently. The remaining portions can be separated and stand alone. In summary, we are of the opinion that ¶¶ 2801.1-8, 2801.10-12, and the “local churches” reference in ¶ 2801.13 in Petition 10 are unconstitutional.

### ***TP Petition 11***

This proposed legislation adds the following language to ¶ 2711.3:

Except, where the conviction is for conducting ceremonies which celebrate homosexual unions, or performing same-sex wedding ceremonies under ¶ 2702.1(b) or (d), the trial court does not have the power to and may not fix a penalty less than the following:

- a) First (1st) offense – One (1) year’s suspension without pay.
- b) Second (2nd) offense - Not less than termination of conference membership and revocation of credentials of licensing, ordination, or consecration.

The concern raised here is that this Petition imposes minimum penalties upon a conviction for conducting same-sex wedding ceremonies in violation of ¶ 20 of the Constitution.<sup>75</sup> In support of this position, another *amicus* brief quoted the following statement from JCD 1318: “Judicial Council 1201 makes it clear that the right to assess penalties resides only with the trial court.” This legislation, asserted the *amicus* brief, restricts that power because the mandatory minimum penalty does not provide any latitude by the trial court for a lesser penalty and, by the same token, violates a respondent’s full right to trial by a committee under ¶ 20.<sup>76</sup>

This argument does not stand up to scrutiny because it overlooks the fact that the ruling in JCD 1201 pertained to a resolution adopted by the Northern Illinois Annual Conference that contained “a suggested maximum penalty” for clergy members convicted of officiating civil unions for same-sex couples. Although framed as a suggested approach, the resolution was an attempt to modify and limit the range of options of a trial court. Put differently, the suggested maximum penalty scheme infringed upon the full power of the trial court to try a respondent. “Only the trial court has the authority to set a penalty, and it must do so within the range of options specified by the *Discipline* (¶ 2711.3).” JCD 1201 [emphasis added]. This means that, while the trial court’s full power cannot be superseded by the clergy session’s right to vote on character and conference relations, the authority to determine penalties was limited by the

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<sup>75</sup> COB Opening Brief at 21 (“For the reasons set forth in Decision 1201 and 1318, the COB believes this petition violates Paragraph 20 and is unconstitutional based upon its preliminary review.”).

<sup>76</sup> Fleck Opening Brief at 2 (“It essentially, takes away the full right to trial by a committee, in which verdicts may and can be tempered based upon the extenuating circumstances of the case, in violation of the Fourth Restrictive Rule.”).

parameters set by *The Discipline* and, thus, by the General Conference, which has full legislative power to “define and fix the powers and duties of elders, deacons.” Constitution, ¶ 16.2.

Further, JCD 1318 involved the constitutionality of three legislative petitions that imposed minimum penalty on a clergy person who acknowledged to a bishop within the course of the process seeking a just resolution that he or she committed a chargeable offense. The Judicial Council ruled them unconstitutional:

Unless the respondent voluntarily agrees to a Just Resolution to promote healing among all parties, a penalty may only be affixed after the respondent has been found guilty of an offense by a trial court. [...] Thus, to add a specific penalty for any complaint at this point in the process is not constitutional as it denies the right to trial and appeal (¶ 20). [...] The change of status of the clergy person (suspension) required by these petitions clearly negates the authority of the clergy session of the annual conference. These petitions transfer that authority from the annual conference to the General Conference and that transfer is unconstitutional. JCD 1318 [emphasis added]

The underlined phrase highlights the main difference. In the extant case, the amended version of ¶ 2711.3 imposes a minimum penalty not within the course of a just resolution process but *after* the respondent has been found guilty of an offense by a trial court. In other words, the minimum penalty is affixed only when a clergy person’s constitutional right to trial by a committee has been preserved and completed through a judicial process. Paragraph 2711.1 states that the “trial court shall have full power to try the respondent.” At this point, “the right to assess penalties resides only with the trial court,” JCD 1318, and there is *nothing* for the clergy session of an annual conference to vote on in terms of character and conference relations. Therefore, we conclude that Petition 11 is constitutional.

