The following brief was joined by James E. Andrews, as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.). The brief was filed in the Minnesota Court of Appeals on July 12, 1995.

STATE OF MINNESOTA
IN THE COURT OF APPEALS

Nos. C8-95-882 and CX-95-883

BOARD OF PENSIONS of the Evangelical Lutheran Church in America and the EVANGELICAL LUTHERAN CHURCH IN AMERICA,

Defendants-Appellants,

v.

The Reverend Thomas L. BASICH, et al.,

Plaintiffs-Respondents.

The District Court Of The County Of Hennepin
Fourth Judicial District
District Court No. 93-16711

BRIEF AMICI CURIAE OF THE CHURCH OF THE NAZARENE, THE UNITARIAN UNIVERSALIST ASSOCIATION, THE MENNONITE CHURCH RETIREMENT PLAN, JAMES E. ANDREWS AS STATED CLERK OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (U.S.A.), GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, THE UNITED HOUSE OF PRAYER, THE UNITED STATES CATHOLIC CONFERENCE, AND THE WORLDWIDE CHURCH OF GOD

Carl Howard Esbeck Charles T. Nixon

Professor of Law
John K. Hulston Hall
Room 213
Ninth & Conley Streets
Columbia, Missouri 65211
(314) 882-3035

Attorney Reg. No. 79339
800 Title Insurance Building
400 Second Avenue South
Minneapolis, Minnesota 55401
(612) 332-1177

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INTERESTS OF AMICI

Statements concerning the interests of Amici are set forth in Addendum A to this brief. A separate Request For Leave To File Brief Amici Curiae has been filed with the Clerk of this Court pursuant to Rule 129, with notice to all parties.

STATEMENT OF LEGAL QUESTIONS PRESENTED

For convenience, Amici refer to Plaintiffs-Respondents as "plaintiffs," the Board of Pensions of the Evangelical Lutheran Church in America as the "Pension Board," and the Evangelical Lutheran Church in America as "ELCA."

1. Because plaintiffs challenge ELCA's ecclesiastical polity agreed upon in the 1988 merger, seeking to render the Pension Board more independent of the ELCA, does the complaint involve the court in a dispute over intrachurch governance that is nonjusticiable under federal and state constitutional principles of church autonomy? See discussion in Point I, infra.
2. Because plaintiffs challenge ELCA's application of church doctrine concerning South African apartheid, particularly the Pension Board's adoption of the equivalency policy governing pension-plan investments, does the complaint involve the court in a dispute over religious doctrine that is nonjusticiable under federal and state constitutional principles of church autonomy? See discussion in Point I, infra.
3. Because the equivalency policy is an application of religious doctrine concerning South African apartheid adopted by the Pension Board according to ELCA polity, will a judgment for plaintiffs burden defendants' exercise of religion in violation of federal and state constitutional principles of religious freedom? See discussion in Point II, infra.

STATEMENT OF THE CASE

Plaintiffs have been disputing with defendants for some time, long before this particular complaint was filed on September 28, 1993, or its precursor lawsuit was brought on July 24, 1991.[1] The conflict goes back at least as far as April 1987 when the three predecessor church bodies to the ELCA met in Columbus, Ohio, and assembled as the Constituting Convention of the Evangelical Lutheran Church in America. The Convention made numerous decisions important

[1] See Basich v. Board of Pensions of the Evangelical Lutheran Church in America, 493 N.W.2d 293 (Minn. App. 1992)(dismissing derivative claim because plaintiffs lacked standing).

to ELCA Lutherans, two of which remain to this day at the heart of plaintiffs' First Amended Complaint.

A. Plaintiffs Object To ELCA's Choice Of Polity.

The Convention adopted the Constitution and Bylaws of the soon-to-be merged church which came into existence on January 1, 1988. Chapter 17.60 of the Constitution sets forth the structure, powers, and responsibilities of the Pension Board.[2] The Pension Board is one of several churchwide units of the ELCA,[3] it is separately incorporated,[4] and is constituted by 21 trustees elected for six-year terms by the Church Assembly.[5] The Pension Board, as brought into being by the Assembly,[6] is not permitted to modify its course of action in any fundamental way except pursuant to "continuing resolutions" adopted either by a majority vote of the Assembly or by a two-thirds vote of the Church Council.[7] Of pertinence here, in ELCA's polity the Pension Board is a fully integrated unit of the church with multifarious responsibilities to the Assembly,[8] the Council,[9] the Advisory Committee on the Church's

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[2]Chapter 17.60 of the Constitution is set forth in Addendum B to this brief.

[3]ELCA Offices (Chapter 15.11), Divisions (Chapter 16.11), and Commissions (Chapter 16.22) are part of the churchwide organization, and The Lutheran (church periodical), the ELCA Foundation (development work), the Women of the ELCA (women's interests and callings), and a Publishing House (Chapter 17.12) are churchwide units.

