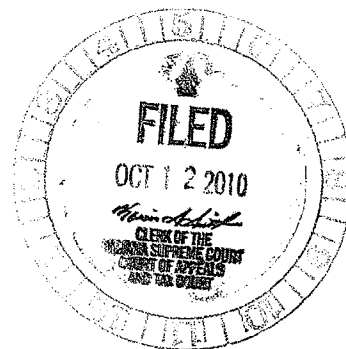


In the
Indiana Court of Appeals

Case No. 82A02-1003-MF-00339



THE PRESBYTERY OF OHIO VALLEY, INC.)
d/b/a The Presbytery of Ohio Valley, d/b/a Ohio)
Valley Presbytery, and THE SYNOD OF)
LINCOLN TRAILS OF THE PRESBYTERIAN)
CHURCH (U.S.A.), INC., d/b/a The Synod of)
Lincoln Trails,)
Appellants,)

v.)

OPC, INC. f/k/a Olivet Presbyterian)
Church, Inc., d/b/a Olivet Presbyterian Church,)
d/b/a Olivet Evangelical Presbyterian Church)
and d/b/a Olivet Presbyterian Church of)
Evansville; OLIVET EVANGELICAL)
PRESBYTERIAN CHURCH OF)
EVANSVILLE, INC., and THE)
EVANGELICAL PRESBYTERIAN CHURCH,)
d/b/a Evangelical Presbyterian Church Of)
America,)
Appellees.)

Appeal from the Judgment
of the Vanderburgh Circuit Court
No. 82C01-0707-MF-343

The Honorable Carl D. Heldt, Judge

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October 12, 2010

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Appellants, the Presbytery of Ohio Valley, Inc. (the “Presbytery”) and the Synod of Lincoln Trails of the Presbyterian Church (U.S.A.) Inc. (together, the “Appellants”), by counsel, respectfully submit this reply brief in support of their appeal from the trial court’s denial of their motion for partial summary judgment and its grant of the cross motion for summary judgment filed by the Olivet Appellees.

SUMMARY OF ARGUMENT IN REPLY

I. The trial court erred in selecting and applying the neutral principles of law approach because: (1) it failed to give proper consideration to the polity and governance structure of the PC(USA), but treated Olivet as if it were part of a congregational denomination; and (2) its truncated application of the neutral principles approach did not give due consideration to the PC(USA) Constitution, particularly the Property Trust Clause, and Olivet bylaws and other documents acknowledging that Olivet was bound by this Constitution. As a result, the trial court erred when it found there was no express or implied trust. An express trust arose from Olivet’s bylaws and the PC(USA) Constitution. However, even if there was no express trust, an implied trust existed based on the parties’ documents, history and long-standing relationship. The trust was not revocable under applicable Indiana law. The trial court breached the separation of church and state to delve into ecclesiastical and doctrinal matters. Summary judgment should have been granted in for the Appellants.

II. Affidavits submitted by the Appellees were not based on personal knowledge and contain inadmissible hearsay and lay opinion testimony, including legal conclusions, and thus were inadmissible under Indiana T.R. 56(E) and the Indiana Rules of Evidence. The trial court erred by relying on these affidavits and by using them to decide ecclesiastical and doctrinal matters in violation of the First Amendment of the United States Constitution and Article 1,

sections 2-4 of the Indiana Constitution. The trial court should have resolved this dispute without addressing ecclesiastical matters or it should have deferred to the decision of the church judicatories.

ARGUMENT IN REPLY

I. The Trial Court Erred in its Selection and Application of the Neutral Principles of Law Approach.

A. The Polity Approach Would have Been a Better Choice.

Civil courts may apply the polity approach¹ or the neutral principles of law approach to resolve church property disputes. See *Jones v. Wolf*, 443 U.S. 595 (1979); *Hinkle Creek Friends Church v. Western Yearly Meeting of Friends Church*, 469 N.E.2d 40, 43 (Ind.Ct.App. 1984 (citing *Presbyterian Church of the United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 445 & 449 (1969));² *Draskovich v. Pasalich*, 280 N.E.2d 69, 76-78 (Ind.Ct.App. 1972). The polity approach would have been a better choice here, but regardless of its choice, the trial court erred because it misapplied the neutral principles approach.

¹ Despite its longevity, the polity approach is still a sound method for resolving church property disputes in hierarchical churches. Olivet would disregard *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871), and the historical foundations of Presbyterian polity because they are “old.” (See Appellees’ Br. at 20-21.) Ignoring long-standing precedent would eviscerate much of our common law and many opinions of this and other courts. The polity of the PC(USA) has its roots in the Reformation, and the origin of the Book of Order can be traced to John Calvin’s 1541 publication of *Ecclesiastical Ordinances* and other writings. See, e.g., John H. Leith, *Introduction to the Reformed Tradition* (John Knox, Atlanta, 1977) (discussing origins of Presbyterian polity). This historical continuity should be respected, not disregarded.

² As discussed in Appellants’ opening brief (p.23, n.16), *Hull* gave scant guidance for applying neutral principles of law to resolve church property disputes. Ten years later, *Jones v. Wolf*, added flesh to the neutral principles skeleton and instructed that denominations may provide for trust or reversionary clauses in their constitutions, thereby allowing civil courts to respect church governance without becoming entangled in doctrinal matters. 443 U.S. at 606. The PC(USA) amended its Constitution to comply with *Jones v. Wolf*. (See R.460, Stip.Ex. 2; see also Addendum Tab D at G-8.0201, showing the annotations to this section.)