### ***TP Petition 12***

This Petition seeks to amend ¶ 304.5 as follows:

In all votes regarding license, ordination, or conference membership, the requirements set forth herein are minimum requirements. Each person voting is expected to vote prayerfully based on personal judgment of the applicant’s gifts, evidence of God’s grace, and promise of future usefulness for the mission of the Church. The District Committee on Ordained Ministry and the Board of Ordained Ministry shall not approve or recommend any person for candidacy, licensing, commissioning, or ordination who does not meet the qualifications of ¶ 304.1-3, based on the full examination and thorough inquiry into the person’s fitness by the committee and board.<sup>1</sup> The bishop presiding in the clergy session shall rule any such unqualified candidate out of order and not eligible to be acted upon.

Footnote 1 reads: “See Judicial Council Decisions 1343 and 1344.”

The *Rationale* for this amendment states:

*Rationale:* Incorporates Judicial Council Decisions 1343, 1344, and 1352 in the Discipline, requiring district committees and boards of ordained ministry to fully examine candidates’ qualifications under ¶304.3. Guarding against non-conforming committees and boards of ordained ministry, this forbids them from approving or recommending persons found to be unqualified under that paragraph.<sup>77</sup>

Although the *Rationale* may suggest an intention to selectively enforce a particular disciplinary requirement by highlighting an applicant’s “qualification under ¶ 304.3,” the language of the legislation makes it clear that the district committee and board of ordained ministry are prohibited from approving or recommending *any* applicant who fails to meet *any* of the “qualifications of ¶ 304.1-3.” Conspicuously absent here is a singling out of self-avowed practicing homosexual candidates for disqualification. The decision to disqualify a candidate must “be based on the full examination and thorough inquiry into the person’s fitness by the committee and board.” [emphasis added] This is in accordance with JCD 1343, 1344, and 1352, which have already been discussed above. *See supra* TP Petition 7. Consistent with General Conference’s full legislative power to “define and fix the powers, duties, and privileges of the episcopacy,” Constitution, ¶ 16.5, the second sentence requires the bishop presiding in a clergy session to rule *any* candidate recommended by the board who is not qualified out of order, mentioning the generic term “unqualified candidate” without reference to any particular grounds for disqualification. This Petition codifies the controlling principle in those judicial precedents and is constitutional.

### ***TP Petition 13***

This proposed legislation amends the complaint process set forth in ¶¶ 362.1(e) and 413.3(d) by providing that the bishop (1) may dismiss a complaint *only* “as having no basis in law or fact” with the consent of the cabinet and (2) must give the reasons in writing, “copies of which shall be placed in the clergyperson’s file and shared with the complainant.” [underlines in original] According to the *Rationale*, this “petition restores language from 2008, guarding against the arbitrary dismissal of complaints” and prevents “a bishop from deciding which parts of church law should be upheld in a given conference.”<sup>78</sup> Further, since “a cabinet is an extension of the office and ministry of the bishop, it is often unable to be an independent check on the bishop’s decision to dismiss a complaint.”<sup>79</sup>

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<sup>77</sup> TP Petition 12, Exhibit C at 35.

<sup>78</sup> TP Petition 13, Exhibit C at 37.

<sup>79</sup> *Id.*

Under the power of ¶ 16.5, the General Conference has a great deal of latitude in establishing guidelines for the handling of complaints by bishops. Simultaneously, it also has ample authority to “define and fix the powers and duties of [clergy members]” under ¶ 16.2, particularly to determine *what* should go into a clergy person’s file and be shared with the complainant. If the General Conference was constitutionally authorized to adopt the original language in 2008, it will certainly be permitted to restore it in 2019 should it decide to do so. Consequently, Petition 13 is constitutional.

#### ***TP Petition 14***

This Petition seeks to amend ¶¶ 362.1, 413.3(c), 2701.5, 2706.5(c)(3) by adding the following language regarding just resolution:

Just resolutions shall state all identified harms and how they shall be addressed by the church and other parties to the complaint. In cases where the respondent acknowledges action(s) that are a clear violation of the provisions of the Discipline, a just resolution shall include, but not be limited to, a commitment not to repeat the action(s) that were a violation.

