

**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**

**BRIEF OF 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**

The undersigned delegates to the 2019 Special Session of General Conference of The United Methodist Church submit this brief regarding the constitutionality, meaning, application, and effect of legislation known as the “Traditional Plan,” as enacted by the Special Session of the General Conference in St. Louis, Missouri, on February 26, 2019.¹ For the reasons set forth in detail below, the Traditional Plan must be invalidated in its entirety.

JURISDICTION

The Judicial Council’s jurisdiction over this matter is appropriate both (1) as an appeal pursuant to ¶¶ 56.1 and 2609.1 of *The Book of Discipline of The United Methodist Church* (2016) (“*Discipline*”), and (2) as a request for a declaratory decision pursuant to *Discipline* ¶ 2610.1. This docket items stems from a motion the Rev. Timothy Bruster (Central Texas) made on February 26, 2019, after the delegates voted (438 to 384) to adopt the Traditional Plan. *See Daily Christian Advocate (DCA)*, Vol. 2, No. 5 (Feb. 27, 2019) at 519. Rev. Bruster specifically invoked “paragraph 2609.1 of The Book of Discipline,” *id.*, but rather framing things as an

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, including the objective of developing legislative approaches that address human sexuality issue in an integrated and comprehensive fashion. 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).

“appeal” (the term used in ¶ 2609.1), Rev. Bruster invoked the terminology used in ¶ 2610.1, by moving “to request a declaratory decision from the Judicial Council on the constitutionality, meaning, application, and effect of the Traditional Plan as amended.” *Id.* Speaking in favor of the motion, Rev. Bruster explained that he believed it was “really important [that] we understand what action we have taken and what its application, meaning, and effect is, in addition to its constitutionality.”

Perhaps Rev. Bruster invoked ¶ 2609.1 (even while referencing the declaratory decision terminology used in ¶ 2610) in order to gain the benefit of the former provision’s rule that an appeal to determine an act’s constitutionality can be authorized by the vote of just “one-fifth of the members of the General Conference.” *Id.* ¶ 2609.1. And, when the time came to vote on Bruster’s motion, Bishop Harvey indicated that a “twenty percent” vote was required to approve the motion. *DCA* (Feb. 27, 2019) at 523. As it turned out, however, Rev. Bruster’s motion passed by a majority vote, with 405 delegates voting to seek the Judicial Council’s review of the Traditional, and 395 delegates voting against the motion. Accordingly, the Judicial Council’s jurisdiction is proper both as an appeal of the Traditional Plan’s constitutionality ¶¶ 56.1 and 2609.1, and as a request for a declaratory decision regarding its constitutionality, meaning, application, and effect under ¶ 2610.1.

ARGUMENT

I. The Unconstitutionality of Multiple Component Parts of the Traditional Plan Requires the Invalidation of the Entire Plan

It is neither legally appropriate nor logical for the Judicial Council to repudiate only the Traditional Plan “petitions” it previously judged to be unconstitutional in isolation, while allowing the remaining petitions to be inserted into the *Discipline* as binding law. As outlined below, such a result would be contrary to the clearly expressed intent of the General Conference—as

documented both during the Special Session held in St. Louis, and when it approved the Way Forward approach during the 2016 General Conference in Portland—and with Judicial Council and analogous civil law precedent concerning the doctrine of severability.

A. The Record in the Plenary Session Confirms that the Traditional Plan was Adopted As a “Package,” Leaving No Reasonable Ground to Conclude that the General Conference Intended for Isolated Petitions to Take Effect if Others are Invalidated

Any severability analysis must begin with the observation that legislative record confirms that, during the plenary session held in St. Louis on February 26, the petitions that ultimately comprised the Traditional Plan were neither enacted, nor even debated, on a petition-by-petition basis. Leaving aside limited debate on a few proposed amendments made from the floor—only one of which passed—the Traditional Plan was presented to the body, debated, and voted upon, as a package.