All three prongs of the polity approach were met and thus that approach should have been used. *See Hinkle*, 469 N.E.2d at 44; *Marich v. Kargulac*, 415 N.E.2d 91, 96 (Ind.Ct.App. 1981). The PC(USA) and its predecessor the UPCUSA have always had a hierarchical structure, with four levels of judicatories, each answerable to the levels above it. (R.923, PC(USA) Constitution, G-4.0301.) The Stipulated Record shows Olivet was a part of that hierarchy, answerable to the Presbytery, which has plenary authority over local congregations, and which made a final decision that should be enforced by this court.

Indiana courts have followed United States Supreme Court precedent finding that the Presbyterians have a hierarchical form of government to which the polity approach is applicable. *See, e.g., Watson*, 80 U.S. (13 Wall.) 679; *Hull*, 393 U.S. 440; *Presbytery of Indianapolis v. First United Presbyterian Church of Indianapolis*, 238 N.E.2d 479, 483-84 (Ind.Ct.App. 1968). Olivet cannot demonstrate a change in the polity or structure of the PC(USA) since the origin of American Presbyterianism or any other factual or legal reason for failing to recognize the PC(USA) as having a hierarchical, not a congregational, form of government. The trial court failed to consider the hierarchical polity of the PC(USA), but made an *a priori* decision about which approach should be used.

Moreover, Olivet cites no authority establishing that “Indiana’s preferred and accepted method for deciding [church property disputes] is the neutral principles approach.” (Appellees’ Br., p.14.) When a denomination has a hierarchical, not a congregational, form of government, it is well settled that an Indiana court should *first* consider using the hierarchical approach, and use the neutral principles approach only when it determines that it would have to decide ecclesiastical doctrine in order to apply provisions in deeds or in a denomination’s constitution to

determine rights to church property.³ See *Draskovich*, 280 N.E.2d at 77-78; *Hinkle*, 469 N.E.2d at 43 (citing *Jones v. Wolf*, 443 U.S. 595). The polity “approach is predicated in part on the fact that hierarchical churches have a legal tradition and a system of canon law for conflict resolution within the church which...antedates the common law tradition...” in some cases by hundreds of years. *Board of Church Extension v. Eads*, 230 S.E.2d 911, 915-16 (W. Va. 1976).

B. The Trial Court Failed to Consider the Hierarchical Polity of the PC(USA), and Incorrectly Treated Olivet as a Congregational Church.

As shown in the Stipulated Record, the PC(USA) is a hierarchical denomination and Olivet was a part of that hierarchy. Olivet argues this is not so, but does not support its position. (Appellees’ Br. p.20.) The PC(USA) is governed by its Constitution, including the Book of Order.⁴ (R.436, Stip.¶ 18; R.909, Stip.Ex. 72.) The Book of Order explains that each lower governing body or “judicatory” is answerable to successive higher governing bodies. (*Id.* at G-4.0301.) Although there are differences between the Presbyterian form of government and other hierarchical models, such as the Episcopal model, there is no dispute that the PC(USA) does not have a congregational form of government.⁵

Since at least 1906, Olivet was a member congregation of the UPCUSA (the immediate predecessor to the PC(USA)) (R.441, Stip.¶ 46), and was subject to its jurisdiction and

³ This is not a dispute based on a “departure from doctrine,” or a dispute among factions within a congregation where it is necessary to determine which faction is the “true” church. (See Appellees’ Br. p.25.) The *only* issue before the trial court was whether PC(USA) polity and governance permit a local congregation to sever its ties with the denomination and depart with church property without the permission of the Presbytery.

⁴ Copies of the Book of Order are at R.921-923, and excerpts from it were also included in the Stipulated Facts (R.458, 461) and at Addendum Tab D to the Appellees’ opening brief.

⁵ Olivet’s observation (Br. at 23-24) that the Presbyterian model is based on a representative model composed of presbyters acting in assemblies at each level of the hierarchy as opposed to the Episcopal model of individual (appointed or elected) bishops is a distinction that makes no difference here. Both the Presbyterian and Episcopal models are hierarchical as opposed to congregational.

Constitution. (R.485, 505, 715; Stip.Exs. 6, 12, 46.) Whether in its unincorporated or incorporated form, Olivet recognized its relationship to the denomination. It adopted a Constitution and bylaws for itself, which provided that it was “**subject to the jurisdiction of the higher courts of the [UPCUSA]**” (R.649, 651, Stip.Ex. 37A), and when it incorporated in 1998, it stated, “**Olivet..., being a particular congregation of the [PC(USA)], recognizes the constitution of said church as the authority for the governance of the church and its congregation**” (R.690, 692; Stip.Ex. 42; R.708; Stip.Ex. 450 (bold added)). In its 1969, 1971, 1998 and 2000 bylaws, Olivet expressly stated it was subject to and governed by the denomination’s Constitution, and that provisions of its bylaws could not be amended or changed to conflict with the denomination’s Constitution. (R.653, 656, Stip.Ex. 37B; R.665, 668, Stip.Ex. 37E; R.690, 692, Stip.Ex. 42; R.704, 708, Stip.Ex. 45.)