[4]Chapter 17.61.

[5]Chapter 17.61.03. The Assembly is the highest legislative authority of the ELCA. The Assembly convenes in regular session every two years for a meeting lasting about five days. The Assembly consists of approximately 1000 voting members elected by synods. Sixty percent of the voting members are lay members of local congregations rather than ecclesiastics or employees of the church. Chapter 12. The ELCA is geographically divided into 65 synods located in the United States and the Caribbean. Each synod is headed by a bishop elected by the synod assembly. Each local congregation relates to the synod in which the local church is situated. Chapter 10.

[6]Chapter 17.61.01.

[7]Chapter 17.61.07. The Council is the board of directors of the ELCA and serves as the interim legislative authority when the Assembly is not in session. The Council regularly meets twice a year. The voting members consists of four churchwide officers and 33 other persons elected by the Assembly. Chapter 14.

[8]Chapter 17.61.01(c), 17.61.03, 17.61.07, and 17.61.A91(a) & (g).

[9]Chapter 17.61.01(c), 17.61.02, 17.61.07, and 17.61.A91(g). The Council has responsibilities to the synods concerning the pension plan. Chapter 17.61.02(e)(2).

Corporate Social Responsibility of the Division for Church in Society,[10] pension-plan contributors (many are local congregations),[11] and pension-plan members and their beneficiaries.[12]

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[10]Chapter 17.61.A91(b). The Division for Church in Society is to "assist this church to discern, understand, and respond to the needs of human beings, communities, society, and the whole creation through direct human services and through addressing systems, structures, and policies of society, seeking to promote justice, peace, and the care of the earth." Chapter 16.11E91. One of the Division's duties is to form the Advisory Committee on the Church's Corporate Social Responsibility that "will include representatives from the Board of Pensions, the Church Council, and other units of this church and that will give counsel and advice to all appropriate units of this church on corporate social responsibility." Chapter 16.11.E91(j)(2).

[11]Chapter 17.61.A91(f). The unit most directly responsible to the congregations is the Financial Information Committee of the Churchwide Council. Chapter 17.61.02(e). One plaintiff, Advent Lutheran Church, is a local congregation and pension-plan contributor.

[12]Chapter 17.61.02(c) and 17.61.A91(b), (d) & (j). Forty-seven of the 49 plaintiffs are pension-plan members.

Plaintiffs vigorously oppose provisions of this ecclesiastical polity implemented at the time of the 1988 merger.[13] By virtue of this lawsuit, plaintiffs seek a judicial order[14] that would have the

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[13]Plaintiffs' opposition to the polity shown in Chapter 17.60 and their desire to change it was clearly manifest in the precursor lawsuit to this one. In Basich v. Board of Pensions of the Evangelical Lutheran Church in America, 493 N.W.2d 293 (Minn. App. 1992), a panel of this Court summarized plaintiffs' claims and the facts as follows:

> Count I...states that [plaintiffs] asked the [Pension] Board to change its articles of incorporation and to disregard ELCA's mandates....
>
> Count I requested the following relief: ...(3) injunctions prohibiting the ELCA from controlling the [Pension] Board, ordering the ELCA and the Board to amend their articles of incorporation so they would be independent....

Id. at 294.

> Count I...states that [plaintiffs] requested the [Pension] Board to disregard ELCA's mandates and to bring a civil action to change its articles of incorporation. When the Board refused to take action, [plaintiffs] brought suit "for the benefit of the Board of Pensions." Additionally, the relief sought reflects a desire to control the Board. [Plaintiffs] sought...an injunction prohibiting ELCA from controlling the Board.
>
> We agree with the trial court that the pleading read as a whole shows an intent to control the Board's corporate decisions and to prevent ELCA from interfering with Board decisions.

Id. at 295.

[14]Plaintiffs' First Amended Complaint dated June 17, 1994, at para. (1) of the Prayer for Relief states the remedy sought as "allowing each plaintiff to withdraw from the Plan the total balances to the credit of their individual accounts."

Plaintiffs' Brief in Opposition to Defendants' Motions for Summary Judgment also states the remedy sought in this lawsuit. On page 8 of the brief, plaintiffs state that they "have no adequate remedy but for the Court to rescind the contracts and order the plaintiffs['] funds returned to them." On page 18, plaintiffs repeat that the remedy they seek is a lump-sum withdrawal of the funds into their control: "Plaintiffs simply want their money back." (emphasis in original) They go on to make it clear that they do not seek money damages, indeed, do not claim that the pension plan "lost money" nor do they allege a "loss of plan assets." Rather, the breach of contract was "the risking of the plaintiffs['] assets to aid the defendants in their divestment program." Plaintiffs' Brief at pp. 18-19. Additional statements concerning the remedy sought by plaintiffs appear in the affidavit of the lead plaintiff. Affidavit of The Reverend Thomas L. Basich dated December 7, 1993, at pp. 5, 16-17.