The concern raised against this proposed legislation is that the commitment to not repeat actions that are a violation of *The Discipline* constitutes (1) a minimum penalty and (2) a determination of fact that should be reserved to the trial court.<sup>80</sup>

The first question is whether such a commitment in the just resolution process can be considered a minimum penalty, which was declared unconstitutional in JCD 1318. The submitter of this legislation correctly pointed out that a commitment is different from a penalty in that a “person who commits not to repeat an action that is a violation has suffered no disadvantage, loss, or hardship.”<sup>81</sup> It is similar to a clergy person taking a vow to uphold *The Discipline* and conduct herself or himself in a certain way. But also instructive is the following statement from the opinion of the Judicial Council:

A Just Resolution process is an attempt by the church to deal with each complaint in a fair way and with the guarantee of confidentiality. Each Just Resolution takes into account the particularities of the individual case. [...] The goal is to repair any harm to people and communities, to achieve accountability by making things right, and bring healing to all parties. A Just Resolution may be sought to prevent the situation from going to trial. “Church trials are to be regarded as an expedient of last resort” (¶ 2707). A Just Resolution is an alternative way of handling chargeable offenses. JCD 1318 [emphases added]

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<sup>80</sup> Fleck Opening Brief at 2 (“By creating a system of admission of the complaint in the Just Resolution process—when it may be in fact that no violation occurred at all—the purpose of Just Resolution, which is to reach agreement, is unnecessarily undermined.”).

<sup>81</sup> Lambrecht Reply Brief at 15.

The commitment to not repeat the offense can be a way to achieve accountability and healing but also an effective means “to prevent the situation from going to trial,” namely “an alternative way of handling chargeable offense.” *Id.* The *Rationale* explains that refusal “to make such a commitment increases the likelihood of future offenses and complaints.”<sup>82</sup> Therefore, commitment does not in any way resemble a penalty in the ordinary sense of the word.

The second question is whether the commitment entails an unconstitutional determination of fact. The language of the legislation stipulates that such commitment be made only “where the respondent acknowledges action(s) that are a clear violation of the provisions of the *Discipline*” or, in other words, the commitment to not repeat the offense requires an acknowledgment or admission of misconduct. Since a supervising bishop must “ensure fair process for clergy and laity as set forth in ¶ 2701,” *The Discipline*, ¶ 415.3, he or she has the obligation to scrutinize *any* admission of wrongdoing by the clergy person. Regardless of whether the clergy person’s acknowledgment is voluntary, the bishop in charge of any process seeking a just resolution has the obligation to independently verify whether the stipulated facts constitute “a clear violation of the provisions of the *Discipline*”—a question that requires a determination of both fact *and* law by the bishop. The only instance where the Constitution permits episcopal findings of law is when a “bishop presiding over an annual, central, or jurisdictional conference” decides “all questions of law coming before the bishop in the regular business of a session.” Constitution, ¶ 51. In JCD 1318, a central problem was that under the “proposed legislation the bishop becomes the ‘trier of fact’, unilaterally determining a violation of church law and imposing the proposed penalty.” In this case, under the proposed provision of Petition 14, the bishop does not impose a minimum penalty but determines on the basis of fact and law that the respondent is required to make such a commitment as a result of his or her admission of wrongdoing. As the Judicial Council held in JCD 1201, “the trial court alone has the authority to reach a determination with regard to a penalty in the circumstance where it has made a finding of guilt.” [emphasis added] “The trial court shall have full power to try the respondent.” *The Discipline*, ¶ 2711.1. The proposed scheme transfers this authority from the trial court to the supervising bishop, thereby violating a clergy person’s right to a trial by a committee under ¶¶ 20, 58 and improperly expanding the episcopal authority under ¶ 51. Consequently, to the extent that it requires the respondent to make such commitment upon admission of wrongdoing, Petition 14 is unconstitutional.

### ***TP Petition 15***

This proposed legislation seeks to amend ¶¶ 362.1(c), 413.3(c), 2701.5, and 2706.5(c)(3) by adding the same sentence to all four as follows:

No matter where in the process a just resolution is achieved, the complainant(s) shall be a party to the resolution process and every effort shall be made to have the complainant(s) agree to the resolution before it may take effect.

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<sup>82</sup> TP Petition 14, Exhibit C at 40.

It would also add the complainant to ¶¶ 2701.5 and 2706.5(c)(3).