PC(USA) congregations are permitted to form civil corporations and may hold property in their own name subject to the Constitutional provision that the presbytery has exclusive authority to transfer property. (R.461, 923, section G-7.0402; Tab D; *see also* R.458, Stip.Ex. 1; Tab C; R.913-20, Stip.Ex. 72.) Having pledged to abide by the denomination’s Constitution, Olivet knew and agreed that even when it held title to property in its own name, the property was subject to the Property Trust Clause, and could not be transferred outside the denomination without Presbytery’s consent. These stipulated facts remain irrefutable.

C. The Trial Court Should Have Applied the PC(USA) Property Provisions or Declined to Decide the Case.

Having elected to use the neutral principles approach, the trial court was not absolved from considering the polity and structure of the PC(USA). *Jones v. Wolf* requires civil courts to examine church constitutions and similar documents for trust language and to consider the particular relationship between the local church and the greater denomination when using the

neutral principles approach to decide a church property dispute. 443 U.S. 603-604; *see also Draskovich*, 280 N.E.2d at 77. This Court explained:

The Neutral Principles of Law Approach requires courts to examine certain documents for language of a trust in favor of the General Church. The documents to be examined include civil statutes, the express language of deeds, local church charters, and general church constitutions.

Hinkle, 469 N.E.2d at 43 (quoting *Grutka v. Clifford*, 445 N.E.2d 1015, 1019 (Ind.Ct.App. 1983)). The trial court failed to undertake this examination and followed its own truncated version of neutral principles, which led it to unduly limit its review of the PC(USA) Constitution and Olivet's documents. (R.26.) The trial court violated the First Amendment and the Indiana Constitution by refusing to apply the PC(USA) Constitution and Olivet corporate documents as mandated in *Jones v. Wolf* and its progeny.

Jones v. Wolf offered the alternative neutral principles approach so that trial courts would not become embroiled in religious doctrine in violation of the First Amendment, but nevertheless "requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization." 443 U.S. at 602 (citations omitted). *Jones v. Wolf* did not supplant *Watson*, but permitted states to adopt an alternative approach for resolving church property disputes as long as courts do not become entangled in doctrinal matters. *Id.* If the relevant church constitutional provisions cannot be enforced "without engaging in a searching and therefore impermissible inquiry into church polity," the civil courts may not intervene. *Serbian E. Orthodox Diocese for the United States of Am. & Canada v. Milivojevich*, 426 U.S. 696, 722-23 (1976) (applying neutral principles). Thus, the neutral principles approach requires courts to determine if there are church constitutions, charters or documents such as corporate bylaws or minutes which may be applied to resolve the dispute without evaluating the merits of conflicting theological interpretations. *Id.* If such documents

cannot be examined on a neutral basis and without extensive theological or doctrinal interpretation, courts must defer resolution of the matter to the church judicatories. *Id.* Civil courts simply may not resolve doctrinal matters.⁶ *Id.*

Thus, the trial court did not have the option of rejecting the PC(USA) Constitution as “ecclesiastical,” and deciding the case without regard to the Property Trust Clause.⁷ If church constitutional provisions are ‘not so express that the civil courts could enforce them without engaging in a searching and therefore impermissible inquiry into church polity,’ the courts may not proceed. *Id.*

In short, the First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters. When this choice is exercised...the Constitution requires that civil courts accept their decisions as binding upon them.

Id. at 724-25; *see also Hinkle*, 469 N.E.2d at 44 (quoting *Marich*, 415 N.E.2d at 96).

The trial court should have limited its analysis to the specific PC(USA) Constitutional provisions concerning property and the relationship between the congregation and the

⁶ Olivet (Br. pp. 14, 26) cites cases from other states, but fails to show those states have constitutional and statutory provisions similar to Indiana’s or that the particular facts and issues of those cases are apposite to those here. Olivet’s citations come from a law review article which identifies ten states that primarily follow the neutral principles approach or its variation the record title approach (which has not been adopted in Indiana) and six states that primarily follow the polity approach, but explains the majority (thirty-four) of states use both approaches based on the particular facts of the case or use a variant approach. Natalie L. Yaw, “Cross Fire: Judicial Intervention in Church Property Disputes after *Rasmussen v. Bunyan*, 2006 MICH. ST. L.REV. 813, 826-27 (2006). It is possible to cite countless articles on church property law and opinions from state courts on both sides of the issue. Appellants have refrained from doing so because this case should be decided on the basis of controlling federal and Indiana law. This Court should examine the PC(USA) Constitution directly, rather than rely on decisions of other states or secondary sources purporting to interpret it.

⁷ The trial court concluded that it could not consider the Property Trust Clause in the PC(USA) Constitution because that provision was “ecclesiastical,” at the same time, it relied on other provisions and inadmissible lay opinion testimony about the meaning of these other provisions. (R.20, 24, 30, 36.) *See also* Part II below regarding the trial court’s improper treatment of ecclesiastical matters and its comparison of denominational approaches to property.