Indeed, during the plenary session in which the decisive vote was held, delegate Kelly Robier (Baltimore-Washington Conference) called for a division of the question, seeking precisely to have the body vote on the Traditional Plan one petition at a time. *DCA* (Feb. 27) at 512. After consulting with the expert parliamentarian retained for the Special Session, the Presiding Officer (Bishop Harvey) denied that request, explaining that, “[a]ll along, we have been voting on these as a bundle. So, these are conferring, conforming, and there is no way to divide the question.” *Id.*

Even more importantly—given that the General Conference’s intent is decisive on the question of severability—the record reveals that the *General Conference agreed* with Bishop Harvey’s assessment that “there [was] no way to divide the question.” After Delegate Robier appealed Bishop Harvey’s ruling, Bishop Harvey spoke in defense of the ruling by reminding the delegates that this “bundling” methodology had been “shared on the first day with the delegates” and was supported by both Robert’s Rules of Order and *Discipline* ¶ 507. Both sources supported treating the Traditional Plan petitions as “composite petitions” that “shall not be separated

into pieces,” *id.* (quoting *Discipline* ¶ 507), a conclusion that surely well-served the objective of producing legislation that would coherently address all of the *Discipline*’s various provisions concerning human sexuality—which, after all, was the defined purpose of the work of the Commission on a Way Forward.

Taking full advantage of the time allotted for speaking in favor of her appeal, Delegate Robier outlined her position in some detail. *DCA* (Feb. 27) at 512. Citing the General Conference’s own rules, Robier argued that the “petitions of the Traditional Plan are not . . . ‘so closely related,’ . . . that they must be treated together,” but instead “deal with completely different paragraphs in our *Book of Discipline*,” and therefore “are divisible.” *Id.*

For present purposes, deciding whether Bishop Harvey or Delegate Robier had the better argument is beside the point. What matters on the question of severability is that the General Conference agreed with Bishop Harvey, voting overwhelming (522 to 301) to sustain Bishop Harvey’s ruling, and thereby leaving no reasonable doubt that the body shared the Presiding Officer’s conclusion that the Traditional Plan must rise or fall as a package, and “shall not be separated into pieces.” *Id.* at 512.

It was only shortly thereafter—as reflected just two pages later in the *DCA*—that the Presiding Officer called the delegates to “get your voting devices” and cast a single vote, up or down, “on the Traditional Plan as it’s been heard, thus amended.” There was no distinct vote on any of the subsidiary petitions, nor is there any reason to suppose that the body intended for the Traditional Plan be “unbundled” after the fact, with the Judicial Council essentially rewriting the “Plan” to include only those “pieces” not directly invalidated in this third (and presumably final) review of the Traditional Plan’s constitutionality.

B. The Bundling Approach Used for the Final Vote Was Consistent with the Approach Used in the Legislative Committee Record and Throughout the Way Forward Process

The bundling approach followed during the plenary session on February 26 was further consistent with how the petitions comprising the various plans were considered and acted upon by the Legislative Committee, both in the ranking process that took place on February 24 and in developing the Committee’s final recommendations on February 25. In each of those instances, votes were cast on plans as a package, not on a petition-by-petition basis.

In addition, the approach adopted throughout the 2019 Special Session was entirely consistent the design of the Way Forward process as it was conceived by the Council of Bishops and approved by the 2016 General Conference. The central thrust of the Way Forward approach was to seek to avoid the gridlock posed by having hundreds of delegates debating a multiplicity of discrete and often inconsistent legislative petitions in a compressed timeframe. As the Judicial Council recognized in JCD 1360, the Way Forward approach was adopted by the 2016 General Conference, at a point when the General Conference “was facing . . . an onslaught of 56 distinct legislative petitions proposing scores of distinct ‘solutions’ to the quadrennial debate over human sexuality issues that have dominated General Conference sessions for nearly a half century.” JDC 1360 at 1.

