BEFORE THE JUDICIAL COUNCIL
OF THE UNITED METHODIST CHURCH

IN RE: Request for Declaratory Decision Regarding the Constitutionality, Meaning, Application, and Effect of the "Traditional Plan," As Enacted During the 2019 Special Session of the General Conference of The United Methodist Church.	))))	**Docket No. 0419-01**

PETITION FOR RECONSIDERATION

SUBMITTED BY GENERAL CONFERENCE DELEGATES TOM BERLIN,
JAY BRIM, EVELYNN CATERSON, LONNIE CHAFIN, GINGER GAINES-CIRELLI,
ADAM HAMILTON, MARK HOLLAND, PHIL MOOTS, DAVE NUCKOLS,
DONNA PRITCHARD, AND CYNTHIA WEEMS

Pursuant to Rule IX of the Judicial Council's Rules of Practice and Procedure, the undersigned delegates to the 2019 Special Session of General Conference of The United Methodist Church ("Delegates") petition the Judicial Council to reconsider the rulings made in Decision No. 1378.[1]

I. SUMMARY OF ARGUMENT

A. The Erroneous Rulings in JCD 1378

Rule IX.A provides that the Judicial Council, on its own motion or on a petition filed by an interested party, may by a majority vote reconsider any of its rulings or action "[w]henever a decision of the Judicial Council is shown to be in error, or in order to prevent a manifest injustice resulting from the interpretation of a Judicial Council decision." For the reasons explained in detail herein—and as amplified by the opening and reply briefs the Delegates submitted in this proceeding on March 18 and March 23, respectively—JCD 1378 is demonstrably erroneous. Most

[1] Besides being delegates to the General Conference, Tom Berlin (Virginia), Dave Nuckols (Minnesota), and Donna Pritchard (Oregon-Idaho) served on the Commission on a Way Forward, giving them a particularly informed perspective on the overall objectives of Commission's work, which, as the Judicial Council recognized in JCD 1360 was nothing less than "to develop a ***complete*** examination and possible revision of ***every*** paragraph in our Book of Discipline regarding human sexuality." The brief's other sponsors attended the Special Session as delegated for the annual conferences indicated: were delegates Jay Brim (Rio Texas), Lynn Caterson (Greater New Jersey), Lonnie Chafin (Northern Illinois), Ginger Gaines-Cirelli (Baltimore-Washington), Adam Hamilton (Great Plains), Mark Holland (Great Plains), Phil Moots (West Ohio), and Cynthia Weems (Florida).

significantly, the Council's decisive application of the doctrine of severability was deeply flawed in two critical respects:

1. The Council erroneously applied a "*presumption* of *severability*," when well-reasoned precedent, the singular circumstances presented by the Way Forward endeavor as a whole, and the legislative record of both the 2016 General Conference and the 2019 Special Session all demanded that the *opposite* presumption be made—that the Traditional Plan enacted by a bare majority in St. Louis was intended "to be effective *as an entirety*," such that "if any provision be [deemed] unconstitutional, the *presumption is that the remaining provisions fall with it*." *Carter v. Carter Coal Co*., 298 U.S. 238, 312 (1936) (emphasis added).

2. The Council was entirely mistaken in its pivotal conclusion that Traditional Plan advocates had no choice but to leave in place the unconstitutional aspects of the Traditional Plan—enacting them "as is," without seeking to fix the constitutional infirmities by amendment—because "[b]ringing the TP into alignment with the Constitution would have necessitated 'dividing the question,'"[2] which the Presiding Officer (Bishop Cynthia Harvey) disallowed.[3] In truth, as a matter of basic parliamentary procedure, the issue of "dividing the question" was entirely distinct from, and *did nothing whatsoever to impede*, the making of motions to amend any of the Traditional Plan's multiple constitutionally infirm petitions. Indeed, the legislative record proves this point beyond any doubt. During the plenary session on February 26, Traditional Plan advocates *successfully* moved to amend one of the Traditional Plan's constitutionally infirm petitions—namely, Petition No. 90037—and from all that appears in the

[2] JCD 1378 at 6-7.

[3] *Id*. at 7 (*citing Daily Christian Advocate* (*DCA*), Vol. 2, No. 5 (Feb. 27, 2019), at 512).

legislative record, they simply chose to "stand pat" when it came to every other petition that the Judicial Council had previously invalidated.