Presbytery, or it should have decided church polity was so entwined with theology and doctrine, it could not decide the case. *Serbian*, 426 U.S. at 722; *Jones v. Wolf*, 443 U.S. at 602 & 604 (When “the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body.”); *see also Draskovich*, 280 N.E.2d at 77-78. The trial court should not have undertaken to decide the case on the basis of its and Olivet’s interpretation of doctrinal matters,⁸ its conclusion that the Book of Order is “inconsistent” (R.30, 36) and the Property Trust Clause is “ecclesiastical” (R.20, 24, 36),⁹ or its expressed its preference for a different religious practice with respect church property (R.38). *See Maryland & Vir. Elder of Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 369 (1970) (Brennan, J. concurring); *Serbian*, 426 U.S. at 718. Had the trial court limited its review of the Book of Order to sections G-8.0201 and G-7.0402 and other provisions dealing with church property, it would not have become impermissibly entangled in religious doctrine. *See Hinkle*, 469 N.E.2d at 43; *United Methodist*, 276 N.E.2d at 922 (Where court reference to church documents is restricted to how property is held and does not involve ecclesiastical inquiries, there is no violation of the establishment clause of the First Amendment.); *Serbian*, 426 U.S. at 721-22 (same).

D. Olivet Acknowledged It Was Subject to the PC(USA) Constitution.

The trial court erroneously placed undue reliance on the deed to the near exclusion of other evidence, including the PC(USA) Constitution and Olivet’s bylaws, minutes and other

⁸ Olivet argues (based on a Pennsylvania case, *see Br.* at 31-32) that the Book of Order is an “ecclesiastical” document, intended to provide only “spiritual guidance.” Yet it cites the Book of Order repeatedly in support of its arguments. *See, e.g., Br.* at 29-32, 33, 35 40-44.

⁹ This is precisely the type of finding that civil courts may not make without violating the First Amendment. *Serbian*, 426 U.S. at 718.

corporate documents.¹⁰ It relied on *Merryman v. Price*, 147 Ind.App. 295, 259 N.E.2d 883 (1970), to apply a truncated form of the neutral principles approach,¹¹ failed to review all the relevant evidence with a neutral eye, and erroneously found the property provisions of the PC(USA) Constitution to be “ecclesiastical” and thus inapplicable. (R.20, 24, 36).

The trial court placed undue weight on its finding that the present (2007) Olivet corporation (which is not the same entity formed in 2006 as part of Olivet’s dismissal to the EPC) had transferred the deed to itself and that the deed does not name the Appellants.¹² The Stipulated Record established that the PC(USA) and Olivet both have a long and continuous history. The trial court erred in finding that formation of this new corporation eliminated any effect of the PC(USA) Constitution on Olivet and negated prior Olivet bylaws precluding such amendments and changes. (R.37.) *See National Bd. of Exam’rs of Osteopathic Physicians and & Surgeons v. American Osteopathic Ass’n*, 645 N.E.2d 608, 617-18 (Ind.Ct.App. 1994)

¹⁰ Indiana is not a “record title” state with respect to church property disputes, and has no preference for one indicia of ownership over another. *See United Methodist*, 276 N.E.2d at 922. Neither Olivet nor the trial court (R.33) offered any Indiana authority for placing primary reliance on a deed. Further, Olivet’s suggestion (Br. p.18) that the relevant documents be arranged in chronological order, with greater reliance placed on more recent documents without regard to context or type, has no legal support and is inconsistent with *Jones v. Wolf* and its Indiana progeny.

¹¹ The *Merryman* court explained the Evangelical United Brethren church before it did not have a specific denominational trust clause like the one found in *Presbytery of Indianapolis* (240 N.E.2d 77). 259 N.E.2d at 310-11. *Merryman* predates and conflicts with the *Jones v. Wolf* holding that civil courts should examine church constitutions and similar documents for trust language and consider the particular structure and relationship between the local church and the greater denomination. 443 U.S. 603-604. This Court’s post-*Merryman* decisions calling for examination of church charters and general church constitutions as directed by *Jones v. Wolf* should have been followed by the trial court. *See Hinkle*, 469 N.E.2d at 43; *Grutka*, 445 N.E.2d at 1019; *Draskovich*, 280 N.E.2d at 77; *see also United Methodist*, 276 N.E.2d at 922.

¹² For example, the trial court never addressed the fact that the deed was always in the name of the “Olivet Presbyterian Church of Evansville, Indiana,” an unincorporated entity, and never in the name of the present Olivet entity (a 2007 corporation) claiming the property (R.22), at the same time it refused to acknowledge that the PC(USA) is the direct successor to the UPCUSA. (R.6.)

("NBOME") (where the parent organization's charter was incorporated by reference in the articles and bylaws of a member organization; the parent organization had the right to enforce the terms of its charter against the member); *see also Scott v. Anderson Newspapers, Inc.*, 477 N.E.2d 553, 560-61 (Ind.Ct.App. 1985); Ind. Code § 23-1-38-9 (amendment of articles of incorporation does not affect the preexisting rights of persons other than the shareholders).¹³

While contending for the application of neutral principles of law, Olivet's response to *NBOME* is to argue that a court cannot discern a course of dealing or intent from the bylaws of a religious organization in the same way it can from those of a secular organization. (Appellees' Br. p.36.) Olivet's straw dog argument ignores decades of Olivet bylaws and minutes that are set forth in the Stipulated Record.¹⁴ There is no material difference between interpretation of Olivet's bylaws and minutes and those of a secular, nonprofit corporation. Olivet, like the trial court, ignored critical and relevant Olivet bylaws and corporate documents precisely because they do establish the type of relationship and course of dealing described in *NBOME*.