The *Rationale* offered here reads:

*Rationale:* The current practice of allowing the counsel for the church to enter into a just resolution without the participation or agreement of the complainant is unjust and circumvents the goal of restoration of relationship. In order for justice to be done and healing to take place, the complainants must be part of the process and, wherever possible, must agree to the just resolution.<sup>83</sup>

As pointed out above in TP Petition 13, the General Conference has a great deal of discretion in establishing guidelines for the handling of complaints by bishops and in determining what should go into a clergy person's file and be shared with the complainant. Constitution, ¶¶ 16.5 and 16.2. Under ¶ 16.7, the General Conference has also full legislative power to "provide a judicial system and a method of judicial procedure for the Church." Petition 15 falls squarely within the grants of power in ¶¶ 16.2, 16.5, and 16.7 and is constitutional.

### ***TP Petition 16***

This Petition proposes to amend ¶ 2715.10 as follows:

10. The Church shall have no right of appeal from findings of fact of the trial court. The Church shall have a right of appeal to the committee on appeals and then to the Judicial Council from findings of the trial court based on egregious errors of Church law or administration that could reasonably have affected the findings of the trial court. When the committee on appeals or the Judicial Council shall find egregious errors of Church law or administration under this part, it may remand the case for a new trial, along with a statement of the grounds of its action. This is not to be double jeopardy. In regard to cases where there is an investigation under ¶ 2702, but no trial is held, egregious errors of Church law or administration may be appealed to the jurisdictional or central conference committee on appeals and then to the Judicial Council by counsel for the Church. The committee on investigation's decision not to certify a bill of charges does not alone constitute an egregious error of Church law or administration. When the committee on appeals or the Judicial Council shall find egregious errors of Church law or administration under this part, it may remand the case for a new hearing, in which event it shall return to the chair of the committee on investigation a statement of the grounds of its action. This is not to be double jeopardy.

The concern raised against this proposal is that it eliminates the finality of the trial

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<sup>83</sup> TP Petition 15, Exhibit C at 44.

court proceedings and creates double jeopardy.<sup>84</sup> In response, the submitter of this legislation asserted that, under the current provisions of *The Discipline*, the respondent can appeal errors of law that favor the Church but not *vice-versa* and that the purpose is to level the playing field for both the Church and respondent.<sup>85</sup>

Paragraph 2701.2(d) states:

- d) *Right Against Double Jeopardy*—No bill of charges shall be certified by any committee on investigation after an earlier bill of charges has been certified by a committee on investigation based on the same alleged occurrences.

This provision says *when* double jeopardy attaches but not *what* it means. According to a common legal definition, the right against double jeopardy “protects against second prosecution for same offense after acquittal or conviction, and against multiple punishments for same offense...The evil sought to be avoided is double trial and double conviction...”<sup>86</sup> The purpose of this right is not to guarantee the *finality* of the trial court proceedings, as claimed by an *amicus* brief,<sup>87</sup> for the respondent has the option to appeal the verdict.<sup>88</sup> *The Discipline*, ¶ 2715.1. The guarantee against double jeopardy is a safeguard against do-overs and consecutive attempts of the Church to hold a clergy person accountable for the same chargeable offense. Amended ¶ 2715.10 would grant the Church the right of appeal “from findings of the trial court based on egregious errors of Church law or administration that could reasonably have affected the findings of the trial court.” [underlines omitted] Even though limited in scope, the proposed legislation effectively permits the Church to seek a second trial for the same offense, albeit on the basis of “egregious errors of Church law and administration”.<sup>89</sup> Nevertheless, such a second trial would fall within the commonly understood definition of double jeopardy. The main issue here is whether the right against double jeopardy is a *disciplinary* or *constitutional* right. If it is the former, then the right against double jeopardy is a legislatively granted right and, therefore, can be restricted or abolished by the General Conference under its authority to “provide a judicial system and a method of judicial procedure for the Church.” Constitution, ¶16.7. But if it is the latter, it has constitutional status and can only be altered or revoked by constitutional amendment. Constitution, ¶¶ 59-61.

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<sup>84</sup> Fleck Opening Brief at 2 (“Petition 16 would rob the Respondent of the finality of the verdict, thus violating Constitutional fair process (creating double jeopardy) and the Fourth Restrictive Rule.”).

<sup>85</sup> Lambrecht Reply Brief at 18 (“The current one-sided appeal provisions mean that egregious errors of law that favor the church can be appealed by the respondent, but egregious errors of law that favor the respondent cannot be appealed by the church. Petition #16 seeks to establish an equal balance by providing both parties the right to appeal such errors of law.”)