Seeking to break that pattern, and in response to a non-binding General Conference resolution asking for guidance from the Church’s bishops, the Council of Bishops recommended “refer[ring] 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.” *Id.* at 3 (*quoting DCA*, Vol. 4, No. 9 (May 19, 2016) at 2488). The objective, the Bishops explained, was to “lead the church toward new behaviors,” *DCA*, Vol. 4, No. 9 at 2488, principally by “step[ping] back from attempts at legislative solutions” hatched and

debated in scores, convening instead a focused group of faithful 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.” *Id.*

In the end, after months of work, the Commission on a Way Forward delivered a report to the General Conference that included three composite “plans,” each purporting to represent a comprehensive approach that aimed to serve the overall objective of allowing The United Methodist Church to move beyond the protracted, decades-long impasse on human sexuality issues. Against that backdrop, the General Conference’s decision to keep those plans intact as they moved through the legislative process—both at the committee level and during the ultimate debates and voting—must be recognized as the byproduct of how the process was presented to and approved by the 2016 General Conference at the outset.

C. Judicial Council and Analogous Civil Law Precedent Support the Conclusion that None of the Traditional Plan May Go into Effect if Any Part of it is Invalidated

1. The “Severability” Question Presented Here Was Not Addressed in JCD 1366

The undersigned recognize that one of the questions presented in JCD 1366 was this: “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?” JCD 1366 at 5. That question is distinct in every significant respect from the question presented now.

In JCD 1366, the Judicial Council was evaluating proposed legislation, and consequently the essence of the severability question presented in that case was whether the constitutional remainder of the proposed legislation—that is, “the other proposed petitions constituting the Traditional Plan” (*id.*)—could be salvaged should the General Conference decide to that much alone. That is not remotely the situation presently before the Council. In this instance, a bare majority of

General Conference knowingly *left embedded* in the Traditional Plan multiple provisions that the Judicial Council had previously declared to be constitutionally defective, leaving the distinct impression that the delegates who so voted believed, if anything, that the *continued inclusion* of the previously repudiated provisions was important to the Traditional Plan’s overall efficacy.

If it were otherwise—if the majority was indifferent on those points and content to move forward without the provisions previously rejected by the Judicial Council—it would have been a simple matter for Traditional Plan proponents to proffer amendments to delete or otherwise cure all of the constitutional infirmities previously identified. The legislative record demonstrates, however, that only selective efforts in that direction were made, and the Traditional Plan proponents opted to press ahead to a vote on a Traditional Plan that contained nearly all the provisions that Judicial Council had previously judged to be unconstitutional:

- During the Legislative Committee proceedings, no attempt was made to amend most of the Traditional Plan petitions the Judicial Council rejected as unconstitutional in JCD 1366. On Monday, February 25, the committee adopted amendments only to the “Episcopal Accountability” provisions included in Petitions 90033, 90034, and 90035. *See DCA*, Vol. 2, No. 4 (Feb. 26, 2019) at 383-84 . For every other Traditional Plan petition the Committee moved to adopt, the Legislative Committee determined that the petition would “stand as submitted,” unconstitutional warts and all. *Id.* (covering Petitions 90032, 90036-90040, 90042-90047).²
- In addition, by the time the plenary session took up consideration of the Traditional Plan on Tuesday morning, February 26, the Judicial Council had already held that the three above-mentioned amendments to Petitions 90033, 90034, 90035 *failed* to fully cure the constitutional

² Two other Traditional Plan petitions—Petitions 90041 and 90048—were rejected by the Standing Committee on Central Conference Matters. *DCA* (Feb. 26, 2019) at 387.

infirmities identified in JCD 1366,³ and that five other Traditional Plan petitions reported out by the Legislative Committee—all in their original form—***remained unconstitutional*** for the same reasons the Judicial Council had spelled out in JCD 1366.⁴