Under the denomination's Constitution, local churches hold property in their own name *only* in trust for the larger church. (R.461, Stip.Ex. 2, G-8.0201, Tab D.) In the PC(USA), a particular church that forms a civil corporation may hold real or personal property in its own name, but only subject to the PC(USA) Constitution. (R.461, 923, section G-7.0402; Tab D.) The Stipulated Record contains decades of minutes of Olivet session meetings, bylaws and

¹³ *See also Presbytery of Indianapolis*, 238 N.E.2d at 487 (seceders from church organization had no authority to claim ownership of church property held in trust); *United Methodist*, 276 N.E.2d at 925 (local church cannot enter into binding relationship with a parent church that has trust provisions in its constitution pertaining to the control of property, then deny the relationship).

¹⁴ The Book or Order is maintained in annotated form with an extensive record of the debate and considerations that surrounded the adoption of each of its sections. *See e.g.*, excerpts at Tab D. This record is far more extensive than that maintained by most corporations, secular or otherwise. *See also* http://index.pcusa.org/publications_and_resources/searchable_annotated_book_of_order.

corporate documents unequivocally demonstrating Olivet's agreement to be bound by these requirements. In the guise of avoiding excessive entanglement with ecclesiastical matters, the trial court dismissively characterized the specific Constitutional provisions that relate to church property as "ecclesiastical" and not meriting its consideration (R.30, 35-36), but repeatedly cited to other doctrinal portions of the Book of Order (R.20, 24, 36). The deed should have been considered in the context of sections G-8.0201 and G-7.0402 and Olivet's own bylaws and minutes.¹⁵

As shown above, in both its unincorporated and incorporated forms, Olivet's own governance documents recognized its connection to the denomination and accepted its Constitution as binding and controlling.¹⁶ After the 1983 denominational reunion, the Olivet Session stated in its 1998 bylaws at Article I, section 2, that it was "a particular congregation of the Presbyterian Church (USA), [and] recognizes the constitution of said church as the authority for the governance of the church and its congregation," and at Article XI, section 3, provided, "These bylaws shall not be amended so as to conflict with the *Constitution of the Presbyterian Church (USA)*." (R.670, 689; *see also* R.703.) The trial court's suggestion (R.22, 27) that

¹⁵ Olivet contends (Br. 26-27) the dates of the minutes cited were not supplied and there is no record of actual Olivet meetings. Even a cursory review of the Stipulated Record reveals this is wrong.

¹⁶ The Stipulated Record is replete with examples of times when Olivet purchased, sold, mortgaged, and improved its property with the requisite Presbytery approval. (*See* Appellants' Br. at 8-9.) Olivet's only response is to suggest some kind of waiver argument because there were purported occasions when it did not record Presbytery approval in its minutes. Not all the minutes are in the Record, and there is no evidence before this Court whether such acts occurred with or without Presbytery permission. Even a few actions taken without documentation of Presbytery permission do not negate the denomination's Constitution and polity. *See, e.g., Presbytery of Indianapolis*, 238 N.E.2d at 486-87. Further, the Stipulated Record shows the Oak Hill real estate was purchased with donations, borrowed money and proceeds from the sale of other church property acquired before 1968 (R.437, Stip.¶ 23; R.409, 594). No designated evidence shows precisely who contributed to the 1968 purchase or their intentions, and Olivet's arguments (Br. at 26) are unsupported.

Olivet's failure to list and itemize the particular provisions pertaining to property when it "recognize[d] the [PC(USA)] constitution...as the authority for the governance of the church and its congregation" is illogical and wrong. It was not necessary for Olivet to cite each constitutional provision separately when it recognized the PC(USA) Constitution "as the authority for the governance of the church and its congregation." (R.689.)

To reach its conclusion that Olivet could voluntarily disaffiliate "with property," the trial court disregarded this express and consistent language declaring Olivet's intent to be a part of the denomination, subject to its Constitution.¹⁷ The trial court added that Olivet's documents were binding only so long as the current Olivet members decided they would be. (R.20.) The facts and law do not support this conclusion. Once it became a part of the denomination, accepting its benefits¹⁸ and governance, Olivet was bound by the denomination's Constitution, including the provisions for disaffiliating. *See NBOME*, 645 N.E.2d at 617; *Presbytery of Indianapolis*, 238 N.E.2d at 487; *United Methodist*, 276 N.E.2d at 925. The trial court wrongly concluded Olivet was free to transfer property to another denomination. (*See* R.20.) As reflected in its petition for dismissal (R.443), the Olivet congregation understood it needed the permission of the Presbytery to leave the denomination with property.

¹⁷ The trial court also erroneously concluded that Olivet voluntarily affiliated itself with the PC(USA). (R.20.) Olivet, its members and ministers had to be accepted into the denomination. (*See* Appellants' Br. p.5.) Individuals can voluntarily quit their PC(USA) membership at any time, but PC(USA) congregations cannot leave at will, as a whole, with church property. Only after its request to leave with property was not granted, did Olivet contend the Presbytery had no authority over it. Similarly Olivet's argument (Br. p.7) that it could sever its PC(USA) ties without following the PC(USA) Constitution because its bylaws do not state its membership was "irrevocable" is unsupported by facts or the law.