The Judicial Council further erred by invoking the doctrine of *res judicata* as justification for refusing to entertain any of the Delegates' arguments challenging the constitutionality of the Traditional Plan petitions that had survived constitutional scrutiny in JCD 1366 and JCD 1377.[4] It is true, as the Council notes, that *res judicata* has been summarized as a "rule . . . that a matter once judicially decided is finally decided,'"[5] but that hardly describes the entirety of the doctrine. It is black letter law that *res judicata* operates only against *parties* to the prior action.[6] With the exception of Tom Berlin, none of the undersigned delegates appeared as parties in the Docket No. 1018-12, the proceeding that culminated in JCD 1366. Furthermore, as the Council will recall, Rev. Berlin appeared in that case solely in his capacity as a member of the Commission on a Way Forward and solely to defend the constitutionality of the One Church Plan. More recently, some of the Delegates submitted briefs in Docket No. 0219-10 (which resulted in JCD 1377), but solely as *amici curiae*,[7] not as Interested parties.[8] Thus, the doctrine of *res judicata* provided no basis for the Council's refusal to address on the merits the Delegates' challenges to the constitutionality of Traditional Plan Petitions Nos. 90032, 90036, and 90042, all of which advanced

[4] *See* JCD 1378 at 5 & nn. 11-12.

[5] Id. at 5, n. 12 (*quoting Black's Law Dictionary* 1305-06 (6th ed. 1990)).

[6] *See Allen v. McCurry*, 449 US 90, 94 (1980) ("Under res judicata, a final judgment on the merits of an action precludes *the parties or their privies* from relitigating issues that were or could have been raised in that action.") (emphasis added); *Black's Law Dictionary*, *supra* (*Res judicata,* "to be applicable, requires *identity* . . . *of persons and parties* to [the] action . . . .") (emphasis added).

[7] The Delegates that sponsored an *amicus brief* in Docket No. 0219-10 were Tom Berlin, Adam Hamilton, Mark Holland, Cynthia Weems, and Mike Slaughter. *See* JCD 1377 at 2.

[8] The Petitioner in Docket No. 0219-10 was the Legislative Committee of the General Conference, *id*. at 1, and the Interested Parties were the Council of Bishops, Keith D. Boyette, and Thomas Lambrecht. *Id*. at 2.

arguments that were not presented by the distinct parties involved in the cases that resulted in JCD 1366 and JCD 1377.

B. The Manifest Injustice Produced by Validating the Truncated Version of the Traditional Plan

Although the errors identified above are sufficient to support reconsideration under the Judicial Council's rules, correcting those errors is also needed "in order to prevent a manifest injustice."[9] For many (including the undersigned delegates), the principal injustice is the prospect that the *Discipline's* human sexuality provisions will not only continue in effect after January 1, 2020, but that they will be reinforced by enhanced enforcement provisions embedded even in the truncated iteration of the Traditional Plan enacted at the Special Session.

But that is not the injustice being pressed in this Petition for Reconsideration. Rather, for present purposes, the salient injustice occasioned by the near-term implementation of the ostensibly "standalone" petitions validated in JCD 1378 is nothing less than the betrayal of the 2016 General Conference's plainly stated purpose in approving the Way Forward process recommended by the Council of Bishops, and of Commission on a Way Forward's faithful and dedicated efforts to fulfill that purpose. It is no exaggeration to say that in May 2016, when the General Conference convened in Portland, Oregon, many believed that the denomination's connectional bonds had frayed to the breaking point —more so than at any time since 1844, when long-simmering disagreements over the institution of slavery final boiled over and tore the church asunder. Making matters worse, the General Conference "was facing . . . an onslaught of 56 distinct legislative petitions proposing scores of distinct 'solutions' to the quadrennial debate over

[9] *Judicial Council Rules of Practice and Procedure*, R. IX.A.

human sexuality issues that have dominated General Conference sessions for nearly a half century."[10]

Seeking to break that pattern, as the Judicial Council recognized in JCD 1360, the 2016 General Conference accepted the Council of Bishops' recommendation to "refer this entire subject [of human sexuality] to a special Commission . . . to develop a ***complete*** examination and possible revision of ***every*** paragraph in our Book of Discipline regarding human sexuality."[11] The stated objective, the Bishops explained at the time, was to "lead the church toward new behaviors," principally by "step[ping] back from attempts at legislative solutions" hatched and debated in scores each and every quadrennium, and convening instead a dedicated and diverse group of United Methodists to labor together and distill focused recommendations for consideration and action at a "two-to-three-day gathering" of a "called General Conference in 2018 or 2019."[12] And more than that, the legislative record of the 2016 General Conference plainly reveals that the ultimate objective of the Way Forward endeavor was nothing less than to avert impending schism by seeking "a way forward for profound unity on human sexuality and other matters"—a unity that "allows for a variety of expressions to coexist in one church."[13]

Now, with the validation imparted by JCD 1378, the stated objectives for convening a Special Session of the General Conference have been stood on end. In lieu of an integrated and comprehensive approach that addresses the "entire subject" of "human sexuality," the denomination has been handed a truncated version of a plan that, far from allowing "for a variety of expressions to coexist in one church," is being championed by Traditional Plan advocates as just

[10] JDC 1360 at 1.