- All told, then, more than ***half*** of the Traditional Plan’s petitions—eight out of fifteen—had been declared unconstitutional by the time the Traditional Plan came to floor for debate and any further amendments. Yet, even then, Traditional Plan proponents mostly stood pat, choosing to amend just one of the eight defective petitions embedded in the Traditional Plan as reported out by the Legislative Committee.⁵

On this record, there is simply no hint that those who voted for the Traditional Plan intended to enact whatever watered down version of the Traditional Plan might conceivably survive this third review of the Traditional Plan’s constitutionality. On the contrary, the only reasonable inference to draw is that Traditional Plan proponents were adamant about enacting the entire package, as a package.

2. Consistency with Other Precedent

The Judicial Council has previously stated, “When reviewing legislation for constitutionality, we defer to the legislative authority of the General Conference” and “our first inclination is to save legislation, if at all possible, and not destroy.” JCD 1210. The foundation for that approach, however, is the judiciary’s overarching duty, bounded only by the Constitution, to identify and honor the legislature’s *intent*. U.S. Supreme Court precedent makes this clear, insisting that once a statutory provision is held to be unconstitutional, the determinative question becomes whether

³ See JCD 1377 at 2.

⁴ JCD 1377 at 3 (invalidating Petitions 90037, 90038, 90039, 90040, and 90045 for the reasons spelled out in JCD 1366).

⁵ 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. As explained in a subsequent section of this brief, that amendment falls short of overcoming the infirmity identified in JCD 1366 and JCD 1377.

the balance of the statute will operate in the manner the legislative branch *intended*. See *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987). It is not enough, in other words, to inquire “whether the balance of the legislation is incapable of functioning independently.” *Id.* Even if the remaining provisions are theoretically capable of operating coherently, that alone will not save the statute. Rather, the “relevant inquiry in evaluating severability is whether the statute will function in a manner *consistent with the intent of Congress*.” *Id.* at 685. See also *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 US 172, 194 (1999) (“embodying as it did one coherent policy, [the entire order] is inseverable”).

In this case, the only viable inference to draw from the legislative record of the Special Session—following upon, as it did, the 2016 General Conference’s decision to dedicate considerable denominational resources to developing a *comprehensive* legislative approach to addressing human sexuality issues—is that this General Conference was asked to enact, and fully intended to enact, the Traditional Plan as a single, comprehensive, integrated *package*.

Finally, insofar as it is relevant to ask whether the constitutional and unconstitutional provisions are “inextricably connected,” JCD 1377, it is worth emphasizing that the Traditional Plan petitions are related not merely by virtue of being included in the same “plan.” Certain petitions are *interdependent* and, indeed, some petitions previously upheld make specific reference to petitions the Judicial Council has already invalidated. A stark example of this is the inter-relationship of Petitions 90036 and 90038. Petition 90036, previously held to be constitutional, would add language to *Discipline* ¶ 415.6 to prohibit bishops from commissioning or ordaining any individual as to whom the Board of Ordained Ministry “*has failed to certify it carried out the disciplinarily mandated examination . . .*” Petition 90036, *Advance Daily Christian Advocate* (“ADCA”) at 184. Yet, the above-referenced BOOM “*certification*” requirement currently

appears nowhere in the *Discipline*, and it would be added only if Judicial Council is persuaded to overrule holdings it just made in JCD 1366 and JCD 1377, both of which repudiated the selective BOOM certification requirement that appears solely in Petition 90038.

II. The Judicial Council Should Reaffirm Its Prior Holdings that Petitions 90033-90035, 90037-90040, and 90045 Are Unconstitutional

A. The Episcopal Accountability Provisions in Petitions 90033, 90034, and 90035 Remain Unconstitutional for the Reasons Previously Mentioned by the Judicial Council

Petitions 90033-90035 proposed to give the Council of Bishops, rather than just the jurisdictional Colleges of Bishops, responsibility for evaluating alleged misconduct by bishops. The Judicial Council declared the petition unconstitutional in their original form in JCD 1366 on two grounds: (i) The provision violated fair process rights secured by ¶¶ 20 and 58 of the Constitution because “prosecutorial and adjudicative functions” were “combined in one and the same body.” JCD 1366 at 32. (ii) Bishops were given no opportunity “to appeal the findings of the COB,” which likewise violates ¶ 58. *Id.* at 33. See also JCD 1375 at 2-3 (invalidating similar provisions in Petition 90052).