If a court were to award the sought-after relief, plaintiffs would receive their account balance in the corpus of the trust to thereafter reinvest in a self-directed pension fund of their own choosing. Such a remedy would make their current account balance in the plan fully portable. Indeed, in their precursor lawsuit plaintiffs explicitly characterized the remedy they sought as a

effect of transforming the Pension Board into an independent unit accountable in its investment decisions solely to pension-plan members and their beneficiaries.[15] The current arrangement whereby the Assembly, Council, and Committee on Social Responsibility have some authority vis-a-vis the Pension Board is the target of plaintiffs' objections.[16] Should plaintiffs be awarded the relief they seek, the polity of the ELCA, especially Chapter 17.60, debated within the church and finally agreed on at the Convention of April 1987, will be materially altered by court decree.

B. Plaintiffs Object To ELCA's Application Of Doctrine.

The second action taken by the Constituting Convention of April 1987 that goes to the heart of this lawsuit was to adopt Resolution 87.2.50, directing that the church "work tirelessly to

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portable plan:

> Count I requested the following relief: (1) an injunction ordering [defendants] to adopt a "portability plan" permitting any beneficiary to withdraw funds from the pension plan.... The trial court interpreted the complaint as requesting injunctive relief in the form of a portability plan....
>
> ...
>
> ...[Plaintiffs] sought a portability plan for all members of the pension plan....

Basich, 493 N.W.2d at 294-95.

Insofar as it would involve a withdrawal of money, the only difference between the remedy plaintiffs sought in their prior lawsuit and this one is that in the prior suit plaintiffs sought "portability" for all plan participants, whereas in this lawsuit plaintiffs seek portability only for themselves. However, the effect will be the same. Should plaintiffs be awarded the remedy they seek, they will have achieved an apparent right to portability for all other plan members. That is, plaintiffs will argue collateral estoppel should defendants withhold the same remedy from other plan members should the latter file claims similar to plaintiffs.

[15]Plaintiffs' brief in opposition to defendants' motions for summary judgment makes it clear that plaintiffs object to ELCA control over the Pension Board, just as they did in their precursor lawsuit (see supra note 13). Plaintiffs' Brief p. 4, paras. 10 & 11.

[16]See para. 8 of Plaintiffs' First Amended Complaint quoting from Art. XII of the Pension Board's Articles of Incorporation. The Affidavit of the lead plaintiff, The Reverend Thomas L. Basich, gives us a sense of the long history to this dispute over control. On page 38, Rev. Basich states that even before the 1988 merger he and others opposed ELCA control of the Pension Board. His efforts were unsuccessful, as he describes it, because "during the negotiations which produced the ELCA merger, the social activists triumphed." On pages 14-15, Rev. Basich relates how in April 1991 he again tried to convince the Pension Board not to act like "a political action committee" and chided trustees for "acquiesc[ing] in the invasion of [their] territory" and surrendering to "a small clique from the office of the national bishop and the Commission For Church In Society and their like-minded cronies elsewhere in the ELCA."

see that none of our ELCA Pension Funds will be invested in companies doing business in South Africa."[17] Resolution 87.2.50 was

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[17] Resolution 87.2.50 is attached as Ex. B to the Affidavit of Lowell G. Almen dated March 17, 1995, and set forth in Addendum C to this brief. Following passage of 87.2.50, the Advisory Committee on Corporate Social Responsibility proposed that all funds of churchwide units, including synods, congregations, and separately incorporated units of the ELCA, including the Pension Board, colleges, seminaries, social-service institutions and others, avoid South African investments. Thereafter, on April 9-11, 1988, the Council voted to "strongly affirm" Resolution 87.2.50. Almen Affidavit at Ex. C p. 70 and exhibit J.

an act by a majority of voting delegates to the Convention expressing their understanding of Lutheran doctrine and applying it to the particular case of South Africa apartheid. Plaintiffs adamantly oppose Resolution 87.2.50 in two respects:

(i) plaintiffs maintain that 87.2.50 is an incorrect expression of Lutheran doctrine concerning apartheid, refusing even to call the resolution "doctrinal" but insisting instead on the characterization "political and social;"[18] and

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[18]Plaintiffs' First Amended Complaint at para. 23; Plaintiffs' Brief in Opposition to Defendants' Motions for Summary Judgment at pp. 4, 6, 8, 10-11, 17, 19, 21-22.