<sup>86</sup> Black’s Law Dictionary, p. 491 (6<sup>th</sup> ed. 1990).

<sup>87</sup> Fleck Opening Brief at 2.

<sup>88</sup> See Lambrecht Reply Brief at 17-18 (“If that is so, then the respondent should be allowed no right of appeal. Yet, the respondent’s appeal (guaranteed by ¶ 20) does not diminish the finality of the trial court verdict.”).

<sup>89</sup> The term “egregious” within the context of this change will require future interpretation by the Judicial Council.

The explicit mention of the prohibition against double jeopardy is disciplinary. *Discipline*, ¶ 2701.2(d). The prohibition against double jeopardy is not explicitly mentioned in the Constitution of the United Methodist Church, nor has the Judicial Council previously found the right against double jeopardy to be implicit in our Constitution. Therefore, Petition 15 *appears* constitutional on its face. On the other hand, the Judicial Council has previously found the concept of fair process “is one that has been engrafted upon the constitutional standards of our Church.” JCD 1230. In the proper case, a future constitutional challenge to the legislative enactment of this provision by the General Conference remains possible, and only its adoption and passage as a constitutional amendment would eliminate this potential infirmity.

The part of the Petition that modifies the Church’s right of appeal from findings of the committee on investigation to include the “central conference” committee on appeals and “the Judicial Council” is simply an expansion of the current provision. In contrast to the portion above, this part does not entail double jeopardy because (1) the interlocutory appeal occurs at the investigative stage and *prior* to a trial and (2) the appellate proceedings are distinct from the trial proceedings in terms of scope and result. The appellate body reviews the findings of the committee on investigation for egregious errors of Church law (not for failure to certify a bill of charges) and can only remand the case for a new hearing.

Further, unlike a grand jury in criminal law that examines only evidence selected and presented by the prosecutor, the committee on investigation conducts its own “investigation into the allegations made in the judicial complaint” independently from the counsel for the Church “to determine if reasonable grounds exist to bring a bill of charges and specifications to trial.” *The Discipline*, ¶ 2706.1. Its investigative mandate and power are broad. “The committee may receive from the counsels suggested lists of persons to be questioned, sources of written material or questions.” *The Discipline*, ¶ 2706.4(c) [emphasis added] It is not restricted to evidence presented by counsel for the Church or defense counsel. It can question additional witnesses to corroborate statements made by either party’s witnesses:

The committee on investigation may call and question such persons or request such written information, including but not limited to materials from the supervisory process, as it deems necessary to establish whether or not there are reasonable grounds for formulating a charge or charges. *The Discipline*, ¶ 2706.4(c) [emphasis added]

The committee can reject any or all pieces of evidence proffered by either side if it deems them not to be “relevant and reliable” under ¶ 2706.4(d). “For the Presiding Officer, the transcript of a Committee on Investigation’s work provides evidence of what was done before a complaint became a charge.” JCD 1296. The broad authority and important role of the committee on investigation make it appropriate to give the Church an independent right to challenge its findings. Put differently, the Church’s appeal at the investigative stage is not a do-over or second trial.

The constitutionality of the following two sentences of Petition 16 is not addressed in this proceeding:

The Church shall have a right of appeal to the committee on appeals and then to the Judicial Council from findings of the trial court based on egregious errors of Church law or administration that could reasonably have affected the findings of the trial court. When the committee on appeals or the Judicial Council shall find egregious errors of Church law or administration under this part, it may remand the case for a new trial, along with a statement of the grounds of its action.

Neither the Constitution nor previous decisions of this Judicial Council have specifically addressed whether the existence of a right against double jeopardy is *constitutional* or *disciplinary*. In the proper case, a future constitutional challenge to the legislative enactment of this language by the General Conference remains possible, and only its adoption and passage as a constitutional amendment would eliminate this potential infirmity.