[11] *Id*. at 3 (*quoting DCA*, Vol. 4, No. 9 (May 19, 2016) at 2488).

[12] *DCA*, Vol. 4, No. 9 at 2488.

[13] *Id*.

the first installment in a series of legislative proposals—with more to come in Minnesota in 2020—all aimed at "enhancing" enforcement of the Discipline's existing human sexuality provisions, which they insist must remain the "one unified moral stance" of The United Methodist Church on the issues of marriage and sexuality.

Against that backdrop, it should surprise no one that the continued unity of The United Methodist Church is now more imperiled than ever in the wake of the Council's decision to allow the half-baked remnants of the Traditional Plan to take effect. It did not need to be so. And it need not be so even now if the Judicial Council grants this Petition for Reconsideration. As outlined above, and as amplified further below, well-established precedent regarding the doctrine of severability, when read in light of the legislative record, demands the conclusion that the Traditional Plan adopted by a bare majority in St. Louis must be invalidated in its entirety.

II. THE COUNCIL ERRED BY ADOPTING A PRESUMPTION OF SEVERABILITY, AND OTHERWISE BY OVERLOOKING THE UNMISTAKABLE EVIDENCE IN THE GENERAL CONFERENCE'S INTENT IN THE LEGISLATIVE RECORD

In upholding implementation of the relatively few Traditional Plan petitions the survived constitutional scrutiny, the Judicial Council reasoned that, "absent clear evidence to the contrary, we are guided by the presumption of severability."[14] That was error. As previously indicated, well-established precedent—handed down by no less than the U.S. Supreme Court—holds that the operative presumption when the legislation in question *lacks* a severability clause "is that the legislature intends an act to be effective *as an entirety*," meaning that if any provision is found to be unconstitutional, "*the remaining provisions fall with it*."[15] In this case, none of the Traditional Plan petitions contained a severability clause. Moreover, although it is true that the absence of

[14] JCD 1378 at 2.

[15] *Carter*, 298 US at 312 (emphasis added).

such a clause "is not dispositive,"[16] the lack of an explicit severability provision puts the burden on Traditional Plan advocates to defeat the presumption that the General Conference intended for the Traditional Plan to be effective as an entirety.[17]

In addition, if one takes seriously the rule that the primary evidence of legislative intent is to be found in the "language, meaning, structure, and purpose" of the legislation itself, then regardless of which presumption is applied it is difficult to reach any other conclusion than that the General Conference—in 2016 and again during the Special Session—was seeking to enact an integrated legislative package that would comprehensively address every provision in the *Discipline* that bears on the subject of human sexuality. The entire design and order of the Special Session bore this out. Thus:

- Before the delegates gathered in St. Louis, the Commission on the General Conference determined that "[p]etitions that compose a plan will be considered together as one unit."[18] Indeed, all delegates were provided in advance with a printed chart of the legislative process that likewise explained that the petitions comprising a single plan "will be considered together as one unit."[19]

- In keeping with that approach, when the plans were considered in Legislative Committee—both for the ranking exercise on February 24 and in deciding upon the Committee's final recommendations on February 25—votes were cast on the plans as a package.[20]

---

[16] JCD 1378 at 6.

[17] *Carter, supra* (without a severability clause, "the burden is upon the supporter of the legislation to show the separability of the provisions involved"); *Williams v. Standard Oil Co*., 278 U.S. 235, 242 (1929) ("In the absence of such a legislative declaration, the presumption is that the legislature intends an act to be effective as an entirety.").

[18] DCA Vol. 2, No. 1 (Feb. 23, 2019) at 263.

[19] *Id.* at 264.

[20] *Id*. at 263.

- As indicated in § III (*infra*), neither the bundling approach, nor the rules governing "dividing the question," precluded motions to amend any of the composite petitions that comprised any of the integrated plans; it meant only that, in the final analysis, a single vote would be taken—up or down—on the plan *as a whole, including* any amended language adopted prior to the final vote on the entire package.

- That said, in particularly unique circumstances, when it made sense to "decouple" the petitions comprising a petition from the plan to which it was originally attached, the General Conference itself made a considered decision to do so. Thus, on February 21, 2019, the Committee on Reference ruled on "a request to 'decouple' the two Wespath petitions, numbers 90016 and 90017, from the One Church Plan since it was the original intent of Wespath that these petitions be considered no matter what plan is selected by the General Conference."[21]

- And finally, during the plenary session itself, a very specific request was made to decouple the TP petitions for voting purposes, and that request denied by Bishop Harvey, serving as Presiding Officer, in a decision that the body overwhelming *affirmed*.[22] For reasons the Delegates cannot fathom, JCD 1378 seems to suggest that the General Conference's somehow *supports* its conclusion that the multiple petitions compromising the Traditional Plan are *severable*. Respectfully, that conclusion is impossible to square with the General Conference's decisive vote to *uphold* Bishop Harvey's *refusal* to allow the Traditional Plan to "be separated into pieces," thereby *precluding* the petitions from being "voted on one-by-one."[23]

In short, taken together, the manifest purpose of the "Way Forward" process as approved by the 2016 General Conference in the first instance; the singular focus of the 2019 Special

[21] DCA, Vol. 2, No. 4 (February 24, 2019) at 283.