In their brief opposing the motions for summary judgment, plaintiffs deny that the church's response to South African apartheid was a matter of Lutheran doctrine. See id. at pp. 21-22. The denial indicates that plaintiffs have the legal posture of the First Amendment issue precisely backwards. It is defendants--not plaintiffs--that are raising the First Amendment maintaining that their religious liberty is being violated. Thus, what matters is whether defendants--not plaintiffs--believe the matter of opposing apartheid with divestment is an application of Lutheran doctrine. And for purposes of the First Amendment, a claimant's religious belief need not be acceptable, logical, consistent, or comprehensible to others, intrafaith differences are common among members of the same denomination, and the free-exercise of religion is not limited to

beliefs which are shared by all members of the particular religion concerned. United States v. Lee, 455 U.S. 252, 257 (1982); Thomas v. Review Board, 450 U.S. 707, 714-16 (1981). The only threshold requirement for raising a religious-liberty defense is that the doctrinal assertion be sincere. Lee, 455 U.S. at 257; Thomas, 450 U.S. at 716; United States v. Ballard, 322 U.S. 78 (1944)(holding that the sincerity of a religious belief is the only inquiry that may be pursued in a court of law, never the objective truth as to the belief).

Evidence that Lutherans have long regarded the matter of South African apartheid as having confessional status (status confessionis) is thoroughly documented in the record. See Affidavit of Robert H. Rydland dated March 6, 1995, at Ex. B; Ex. C pp. 39-40; Ex. D pp. 21-22, 265-69; Ex. E pp. 788-90, 983-86; Ex. F pp. 4-5; Ex. G pp. 595-96; Ex. J p. 738; and Ex. K p. 824.

(ii) plaintiffs maintain that it was improper to apply this ersatz doctrine to the investment of assets held by the Pension Board.[19]

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[19]For example, the lead plaintiff, The Reverend Thomas L. Basich, quotes Proverbs 25:21 for the proposition that the Pension Board's investment policies are contrary to Scripture,

> Divestment is deliberate economic sabotage, a form of violence. It is fundamentally destructive--a tearing down instead of a building up. And no one told me when I signed up for the Pension Plan years ago that my personal pension account would be used to weaken the economy of another country. Scripture teaches, "If your enemy is hungry, give him bread to eat." (Proverbs 25:21 RSV) The modern-day application of that teaching is, Don't undermine any nation's economy, and thereby deprive its citizens of bread.

Basich Affidavit at p. 11. Rev. Basich also disputes the application of the doctrine to South Africa apartheid:

> I believe there is a major battle under way in the ELCA between those who want to use the church and its assets as a political weapon in our society and those of us who believe that the assemblies, pulpits, and money of the church should not be used in support of any political agenda.

Id. at Ex. H p. 8.

Similar disagreements by other plaintiffs over the application of the Bible as well as Lutheran tradition when applied to South African divestment are found in the record on appeal. See Affidavit of James

G. Vander Linden dated March 29, 1995, at Ex. D (Rev. Rodney Eberhardt deposition); Ex. E (Mr. Robert D. Hansen answer to interrogatory); Ex. G (Rev. Frederick M. Archer deposition); Ex. H (Rev. Gary G. Scott deposition); Ex. I (Rev. Kerry G. Beauchaine deposition); and Ex. J (Rev. Arthur C. Sziemeister deposition); Affidavit of Eric Jorstad dated March 29, 1995, at paras. 2-9, 17-18, 21.

In all candor, the Pension Board received Resolution 87.2.50 with considerable ambivalence. On June 4, 1988, the Pension Board issued its Policy Statement responding to 87.5.20.[20] The Policy Statement was a cautious reply to the church's doctrinal directive, balancing the Pension Board's responsibilities to plan members with its responsibilities to the overall church as set out in Chapter 17.60 of the new Constitution. From the text of the Policy Statement, it is evident that the Pension Board quite properly did not deny that it had some responsibilities to other units of the ELCA. Rather, the Pension Board disputed the scope of ELCA authority implied by 87.5.20. The precise terms of the Policy Statement made relevant here by plaintiffs' lawsuit initially appeared as paragraphs "first" and "fifth":

> para. 1 set out the "equivalency policy" on South African apartheid that was thereafter followed as to investment decisions by the Pension Board;[21] and

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[20]The Policy Statement of June 4, 1988, and a first revision dated October 7, 1988, are set forth in Addendum D to this brief. A third revision of the Policy Statement was issued on February 17, 1989, and a fourth revision on April 5, 1991. So far as pertinent to this lawsuit, the operative terms of this evolving Policy Statement did not materially change.

[21]Para. 1 of the June 4, 1988, Policy Statement provided:

> [T]he Board of Pensions has directed that, whenever the conditions of risk and return are equal in the choice among stocks and bonds held by the Board on behalf of Plan members, or available for purchase, the holdings in companies with South Africa investments will be divested, and similarly, investments in these companies will not be made.