During the Legislative Committee portion of the Special Session,⁶ amendments were proposed to “address the problem of comingling [sic] different functions,” but the Judicial Council subsequently held in JCD 1377 that all three petitions remained unconstitutional because they still lacked “any provision granting a bishop the right to appeal the findings of the COB,” which constitutes “a clear violation of the constitutional guarantee of ‘a right to trial by a committee and an appeal.’” JCD 1377 at 2 (quoting JCD 1366 at 33). Yet, no attempt was made during the

⁶ The amendments approved in committee are reflected at *DCA* (Feb. 26) at 383 (Petitions 90033 & 90035) and 384 (Petition 90034).

plenary session to correct this continued deficiency, and consequently Petitions 90033, 90034, and 90035 remain unconstitutional.

B. Amended Petition 90037 Fails to Meaningfully Overcome the Constitutional Infirmity Identified in JCD 1366 (Principle of Legality) and Is Now Objectionable for the Additional Reason that it Extends or Withholds Clergy Privileges Based on a Future Possibility, Rather than a Past or Present Act

In its original form, Petition 90037 proposed to amend ¶ 635.1.a to provide that all nominees for membership on the Board of Ministry “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,” and that all bishops must likewise “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 homosexuals.” In JCD 1366, the Judicial Council held that the selective nature of the certification violates the “principle of legality,” and was therefore unconstitutional, 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.” *Id.*

Petition 90037 was the *lone* Traditional Plan petition that its proponents moved to amend to cure any of the constitutional defects previously identified by the Judicial Council. Rather than requiring certification of compliance with the human sexuality provisions alone, the amended version of Petition 90037 requires BOOM nominees and bishops to certify that they “will uphold, enforce, and maintain the Book of Discipline in its entirety, including but not limited to all qualifications for ordination (¶¶304, 330, 335, 336).”

Enacted at the end of the commission-led Way Forward process that was designed and implemented to focus exclusively on the provisions of the *Discipline* germane to human sexuality issues, the amendment adopted during the plenary should be seen for what it is: superficial

window dressing. It does nothing to cure the practical reality that the provision was designed to target one group of candidates for disqualification, and that it will inevitably be deployed in practice for the narrow purpose of weeding out BOOM members and bishops whom Traditional Plan proponents are unwilling to trust to comply with the *Discipline* when it comes to issues concerning human sexuality.

C. Petition 90038 Still Contains the Constitutional Defect Identified in JCD 1366

Petition 90038 sought to amend ¶ 635.2.h to explicitly require that the “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,” “to certify that such an examination has occurred and its results,” and to prohibit the Board from recommending the candidate for commissioning or ordination if “it is determined as a matter of fact that an individual is a practicing homosexual.” The Judicial Council declared the petition unconstitutional in JCD 1366 (and again in JCD 1377), because it, too, “single[d] out one particular group of candidates for disqualification in violation of the principle of legality.” By “[d]irecting the board [of ordained ministry] 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 [a] focused examination has occurred, is tantamount to selective and partial enforcement of Church law.” JCD 1366 at 38.

Ignoring the Judicial Council’s repudiation of Petition 90038 in its original form, the Legislative Committee determined on February 25 that the “Petition stands as submitted” and recommended its adoption, without amendment, during the plenary session on the following day. *DCA* (Feb. 26) at 383. In addition, during the plenary—and even after receiving notice that JDC 1377 had reaffirmed the Judicial Council holding regarding Petition 30068—no motion was made to

amend those provisions. Thus, as enacted, the Traditional Plan includes the very same language that the Judicial Council has twice declared unconstitutional.