¹⁸ Olivet does not disagree it received, *e.g.*, substantial tax benefits from its PC(USA) membership, but argues (Br. p.31) it could have affiliated with some other tax exempt organization. However, it did not do so; it was a part of the PC(USA).

E. Olivet's Property Was Held in Trust.

As explained in the Appellants' opening brief (p.21), the polity approach is the foundation for the implied trust theory of property control within hierarchical churches. *Watson*, 80 U.S. at 919. Trust language may be found in church constitutions or other controlling documents, or alternatively a denomination may "provide in its constitution or by some authoritative source for the reverting of the local church property to the hierarchical body upon withdrawal by a local congregation with an implied consent by the local church to this provision." *United Methodist*, 276 N.E.2d at 920 (citations omitted). When such reversionary or trust provisions are included in a church constitution or similar document, all member congregations within the denomination are deemed to consent to their terms as a condition of membership in the greater church body. *Id.*; *NBOME*, 645 N.E.2d at 617. **Olivet's consent and agreement to be bound by the PC(USA) Constitution was express and irrevocable.** Olivet did not agree to abide by selective portions of the PC(USA) Constitution, and it did not become a member congregation with a right to dissociate without following the PC(USA) Constitution.

In order to avoid entanglement with religious doctrine and leave the parties to resolve their disputes according the principles of governance and within the hierarchical structure to which they agreed, the trial court should have avoided doctrinal matters and enforced the decision of the Presbytery. *See Marich*, 415 N.E.2d at 96; *Serbian*, 426 U.S. 724. The trial court's analysis of the trust issues in this case was wrong, and this Court should reverse the judgment of the trial court.

1. Olivet Held Record Title to the Property in Trust for the PC(USA).

Jones v. Wolf instructed that churches could avoid interference in religious matters by, for

example, amending deeds or articles of incorporation to include a right of reversion in favor of the general church, or by modifying the constitution of the general church to include an express trust in favor of the denomination. 443 U.S. at 606. The PC(USA) amended its Constitution in 1983 in response to *Jones v. Wolf* to state:¹⁹

All property held by or for a particular church, a presbytery, a synod, the General Assembly, or the Presbyterian Church (U.S.A.), whether legal title is lodged in a corporation, a trustee or trustees, or an unincorporated association, and whether the property is used in programs of a particular church or of a more inclusive governing body or retained for the production of income, is held in trust nevertheless for the use and benefit of the Presbyterian Church (U.S.A.).

Olivet's 1998 and 2000 bylaws and minutes stated Olivet's agreement to be bound by that particular Constitution, which then included sections G-8.0201 and G-7.0402.

Over many years, Olivet expressly and repeatedly declared it was bound by the UPCUSA/PC(USA) Constitutions, in their entirety and including the property provisions. It did so *after Jones v. Wolf* and the adoption of G-8.0201.²⁰ (R.670, Stip.Ex. 37F; R.690, 692; Stip.Ex. 42; R.704, 708, Stip.Ex. 45.) The "settlor's declaration" Olivet contends (Br. p.28) is missing is found in these Olivet documents. The contention that these minutes were a "voluntary" statement that Olivet "would work with the Presbytery" only so long as it was part of the denomination (Br. p.31) is a gross misstatement of the Stipulated Record. *See United Methodist Church*, 276 N.E.2d at 925; *see also, Brunson v. Henry*, 39 N.E. 256, 260 (Ind. 1894) ("a trust once created and accepted can not be altered or changed").

The trial court concluded that no express trust exists because Olivet never signed a *single*

¹⁹ *See* R.460, Stip.Ex. 2; *see also* Addendum Tab D, G-8.0201 showing the annotations to this section including the 1980 Report of the UPCUSA Permanent Committee on Preservation of Property.)

²⁰ Olivet's discussion of G-8.0201 (Br. 28) is devoid of citation to legal authority. *See Shepherd v. Truex*, 819 N.E.2d 457, 463 (Ind.Ct.App. 2004) (arguments not supported with cogent reasoning and citation to authority may be deemed to be waived); Ind. App. R. 46(A)(8)(a).

document expressly conveying property in trust for the PC(USA). (R.34, 38.) Indiana trust law in effect at the time of the 1968 property transfer, when the implied trust first arose, and in 1983, when the express trust arose (at the very latest), did not require a single document or particular form of writing. *See* 28 IND. L. ENCYCL. *Trusts* § 23 n.8 (2007); *see also* Ind. Code § 30-4-2-1(a) at cmt. (a); *Betsner v. Betsner*, 151 N.E. 343 (Ind.Ct.App. 1926).²¹

The trial court repeatedly faulted the Appellants for not including express trust language in the Olivet deed. (R.26, 38.) However, Indiana law before or after the 1971 Trust Code does not require that a trust be declared in the real estate deed because a trust can be established by any writing signed by the party charged. *See, e.g., Ellison v. Ganiard*, 79 N.E. 450 (Ind. 1906); *Daugherty v. Farrar*, 124 N.E. 775 (Ind.Ct.App. 1919). Similarly, *Jones v. Wolf* gave the option of including express trust language in deeds or including a right of reversion or trust in favor of the denomination in its constitution. 443 U.S. at 606.²² The PC(USA) elected the latter option. Olivet's numerous iterations in its own minutes, bylaws and other governance documents declaring that it was subject to the authority of the PC(USA) Constitution satisfy this requirement, and specific trust language in the deed is not required.