In the October 7, 1988, revision to the Policy Statement, as well as in the two later revisions, paragraph 1 was renumbered as paragraph 6 and minor changes were made to the text.

para. 5 concerned shareholder rights (i.e., the voting of proxies and other participation in shareholder actions)[22] stating that the Pension Board would "receive advice on proxy matters" from the Advisory Committee on the Church's Social Responsibility and would cooperate with the Committee so long as it was "in the best interests of the Plan members."[23]

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[22]Plaintiffs aver that proxies were voted without consulting plan members. First Amended Complaint at para. 24. The pension plan, however, unambiguously places the power to vote proxies in the Pension Board. Pension Trust ' 3.02(j), attached as Ex. A to the Affidavit of John G.
Kapanke dated March 6, 1995.

[23]Para. 5 of the June 4, 1988, Policy Statement provided:

> [T]he Board of Pensions will continue to receive advice on proxy matters from the Corporate Social Responsibility Advisory Committee, and will respond cooperatively in shareholder actions to the extent that such actions are in the best interests of the Plan members.

In the October 7, 1988, revision to the Policy Statement, as well as in the two later revisions, paragraph 5 was renumbered as paragraph 4, and reworded to provide:

> The Board of Pensions will continue to receive advice on proxy matters concerning social issues from the Advisory Committee on the Church's Social Responsibility, and where appropriate will participate in shareholder actions.

This measured response to ELCA's theological stance on South African apartheid was followed by a period of intrachurch struggle and diplomacy between the Pension Board, on the one hand, and the Church Council and Churchwide Assembly, on the other. At its July 1988 meeting, the Council voted to "affirm" that as a churchwide unit the Pension Board bears responsibility to both the plan members and the ELCA as a whole. The Council went on to encourage the Board to do everything "in its power to accomplish this goal [of divestment] as quickly as legally possible."[24] In October 1988, the Pension Board responded by reissuing its Policy Statement, with minor changes, reiterating the equivalency policy and paragraph on proxy voting (see Addendum D). At its August 1989 meeting, the Churchwide Assembly adopted action CA89.6.26,[25] reaffirming Resolution 87.5.20, and containing therein Continuing Resolution 16.51.C.89, setting three deadlines for divestment by the Pension Board.[26] Later that year, the Council interpreted 16.51.C.89 as the Assembly initiating a modification of the ELCA Pension Plan. Under bylaw 17.61.01(c), this interpretation meant that 16.51.C.89 was required to be forwarded to the Pension Board for an assessment of its effect on pension accumulations. Further discussions and negotiations ensued resulting in the Chair of the Church Council, in consultation with

[24]Almen Affidavit at Ex. D p. 30.

[25]Almen Affidavit at Ex. E. Action CA89.6.26, containing therein Continuing Resolution 16.51.C.89, is set forth in Addendum E to this brief.

[26]Pursuant to 16.51.C.89, the Pension Board was to halt any new investment in corporations doing business in South Africa by September 1, 1989, divest of at least 50% of such holdings by September 1, 1990, and be wholly divested by September 1, 1991.

the National Bishop, appointing a "Working Group On Divestment" to prepare a report with recommendations for submission to the April 1990 meeting of the Council.[27] In February 1990, the Working Group met and recommended the addition of South African screened funds to the pension plan, while keeping the regular funds which continued to be subject only to the equivalency policy and paragraph on proxy voting. These new funds, entirely optional with each member of the plan, were thereafter added to the pension plan. Because of the recent repeal of the apartheid system in South Africa followed by free elections, the Pension Board revoked the equivalency policy on November 12, 1993.[28]

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[27] Almen Affidavit at paras. 20-22.

[28] If the remedy plaintiffs sought was to enjoin the Pension Board's use of the equivalency policy, their case became moot on November 12, 1993. However, plaintiffs continue to vigorously press forward because they seek to change far more than ELCA's approach to South African apartheid: plaintiffs seek a judgment that essentially renders the Pension Board independent of the ELCA. See supra text accompanying notes 2-16. The consequence would be a fundamental alteration of ELCA polity.

Relying on Minnesota common law, plaintiffs aver that the Policy Statement with its equivalency policy and paragraph on proxy voting constitute a "breach of contract." The terms of any "contract" between the parties[29] necessarily includes (among others) four of the ELCA's cardinal documents: the Constitution with its description of churchwide polity, especially Chapter 17.60; the Pension Plan document;[30] the Pension Trust document;[31] and the Articles of Incorporation of the Pension Board.[32] The multiple responsibilities of the Pension Board are set out in all significant respects--and all their religious ambiguity--in these ELCA documents. Various plaintiffs concede that there are some investments that the Pension Board should not make because of religious doctrine.[33] Gambling, pornography, condoms, tobacco, and alcoholic beverages are investments that many plaintiffs admit

[29]Although acknowledging that the Pension Board owes the plaintiffs fiduciary duties under the Minnesota law of trusts, defendants deny that there is a "contract" between the parties. Nevertheless, because the posture of this appeal is from a denial of summary judgment, defendants proceed as if, arguendo, there is a contract.