D. Petitions 90039 and 90040 Still Contain the Constitutional Defect Identified in JCD 1366

Petitions 90039 and 90040 were included in the Traditional Plan for purposes of amending ¶¶ 806.9 and 613.9, respectively, to require that 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.” Those paragraphs would be further revised to impose grave penalties on any annual conference that failed to supply the requisite certification: “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.”

As with Petitions 90036-90038, the Judicial Council held that Petitions 90039 and 90040 violated the principle of legality and were unconstitutional. Once again, the Traditional Plan was seeking to revise the *Discipline* in such a way as to make “one particular group (‘practicing homosexuals’) the focal point of disciplinary fidelity in violation of the principle of legality,” JCD 1366 at 38, and not merely that, but to impose crippling sanctions on annual conferences for failure to heed such obsessively selective certification requirements. *Id.*

No attempt was made to amend these Petitions to cure the defects identified by the Judicial Council. They were reported out of Legislative in their original form; no relevant motions to amend were made during the plenary session; and, as a consequence, the unconstitutional provisions came to be embedded wholesale into the Traditional Plan approved by a bare majority of the delegates on February 26.

E. Petition 90045 Remains Unconstitutional for the Reason Identified in JCD 1366

Petition 90045 sought to amend Just Resolution provisions in *Discipline* ¶¶ 362.1, 413.3c, 2701.5, and 2706.5.c.3, in order to provide that, “[i]n 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.” After unpacking the several important legal issues implicated by this provision, the Judicial Council concluded that this “proposed scheme” essentially transfers “from the trial court to the supervising bishop” the trial court’s “full power to try the respondent,” and “thereby violating a clergy person’s right to a trial by a committee under ¶¶ 20, 58 and improperly expanding the episcopal authority under ¶ 51.”

Nothing was done to correct this deficiency either. It remains unconstitutional for the reasons previously explained by the Judicial Council, yet it remains intact in the Traditional Plan approved by the General Conference during the Special Session.

III. Alternative Arguments Concerning Provisions the Judicial Council Previously Declared to be Constitutional

For the reasons previously outlined, the undersigned delegates believe the Judicial Council is obliged by the legislative record and precedent to invalidate the Traditional Plan in its entirety, based on the unmistakable record that the General Conference voted on the Traditional Plan as a composite whole and fully intend for it to be implemented as a package. In the event the Judicial Council concludes otherwise, set forth below are additional arguments concerning Traditional Plan petitions that have survived scrutiny in the requests for review pursued by the Council of Bishops and the Legislative Committee.

A. The Footnote Language Included in Petition 90032 Lacks the Force of Law, or, in the Alternative, is Impermissibly Vague, Ambiguous, and Self-Contradictory

Petition 90032 would amend footnote #1 to *Discipline* ¶ 304.3 to provide explicitly that the phrase “‘self-avowed practicing homosexual’ is understood to mean that a person . . . is living in a same-sex marriage, domestic partnership or civil union, or is a person who publicly states she or he is a practicing homosexual.” However constitutional this provision may be, the Judicial Council, exercising its jurisdiction under ¶ 2610.1, should nevertheless declare that the added verbiage in the footnote does not have the effect of law, but rather is merely “explanatory and informative,” constituting “an expression of the current judgment of the General Conference.” JCD 480 (regarding the purpose and effect of language in the same footnote, as included in what was ¶ 404 of the 1980 edition of the *Discipline*).

In the alternative, if the language added to the footnote is held to have the effect of law, its inclusion renders ¶ 304.3 unconstitutionally vague, ambiguous, and self-contradictory, insofar as it suggests that merely “*living* in” a “domestic partnership” or “civil union”—unaccompanied by any public statement or disclosure of any kind—constitutes not only a “self-avowal,” but a self-avowal that the couple comprising the “partnership” or “civil union” is engaging in “genital sexual activity” of the kind needed to qualify as “practicing.”