Faced with this irrefutable, stipulated evidence and lack of legal support for its position, Olivet now resorts to arguing (Br. p.34) that the trust cannot be enforced because: it is vague as to who is the settlor, the intent of Olivet was not "manifested with reasonable certainty," and the

²¹ Similarly, any argument (Appellees' Br. p.38) that the trust is revocable by Olivet as the settlor because it was not expressly made irrevocable pursuant to Indiana Code § 30-4-3-1.5 is wrong and does not reflect Indiana trust law as it existed at the relevant time. The trial court (R.20) erred in its conclusion that Olivet could "voluntarily" decide whether to follow PC(USA) governance. *See* I.C. § 32-21-1-13. Olivet could not revoke or modify the trust it established under applicable law. (*See* Appellants' opening brief at 33-34.)

²² The trial court suggested that *Hull* required the PC(USA) to revise the "deeds and documents of ownership" (R.26-27, 32), there is no such holding in that case, and in fact *Jones v. Wolf*, ten years later, did not so hold. 443 U.S. at 606.

trust has no firm terms. All three points are unequivocally answered by Olivet's own documents which state repeatedly and without reservation that it was subject to the Constitution and jurisdiction of the PC(USA). The PC(USA) Constitution provides that all property is held in trust for the denomination, regardless of how record title is lodged.²³ Olivet is the settlor; and the terms the trust are clear, simple and firm.

Olivet expressly agreed to be bound by the language in the 1983 PC(USA) Constitution (including G-8.0201) and directed that its corporate documents be made consistent with this Constitution (R.670). On at least four occasions over the next seventeen years, it reaffirmed in its own governance documents that it was a part of the PC(USA), subject to its Constitution and stated no exceptions or reservations. Olivet further declared that its governance documents could not be changed to revoke its agreement to the binding jurisdiction of the PC(USA) or conflict with the PC(USA) Constitution. (R.675, 678, 689,703.) These actions were sufficient to create an express, irrevocable trust under Indiana law.

2. The Equities Favor an Implied Trust, Even If No Express Trust Is Found.

If written documents fail to establish an express trust, Indiana courts may nevertheless find an implied trust,²⁴ even where a deed appears on its face to be absolute and free of any trust language. *See, e.g., Flying Squadron Found. v. Crippen*, 169 N.E. 843 (Ind. 1930) (documents that do not satisfy requirements for an express trust may be used to establish an implied trust based on the parties' relationship). Without citation to the Record, Olivet asks the Court to conclude the parties' relationship would not support an implied trust. (Appellees' Br. at 37.)

However, the undisputed, Stipulated Record shows a long and continuous relationship

²³ Olivet concedes (Br. p.28) this may "create some sort of 'ecclesiastical trust,' that would be revocable and unenforceable. Olivet's contention is simply inconsistent with the Stipulated Record, including Olivet's own documents, and is not supported by the law.

²⁴ Olivet confused an implied trust with a resulting trust. (Appellees' Br. p.37.)

between the parties sufficient to establish an implied trust. Olivet's explicit acceptance of the governance and polity of the PC(USA) and its participation in the denomination for decades are more than sufficient to establish such a relationship. Having reaped the benefits of affiliation with the denomination, Olivet is estopped from now claiming it never agreed or consented to the principles of denominational polity and governance. *United Methodist*, 276 N.E.2d at 920.

F. The Trial Court Violated the Indiana and United States Constitutions.

The trial court erred by concluding (R.26) that inclusion of reversionary trust language in the PC(USA) Constitution instead of in the Olivet deed was insufficient to create a trust. The trial court's conclusion runs contrary to *Jones v. Wolf*: "Through appropriate reversionary clauses and trust provisions, religious societies can specify what is to happen to church property in the event of a particular contingency, ...schism or doctrinal controversy." 443 U.S. at 603. The trial court compounded its error when it dismissively concluded the PC(USA) Constitution "is an ecclesiastical set of rules" that it need not apply. (R.30.) Any argument or finding (*see* R. 26) that the PC(USA) is somehow at fault for not taking steps to structure its documents to avoid "theological" argument" (See Appellees' Br. p.25) negates Constitutional protections against religious discrimination and establishment of religion.

The trial court expressed its fear of religious entanglement as a basis for its truncated application of the neutral principles approach (R.25, 30), but failed to follow the well established precedent and directions for avoiding such entanglements. It went so far as to offer its own (but erroneous and out of context) interpretation of specific provisions of the Book of Order unrelated to property rights, based on inadmissible lay opinion testimony regarding doctrinal matters. (*See*

Part II below.)²⁵ Its decision should be reversed.

II. The Trial Court Used Inadmissible Affidavits to Delve into Doctrinal Matters and Crossed Constitutional Lines against Establishment of Religion.