[30]Kapanke Affidavit at Ex. A. The Pension Plan document was adopted by the Assembly and governs plan operation, such as eligibility requirements, contribution levels, and benefits.

[31]Kapanke Affidavit at Ex. B. The Pension Trust document was adopted by the Assembly and governs the duties of the trustees and the investment of the trust funds. Pension Trust ' 1.03 manifests the religious values intrinsic to this lawsuit:

> The Regular Pension Trust is formed exclusively for religious and charitable purposes and in connection therewith exclusively for the benefit of, and to assist in carrying out the purposes of, the Evangelical Lutheran Church in America....

The Pension Plan and Pension Trust documents together constitute the ELCA Pension Plan.

[32]Articles II and XII the Articles of Incorporation of the Pension Board are set forth in Plaintiffs' First Amended Complaint at paras. 6 and 8.

[33]Supplemental Affidavit of Robert H. Rydland dated March 14, 1995, at Ex. A (Mr. Lyle M. Bohlig deposition); Ex. C (Rev. John W. Lee deposition); and Ex. B (Rev. Waldo Allen Pierson deposition); Vander Linden Affidavit at Ex. C (Rev. Edward Frank Balint deposition); Ex. K (Rev. William J. Cork deposition); Ex. L (Mr. Raymond Ehrman deposition); Ex. M (Rev. James R. Corgee deposition); Ex. N (Mr. Jack R. Kirkham deposition); Ex. O (Rev. David Gensch deposition); Ex. P (Rev. William Earl Jernigan deposition); Ex. H (Rev. Gary G. Scott deposition); Ex. F (Rev. Dean W. Hoferer deposition); Ex. Q (Rev. Robert E. Ward deposition); Ex. R (Mr. Richard Herrig deposition); Jorstad Affidavit at paras. 4, 6, 10-12, 15, 19, 22-23.

should never be part of the portfolio--albeit all are lawful and profitable enterprises. In plaintiffs' views, however, apartheid is not one of the immoral activities to which there is a theological bar to investment. Contrariwise, as evidenced by Resolution 87.5.20 and Continuing Resolution 16.51.C.89, the ELCA disagrees. Accordingly, in order to adjudicate questions of contract law raised by plaintiffs' theory of their case, a court will necessarily become embroiled in the longstanding dispute concerning whether Lutheran doctrine on South African apartheid--unlike pornography or tobacco--should influence investments by the Pension Board. This would place the court in the position to rule, within the terms of the four documents that comprise this putative contract, on the appropriateness of the Pension Board's response to ELCA's apartheid doctrine, which was the adoption of the equivalency policy and paragraph on proxy voting. This is a sensitive question entailing the interpretation of church documents, the resolution of which cannot help but reshape ELCA doctrine and polity.

Plaintiffs, of course, are part of ELCA, but they represent a schismatic faction in this ongoing dispute. During 1987-91, plaintiffs sought to dissuade the ELCA from directing the Pension Board to divest of securities issued by corporations doing business in South Africa. Plaintiffs lost. They now seek to carry on this disagreement by other means, namely going outside the church's dispute-resolution processes and enlisting the jurisdiction of the courts to ally with their cause. But, as discussed below, recruiting civil authorities to assist with their jihad is a pathway foreclosed by the First Amendment.

ARGUMENT

By virtue of their complaint, plaintiffs challenge the venerable tradition of "conscience investing" that for some American Christians dates back to the seventeenth century.[34] Investing time and capital according to religiously informed conscience and the doctrinal teachings of a church has been traced to colonial territories settled by the Society of Friends (better known as "Quakers"). Quakers refrained from engaging in or profiting from commercial activity that ran contrary to the Society's doctrine, notably the slave trade and manufacturing war matériel, both large and profitable industries at the time. Historians tell us that the Progressive Era (1890-1917) was the period of a major Protestant surge toward labor and social reform, including the steering of investment assets according to religious doctrine.[35] For example, churches opposed to alcoholic beverages, tobacco products, and gambling refused to invest their capital in "sin stocks" or even to hold securities in business enterprises that profited from these doctrinally prohibited activities.[36] By 1928 "conscience investing"

[34] Peter D. Kinder, Steven D. Lydenbert and Amy L. Domini, INVESTING FOR GOOD: MAKING MONEY WHILE BEING SOCIALLY RESPONSIBLE 12 (1993).