Respectfully, the delegates sponsoring this brief disagree with the Judicial Council’s conclusion in JCD 1341 that “being *legally married* and living in a same-sex relationship is a public declaration containing both personal and objective elements and, therefore, constitutes *self-avowal* under ¶ 304.3.” JCD 1341 (emphasis added). But even accepting that conclusion as binding law, persons living in “domestic partnership” or “civil union” are not “legally married.” Nor is there any “common understanding or practice in many parts of the world” regarding such relationships, let alone one that justifies making the presumption that such persons have

consummated their “partnership” or “civil union” by engaging in “genital sexual activity.” And finally, there is nothing to suggest that merely “living in” “domestic partnership” or “civil union” constitutes a ***public*** declaration of anything, let alone of the couple’s sexual activity or lack thereof.

B. Petition 90036 is Unconstitutional Because it is Linked to the Unconstitutional Petition 90038, and Separately Because it Intrudes on the Annual Conference’s Constitutional Powers Under ¶ 33 of the Constitution

Petition 90036 sought to amend ¶ 415.6 to provide as follows:

Bishops are prohibited from consecrating bishops who are self-avowed homosexuals, even if they have been duly elected by the jurisdictional or central conference. Bishops are prohibited from commissioning those on the deacon or elder track if the Board of Ministry has determined the individual is a self-avowed homosexual or has ***failed to certify it carried out the disciplinarily mandated examination***, even if the individual has been recommended by the Board of Ordained Ministry and approved by the clergy session of the annual conference. Bishops are prohibited from ordaining deacons or elders if the Board of Ministry has determined the individual is a self-avowed homosexual or has ***failed to certify it carried out the disciplinarily mandated examination***, even if the individual has been recommended by the Board of Ordained Ministry and approved by the clergy session of the annual conference.

At this juncture, the most evident infirmity with this provision is that the provisions highlighted with bold italics above are an explicit reference to a new “certification” requirement that currently appears nowhere in the *Discipline* but only in the twice-repudiated, constitutionally defective Petition 90038. As such, Petitions 90036 and 90038 are inextricably related, leading to the inescapable conclusion that General Conference *intended* for them to operate *together*, and leaving no room to conclude that Petition 90036 can operate independently of Petition 90038.

While that reasoning alone suffices to invalidate Petition 90038, the provision is unconstitutional for the further reason that it effectively empowers bishops to thwart the annual conference’s exercise of powers that are constitutionally reserved to the annual conferences. Under ¶ 33, annual conferences have the absolute prerogative to vote on all matters relating to

ordination and conference relations. The General Conference cannot, under the guise of purporting to “define and fix the powers, duties, and privileges of the *episcopacy*,” use the bishops as an agent for constraining, let alone effectively nullifying, the annual conference’s exercise of its constitutional authority under ¶ 33 to decide which individuals are suited for ordination as ministers of the Gospel of Jesus Christ in The United Methodist Church. Indeed, as the Judicial Council has emphasized only recently, the doctrine of separation of powers firmly prohibits bishops from effectively annulling the annual conference’s exercise of that authority. *See* JCD 1368.

C. Petition 90042 (Traditional Plan #11 – Minimum Penalty) is Unconstitutional

Petition 90042 mandates that the following minimum penalties be imposed on clergy convicted of performing a same-gender marriage: (i) a one-year suspension, without pay, for a first offense; and (ii) revocation of credentials if the offense is repeated. In JCD 1366, the Council of Bishops argued that this petition violated a “respondent’s full right to trial by a committee under ¶ 20.” JCD 1366 at 46. The Judicial Council rejected that argument, reasoning that “the trial court [alone] has the authority to set a penalty,” but that “it must do so within the range of options specified by the *Discipline* (¶ 2711.3).” JCD 1366 at 47 (quoting JCD 1201) (emphasis added in JCD 1366).