As shown in the Appellants' opening brief (at 37-38), the Merwin and Rasch Affidavits contain extensive opinion testimony about ecclesiastical matters. Other inadmissible affidavits were used by the trial court to address doctrinal matters, and specifically to compare approaches to handling church property and to consider the "appropriateness" of the Presbytery's process for dismissal of congregations.²⁶ (R. 26-27, 32.) The trial court used the improper opinion testimony to draw conclusions about the ecclesiastical merits of the Presbytery's actions to reach its conclusions about what the Presbytery should have done differently in comparison to the practices of other religions. *Id.* This is not constitutionally permissible. *Lynch v. Indiana State Univ. Bd. of Trustees*, 177 Ind.App. 172, 183, 378 N.E.2d 900, 907 (1978) citing *Everson v. Board of Educ.*, 330 U.S. 1, 15-16 (1947)(other citations omitted); *see also Elbert v. Elbert*, 579 N.E.2d 102, 110 (Ind.Ct.App. 1991) (our judicial system should not be "used to express skepticism of an individual's beliefs *or preference for a certain manner in which a religious*

²⁵ *See, e.g.*, R.24-25, 35-36 (addressing doctrinal matters and the purported inadequacy of the Presbytery's process for dismissing Olivet); R.19-20 (Findings 17-20). More than once (R.30, 35), the trial court cited (but out of context and without cogent exegesis) part G-9.0102 for the proposition that the Book of Order should play no role in its analysis. The trial court impermissibly relied on the Merwin Affidavit for its finding that "there is no written express trust." (R.22.)

²⁶ As noted in the Appellants' opening brief (p.40), the Affidavits of Mark Dicken (R.351) and Kenneth Knapp (R.354) were used to argue the superiority of United Methodist and Roman Catholic practices for handling church property. The error is not in identifying how other churches hold title to property, but in drawing conclusions about the merits of the PC(USA) approach based on any comparison invited by these affidavits. (*See Appellees' Br.* p.39.) By comparing one denomination to another, and then expressing its opinion that one approach is preferable (R.26-27, 32), the trial court crossed Constitutional lines against establishment of religion. It should have "'defer[red] to the resolution of the doctrinal issue by the authoritative ecclesiastical body.'" *Grutka*, 445 N.E.2d at 1019-20 (quoting *Jones v. Wolf*, 443 U.S. at 604).

belief is practiced.” Id. (citing Thomas v. Review Bd. of Ind. Employ. Sec. Div., 450 U.S. 707, 717-18 (1981)(italics in original).

The trial court’s error underlying its use of the inadmissible affidavits to support its entry into ecclesiastical and doctrinal matters comes into sharp focus in the Appellees’ arguments that the Presbytery failed “to follow its own procedures” for resolving this church property dispute (Br. p.42) or that “doctrinal matters” preclude entry of summary judgment (*id.* p.44.) Both arguments are raised in defense of these inadmissible affidavits and underscore how the trial court’s failure to examine all the relevant documents in context and with a neutral eye led it to violate both the religion clauses in the First Amendment and the Indiana Constitution. For example, the Appellees argue (Br. at 42-43) that there are undecided issues of Presbyterian polity or flaws in the process used by the Presbytery to dismiss the Olivet Church conditionally, and that these matters and the relevant documents are “fraught with opinions about doctrinal and ecclesiastical matters” (Br. p.44.)²⁷ If this is true, the trial court erred by attempting to resolve these religious matters. The Supreme Court has consistently reaffirmed the concerns that impelled the Framers to write both religion clauses into the Constitution.²⁸ The trial court should

²⁷ The Appellants invite this Court to consider ecclesiastical documents such as the Westminster Confession (Br. 22) and the theological principle that God alone is the Lord of Conscience (G-1.0301) (Br. 32).

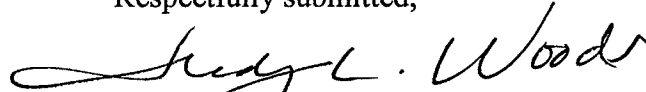
²⁸ See *School Dist. of Abington Tp., Pa. v. Schempp*, 374 U.S. 203, 243-44 (1963) (“A long line of cases has settled the proposition that in order to give effect to the First Amendment’s purpose of requiring on the part of all organs of government a strict neutrality toward theological questions, courts should not undertake to decide [some church property] questions. These principles were first expounded in the case of *Watson v. Jones*, which declared that judicial intervention in such a controversy would open up ‘the whole subject of the doctrine, theology, the usages and customs, the written laws, and fundamental organization of every religious denomination....’ Courts above all must be neutral, for ‘(t)he law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.’”)(internal citations and footnotes omitted); accord *Elbert*, 579 N.E.2d at 110 (Indiana law).

not have decided the case on ecclesiastical or doctrinal grounds, and thus its decision should be reversed.

CONCLUSION

For all the foregoing reasons, the entry of final judgment by the trial court should be reversed, and summary judgment should be entered for the Appellants.

Respectfully submitted,



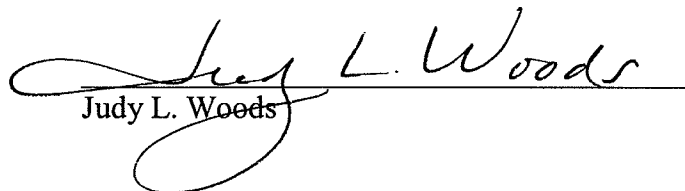
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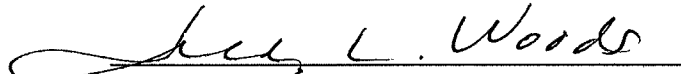


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CERTIFICATE OF SERVICE

The undersigned, hereby certifies that a copy of the above and foregoing was deposited into the United States Mail, First Class postage prepaid, on October 12, 2010, addressed to:

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