### ***TP Petition 17***

This last Petition seeks to amend ¶¶ 570 and 574.1 by adding the language “and churches formed through the provisions of ¶ 2801.” [underlines in original]

The *Rationale* offered here states:

*Rationale:* This opens the possibility for concordat churches in the United States, allowing negotiated covenants and relationships between self-governing Methodist churches formed under ¶ 2801 and The United Methodist Church. This allows a continuing connection with those congregations departing from the denomination because of conscience.<sup>90</sup>

The phrase “and churches formed through the provisions of ¶ 2801” is vague. It can be read as referring to the self-governing Methodist churches formed by *annual conferences* under the provisions of amended ¶ 2801.9, which we upheld as constitutional. *See supra* TP Petition 10. If this is the correct reading, then Petition 16 is constitutional. However, if the phrase is interpreted to include groups of *local churches* forming new or joining existing self-governing Methodist churches under the provisions of proposed ¶¶ 2801.10-12, it would be unconstitutional for the reasons discussed above.

If the wording of a provision can reasonably be construed to have two different meanings, one of which is unconstitutional, the presumption is that the author of the legislation would have chosen the meaning that conforms to the Constitution. Our task here is not to determine the meaning, application, or effect of this proposed legislation. It is up to the General Conference to clarify ambiguous language. For this reason, Petition 17 presumably refers to self-governing Methodist churches formed by annual conferences under proposed ¶ 2801.9 and is constitutional.

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<sup>90</sup> TP Petition 17, Exhibit C at 48.

## RULING

The Judicial Council has jurisdiction to determine the constitutionality of any proposed legislation when such declaratory decision is requested by the General Conference or by the Council of Bishops but lacks the authority to scrutinize proposed constitutional amendments under ¶ 2609.2. To trigger jurisdiction and be properly before the Judicial Council, a petition for declaratory decision must contain proposed legislation that *prima facie* requires no constitutional amendment(s) for implementation and can be tested directly against the constitutional provisions in effect at the time of filing. The Connectional Conference Plan contains proposed constitutional changes and does not pass this jurisdictional test. The One Church Plan and the Traditional Plan meet those criteria to be properly before the Judicial Council. The task of the Judicial Council is to pass upon the constitutionality of the legislative petitions without expressing an opinion as to their merits or expediency. It is up to the General Conference to determine the wisdom of each plan.

With respect to the **One Church Plan**, the Judicial Council makes the following ruling: As a primary principle in any organizational structure of The United Methodist Church, connectionalism denotes a vital web of interactive relationships—multi-leveled, global in scope, and local in thrust—that permits contextualization and differentiation on account of geographical, social, and cultural variations and makes room for diversity of beliefs and theological perspectives but does not require uniformity of moral-ethical standards regarding ordination, marriage, and human sexuality. Full legislative power of the General Conference includes the authority to adopt a uniform, standardized, or a non-uniform, differentiated theological statement. Our Constitution commands not that all church policies enacted by the General Conference be uniform but that all uniform church policies be enacted by the General Conference. It assigns the legislative function to set standards related to certification, commissioning, ordination, and marriage to the General Conference and the administrative responsibility for applying them to the annual conferences, local churches, and pastors within their missional contexts. The legislative branch of the Church is constitutionally free to set the standards for entrance into the ministry wherever and whenever it sees fit. Regardless of where that threshold may be at any given time, the annual conference may enact additional requirements that are not in conflict with the letter or intent of the minimum standards set by the General Conference.

Petition 1 is constitutional.

Petition 2 is constitutional.

Petition 3 is constitutional.

Petition 4 is constitutional, *except* for the second sentence:

The bishop may choose to seek the non-binding advice of an annual conference session on standards relating to human sexuality for ordination to inform the Board of Ordained Ministry in its work.

This part violates the separation of powers, is contrary to ¶ 33 and, therefore, unconstitutional.

Petition 5 is constitutional.

Petition 6 is constitutional.

Petition 7 is constitutional.

Petition 8 is constitutional, *except* for the sentence:

Similarly, clergy who cannot in good conscience continue to serve a particular church based on unresolved disagreements over same-sex marriage as communicated by the pastor and Staff-Parish Relations Committee to the district superintendent, shall be reassigned.

This part is in conflict with ¶ 54 and is unconstitutional.

Petition 9 is constitutional.

Petition 10 is constitutional.

Petition 11 is constitutional.

Petition 12 is constitutional

Petition 13 is constitutional, *except* for the second sentence:

Provided, however, that any clergy session of an annual conference that votes on such matters shall not, without the consent of the presiding bishop, take up any subsequent motion on that issue during any called or special session of annual conference held within 30 full calendar months from the date of such vote regardless of the outcome.

This part infringes upon an annual conference's reserved rights under ¶ 33 and is unconstitutional.