The undersigned delegates, however, are challenging Petition 90042’s constitutionality on different grounds. The constitutional flaw arises because these particular “minimum” penalties are tantamount to a General Conference *mandate* that a clergy person’s *conference relations* be changed, regardless of what the relevant annual conference’s own clergy have to say about the matter. In one circumstance, the annual conference has no choice but to suspend the clergy person for a full year (without pay), and in the other to fully revoke the clergy person’s conference membership and credentials.

Such mandated minimum penalties—to the point of insisting that a clergy person’s relationship with his or her own conference be fully severed – cannot be squared with annual conference’s constitutionally guaranteed right to “vote on all matters relating to the character and conference relations of its clergy members.” *Constitution* ¶ 33. The General Conference’s powers may be broad, but they can never be allowed to effectively nullify a core, bedrock constitutional prerogative of the denomination’s basic and fundamental body, the annual conference.

D. Petition 90043 Violates the Doctrine of Separation of Powers, as Recently Applied by the Judicial Council in JCD 1368

Petition 90043 sought to add the following language to *Discipline* ¶ 304.5:

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 (see Judicial Council Decisions 1343 and 1344). The bishop presiding in the clergy session shall rule any such unqualified candidate out of order and not eligible to be acted upon.

At a minimum, the last sentence of Petition 90043 – directing that the “bishop presiding in the clergy session shall rule any such unqualified candidate out of order and not eligible to be acted upon” – is directly at odds with the Judicial Council’s recent holding in JCD 1368. In that case, the Board of Ordained Ministry of the Baltimore-Washington Conference issued a report that recommended for commissioning and ordination, respectively, two candidates who had acknowledged being married to persons of the same gender. During the annual conference’s clergy session, one of the Conference’s elders presented the following question of law to the presiding bishop:

“As a question of law, Bishop, must **this session of the clergy** exclude these two candidates on the basis of the Chair’s report [that each candidate had acknowledged being married to persons of the same gender] and on the basis of *the Discipline*, ¶ 304.3?” (JCD 1368 at 5)

Bishop Easterling issued her ruling immediately. Pointing out that the two candidates “had already disclosed in writing as a part of their profile that they are married to same-gendered partners,” and referencing “JCD 1341 and several that followed thereafter and the Book of Discipline,” Bishop Easterling stated: “I rule, to this question of law, that these two individuals are not able to come forward as candidates either for commissioning or for ordination.” JCD 1368 at 4.

In a decision rendered just before the start of the 2019 Special Session of General Conference, the Judicial Council reversed Bishop Easterling’s ruling of law, holding that “it violated the separation of powers by intruding on the responsibilities and rights of the Clergy Session.” *JCD 1368* at 6. “It is not within the authority of a bishop,” the Judicial Council ruled, “to prevent the Clergy Session from fulfilling its responsibilities, or to exclude individuals to come forward as candidates either for commissioning or for ordination.” *Id.* Indeed, the Council explained that “[t]here is no permissible basis for a bishop to make a ruling requiring the Executive Session to exclude persons (or to do anything),” and consequently the “Bishop’s ruling of law violated the separation of powers by intruding on the responsibilities and rights of the Executive Session.” *Id.* at 5.

By its explicit terms, the last sentence in Petition 90043 requires a “bishop presiding in the clergy session” to do precisely what JCD 1368 holds is constitutionally forbidden—to “rule any such unqualified candidate out of order and not eligible to be acted upon.” On that ground alone, Petition 90043 should now be declared to be independently unconstitutional.

CONCLUSION

For all of the foregoing reasons, the undersigned delegates to the 2019 Special Session of the General Conference urge the Judicial Council rule that the Traditional Plan, as adopted by the

General Conference on February 26, 2019, is unconstitutional and otherwise void and of no effect in its entirety.

Respectfully submitted,

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