[35] Severyn T. Bruyn, THE FIELD OF SOCIAL INVESTMENT 1 (1987)(churches involved since nineteenth century); Kinder, supra note 34, at 12-15.

[36] Bruyn, supra note 35, at 1; Elizabeth Judd, INVESTING WITH A SOCIAL

had become so widespread that the Pioneer Fund was established as the first mutual fund specifically designed to accommodate the moral concerns of religious groups. The fund initially avoided businesses involved in the sale of tobacco products, gambling, and similar activities.[37] The Pioneer Fund added a partial South African screen in the 1970s.[38] The Social Investment Forum based in Minneapolis reported that as of 1989 some 247 religious institutions had $20 billion invested in funds screened in accord with religious doctrine.[39] Research by Amici has been unable to find any court challenges to "conscience investing" brought against a church or other religious organization. That was true until July 1991, when plaintiffs filed their first lawsuit in this matter. That plaintiffs seek to overturn such a time-honored practice by American churches is perhaps the most striking feature of what is an all around extraordinary lawsuit.

I. PURSUANT TO FIRST AMENDMENT PRINCIPLES OF CHURCH AUTONOMY, LAWSUITS THAT ENTANGLE COURTS IN MATTERS INVOLVING DISPUTES OVER DOCTRINE OR INTRACHURCH POLITY ARE NONJUSTICIABLE.

A. A Summary of First Amendment Law on Church Autonomy.

CONSCIENCE 10-11 (1990); Kinder, supra note 34, at 13.

[37] Council on Economic Priorities, THE BETTER WORLD INVESTMENT GUIDE 2 (1991); Judd, supra note 36, at 10; Kinder, supra note 34, at 13.

[38] Kinder, supra note 34, at 13.

[39] Council on Economic Priorities, supra note 37, at 1.

Unlike voluntary organizations generally, churches are afforded a high level of freedom from governmental interference in the determination of their polity and the derivation of their doctrine. It is helpful to envision the scope of this liberty as defined spheres within which the U.S. Supreme Court has stated that churches may operate with few constraints. A survey of the case law shows that there are at least four such areas within which religious organizations have virtually free reign: (1) questions of doctrine, changes in doctrine, and the resolution of doctrinal disputes;[40] (2) the choice as to ecclesiastical polity and its administration, including matters concerning the interpretation of a church's organic documents and bylaws;[41] (3) the selection, credentials, promotion, discipline, and conditions of employment concerning clerics and other ecclesiastics;[42] and (4) the admission, guidance,

[40] Md. & Va. Churches of God v. Church at Sharpsburg, 396 U.S. 367, 368 (1970)(per curiam)(avoid doctrinal disputes); Presbyterian Church v. Hull Church, 393 U.S. 440, 449-51 (1969)(rejecting rule of law that discourages changes in doctrine); Watson v. Jones, 80 U.S. (15 Wall.) 679, 725-33 (1872)(rejecting implied-trust rule because of its departure-from-doctrine inquiry); see Thomas v. Review Board, 450 U.S. 707, 715-16 (1981)(courts not arbiters of scriptural interpretation); Order of Saint Benedict v. Steinhauser, 234 U.S. 640, 647-51 (1914)(religious practices concerning vow of poverty and communal ownership of property not contrary to individual liberty and will be enforced by the courts).

[41] Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708-24 (1976)(civil courts may not probe into church polity); Presbyterian Church v. Hull Church, 393 U.S. 440, 451 (1969)(civil courts forbidden to interpret and weigh church doctrine); Kreshik v. St. Nicholas Cathedral, 363 U.S. 190, 191 (1960)(per curiam)(First Amendment prevents judiciary, as well as legislature, from interfering in ecclesiastical governance of Russian Orthodox Church); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 119 (1952)(same); Shepard v. Barkley, 247 U.S. 1, 2 (1918)(aff'd mem.)(courts will not interfere with merger of two Presbyterian denominations).

[42] Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708-20 (1976)(civil courts may not probe into defrocking of cleric); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952)(courts not to probe into clerical appointments); Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1, 16 (1929)(declining to intervene on behalf of petitioner who sought order directed to archbishop to appoint petitioner to ecclesiastical office); see NLRB v. Catholic Bishop, 440 U.S. 490, 501-04 (1979)(refusal by Court to force collective bargaining on parochial school because of interference with relationship between church superiors and lay teachers); Rector of Holy Trinity Church v. United States, 143 U.S. 457, 472 (1892)(refusing to apply general law preventing employment of aliens to church's appointment to cleric); Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1872)(unconstitutional to prevent priest from taking up his ecclesiastical position because of refusal to take civil oath).

expected moral behavior, and excommunication of church members.[43] There are limits, of course, to a church's actions even when falling within these well-defined spheres of ecclesiastical autonomy. The Supreme Court has repeatedly said that the line is to be drawn at instances of fraud or collusion,[44] albeit the Court has never had a case where either fraud or collusion was an issue.