Petition 14 is constitutional.

Petition 15 is constitutional.

Petition 16 is constitutional.

Petition 17 is constitutional.

With respect to the **Traditional Plan**, the Judicial Council makes the following decision: Impartiality and independence of decision-making bodies are the hallmarks of due process and bedrock principles of procedural justice in our constitutional polity. No process can be fair and equitable if the body bringing the complaint is also empowered to determine its merits. The fundamental right to fair and due process of an accused bishop is denied when the complainants are also among those tasked with reviewing and making the final decision. The Council of Bishops was not designed to function as an inquisitorial court responsible for enforcing doctrinal purity among its members.

As a tenet of United Methodist constitutionalism, the principle of legality means that all individuals and entities are equally bound by Church law, which shall be applied fairly and without regard to race, color, national origin, status, or economic condition. It forbids selective or partial enforcement of Church law at all levels of the connection and demands that *The Discipline* in its entirety be followed without distinction. All decisions and actions by official bodies and their representatives must be based on and limited by the Constitution and *The Discipline*. Individuals must be informed with specificity and clarity as to what is prescribed and proscribed by Church law. No person or body can be required to act contrary to Church law or prohibited from engaging in lawful conduct. No person can be punished for actions and conduct that are permitted or required by Church law. Clergy persons whose credentials and conference membership are at stake have the right to know what to expect when they choose a course of action or take a particular stance on ordination, marriage, and human sexuality. To pass constitutional muster, any proposed legislation affecting clergy rights must define with sufficient clarity and specificity the standards to guide future actions of all concerned persons and entities.

Under the principle of legality, the General Conference can prescribe or proscribe a particular conduct but cannot contradict itself by prescribing prohibited conduct or prohibiting prescribed conduct. It can require bishops, annual conferences, nominees, and members of boards of ordained ministry to certify or declare that they will uphold *The Discipline* in its entirety and impose sanctions in case of non-compliance. But it may not choose standards related to ordination, marriage, and human sexuality over other provisions of *The Discipline* for enhanced application and certification. The General Conference has the authority to require that the board of ordained ministry conduct a careful and thorough examination to ascertain if an individual meets all disciplinary requirements and certify that such an examination has occurred. But it cannot reduce the scope of the board examination to one aspect only and unfairly single out one particular group of candidates (self-avowed practicing homosexuals) for disqualification. Marriage and sexuality are but two among numerous standards candidates must meet to be commissioned or ordained; other criteria include, for example, being committed to social justice, racial and gender equality, and personal and financial integrity, that all should be part of a careful and thorough examination.

Petition 1 is constitutional.

Petitions 2, 3, and 4 deny a bishop's right to fair and due process guaranteed in ¶¶ 20, 58 and are unconstitutional.

Petition 5 is constitutional.

Petitions 6, 7, 8, and 9 violate the principle of legality and are unconstitutional.

Petition 10:

- ¶¶ 2801.1-7 violate the principle of legality and are unconstitutional;
- ¶ 2801.8, the first sentence:

**Clergy** who find themselves for reasons of conscience unable to live within the boundaries of ¶¶ 304.3, 341.6, 613.19, and 2702.1a-b are encouraged to

transfer to a self-governing church formed under this paragraph.

is unconstitutionally vague and violates the principle of legality;

- ¶ 2801.9 is constitutional;
- ¶¶ 2801.10-12 and the “local churches” reference in ¶ 2801.13 are in conflict with ¶ 41 and unconstitutional;
- ¶¶ 2801.14-23 are constitutional.

Petition 11 is constitutional.

Petition 12 is constitutional.

Petition 13 is constitutional.

Petition 14, the second sentence:

In cases where the respondent acknowledges action(s) that are a clear violation of the provisions of the *Discipline*, a just resolution shall include, but not be limited to, a commitment not to repeat the action(s) that were a violation.

violates ¶¶ 20, 58 and is unconstitutional.

Petition 15 is constitutional.

Petition 16 is constitutional.

Petition 17 is constitutional insofar as it refers to self-governing Methodist churches formed by annual conferences under the provisions of proposed ¶ 2801.9.

Ruben Reyes was absent. Warren Plowden, first lay alternate, participated in this decision.

Beth Capen participated fully in the deliberation of this matter. Kent Fulton, Second Lay Alternate, cast the vote.