[22] DCA, Vol. 2, No. 5 (Feb. 27, 2019) at 512-513.

[23] *Id.* at 512.

Session; and the actions taken throughout those proceedings by the General Conference delegates, officers and committees alike—none of that can plausibly be squared with the Council's reflexive characterization of the Traditional Plan as simply "consist[ing] of a series of petitions that were separately numbered, dealing with completely different paragraphs of *The Discipline*."[24] Repeating that exact refrain in three distinct places—and without once mentioning the Commission on a Way Forward, or "human sexuality," or even the stated purpose of this called session of the General Conference—JCD 1378's virtually exclusively focus on the bare mechanical functionality of the Traditional Plan's composite petitions completely bypasses, and thereby obscures, the reality that the legislative ***plans*** presented for action during the Special Session were the furthest thing from *ad hoc* collections of petitions "dealing with completely different paragraphs of the *Discipline*."[25] On the contrary, each was presented as a comprehensive, integrated response to the 2016 General Conference's mandate that the "*entire* subject" of "human sexuality" be referred to "a special Commission . . . to develop a *complete* examination and possible revision of *every* paragraph in our Book of Discipline *regarding human sexuality*."[26]

III. TRADITIONAL PLAN ADVOCATES WERE FREE TO CURE BY AMENDMENT THE UNCONSTITUTIONAL PORTIONS OF THE TRADITIONAL PLAN; THEY CHOSE NOT TO

In a pivotal portion of JCD 1378, the Judicial Council reasons that advocates of the Traditional Plan were effectively *prevented* from "bringing the TP into alignment with the Constitution" because that "would have necessitated 'dividing the question,' that is, dividing the TP into

[24] JCD 1378 at 6.

[25] *Id.* at 6.

[26] DCA, Vol. 4, No. 9 (May 19, 2016) at 2688 (emphasis added). *See also* JCD 1360 at 3 & n. 6 (Affirming that the legislative record of the 2016 General Conference establishes that the core purpose of the called special session would be to address legislative proposals that ultimately emanate from the Commission's "'complete examination' of the subject of human sexuality" and "the 'possible revision of every paragraph in our Book of Discipline regarding human sexuality . . . .'").

separate petitions for debate and voting." In fact, there is no basis—none at all—for this conclusion.

Nothing the General Conference's rules, and nothing in Robert's Rules of Order, functioned to prevent any delegate from making motions to amend any particular provisions of any particular petition, and then engaging in debate on those motions. In fact, that was done on select TP petitions, both during the Legislative Committee's deliberations on February 25,[27] and in the plenary session on February 26.[28] In the end, however, after succeeding in that single effort to amend just one of the seven constitutionally infirm petitions, it was Traditional Plan advocates themselves pressed forward for a vote by the plenary session on the plan *as a whole*, when Clergy Delegate Timothy McClendon, invoking Rule 7, asked for the question to be "put automatically" after the minimum number of speeches for and against the Traditional Plan had been made, and thereby terminating any further opportunity to amend, and moving immediately to a vote on the Traditional Plan as a whole. *See DCA* (Feb. 27) at 509, 511.

IV. CONCLUSION

For all of the foregoing reasons, the undersigned delegates respectfully request reconsideration of JCD 1378, and upon reconsideration, that all of the Traditional Plan petitions be invalidated.

Respectfully submitted,

Tom Berlin
Virginia Annual Conference
tberlin@florisumc.org

[27] *DCA*, Vol. 2, No. 4 (Feb. 26, 2019) at 383-84 .

[28] The only attempt made during the plenary session to cure a constitutional defect by amendment related to Petition 90037, concerning the composition of Boards of Ordained Ministry.

Jefferson K. Brim
Rio Texas Annual Conference
jay@teacher.legal

Evelynn Caterson
Greater New Jersey Annual Conference
jecaterson@verizon.net

Lonnie Chafin
Northern Illinois Annual Conference
lchafin@umcnic.org

Ginger Gaines-Cirelli
Baltimore-Washington Conference
ggainescirelli@foundryumc.org

Adam Hamilton
Great Plains Annual Conference
revahamilt@mac.com

Phil Moots
West Ohio Annual Conference
pmoots@npkhlaw.com

Dave Nuckols
Minnesota Annual Conference
dave.nuckols@gmail.com

Donna Pritchard
Oregon-Idaho Annual Conference
DPritchard@fumcpdx.org

Cynthia Weems
Florida Annual Conference
ds-se@flumc.org