B. The Underlying Rationale for the Law of Church Autonomy.

[43] Watson v. Jones, 80 (13 Wall.) 679, 733 (1872)(no court jurisdiction as to church discipline or the conformity of members to the standard of morals required of them); cf. Order of Saint Benedict v. Steinhauser, 234 U.S. 640, 647-51 (1914)(so long as individual voluntarily joined a religious group and is free to leave at any time, religious liberty is not violated and members are bound to the rules consensually entered into such as vow of poverty and communal ownership of property).

[44] Jones v. Wolf, 443 U.S. 595, 609 n.8 (1979)(fraud and collusion); Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 713 (1976)(fraud and collusion; but arbitrary application of administrative procedures is nonjusticiable).

The law of church autonomy is altogether different from the free-exercise right discussed in Point II, infra. The principal difference is the institutional character of the church-autonomy defense.[45] Rather than the familiar emphasis on the person and his or her individual rights, the law of church autonomy is for organizations.[46] The Court stated the heart of the matter in Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94 (1952). The Kedroff Court said that the First Amendment contains "a spirit of freedom for religious organizations, an independence from secular control or manipulation--in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." Id. at 116. The Supreme Court has derived the law of church autonomy far more from the structure intrinsic to a system of separation of church and state than from the notion of individual conscience being inviolate. Hence, the Establishment Clause along with the Free Exercise Clause undergird the doctrine.[47] Whereas a prima facie claim under the Free Exercise Clause requires proof of coercion of religiously informed conscience,[48] often expressed in terms of a "substantial burden" on

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[45]This takes into account the corporate nature and practices of virtually every religion currently extant in American life. People generally exercise religious beliefs collectively, not as autonomous individuals. Moreover, institutional autonomy accounts for the church's historically pivotal role in guarding against state absolutism. Gerard V. Bradley, Church Autonomy in the Constitutional Order, 49 LA. L. REV. 1057, 1072 (1989).

[46]Religious organizations have an institutional character distinct from other voluntary organizations, and hence unique institutional rights, not merely the sum of the derivative rights of their individual members. The rationale is that religious organizations have a sphere in which they may operate unhindered in accordance with their understanding of their own divine origin and mission. This unique character is acknowledged in the necessity under the Establishment Clause to keep organized religion and the offices of state in proper relationship to each other. See Mark D. Howe, THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY 5-30 (1965); Paul G. Kauper, Church Autonomy and the First Amendment: The Presbyterian Church Case, CHURCH AND STATE: THE SUPREME COURT AND THE FIRST AMENDMENT 67, 95 (P. Kurland ed., 1975) ("[I]n the Court's view voluntary religious associations are constitutionally distinguishable from other types of voluntary associations."); Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW ' 14-11, at 1236 (2d ed. 1988); Meir Dan-Cohen, RIGHTS, PERSONS, AND ORGANIZATIONS: A LEGAL THEORY FOR BUREAUCRATIC SOCIETY 177 (1986); Mark D. Howe, Political Theory and the Nature of Liberty, 67 HARV. L. REV. 91, 92-95 (1953)(identifying church autonomy as the "political philosophy of pluralism" that gives religious bodies "some of the prerogatives of sovereignty").

[47]Douglas Laycock, Towards a General Theory of the Religion Clauses, 81 COLUM. L. REV. 1373, 1395 n.176 (1981).

[48]See, e.g., Engel v. Vitale, 370 U.S. 421, 430 (1963); McGowan v.

the claimant's religious practice,[49] proof of such a burden is not an element of a defense based on the law of church autonomy.[50] Rather, defendants need to show only that there is an intrusion into one of the proscribed areas of either doctrine, polity, clergy, or church membership.

Maryland, 366 U.S. 420, 430 (1961).

[49]See, e.g., the repeated use of the term "substantial burden" in the Religious Freedom Restoration Act, 42 U.S.C. '' 2000bb to 2000bb-4 (1994 Supp.).

[50]Laycock, supra note 47, at 1388-92.

In Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871), the Supreme Court established the first broad principles of judicial deference concerning matters of dispute within religious bodies over polity and doctrine.[51] This post-Civil War case involved a struggle between two factions of a local Presbyterian Church for control of the church building. Title to the property was in the name of the trustees of the local church. However, the deed and charter of the local church "subjected both property and trustees alike to the operation of [the general church's] fundamental laws." Id. at 683. The general church was the Presbyterian Church of the United States. Its governing body was called the General Assembly. The ecclesiastical rules of the General Assembly stated that the Assembly possessed "the power of deciding in all controversies respecting doctrine and discipline." Id. at 682. Following the Civil War, the General Assembly ordered the members of all local congregations who believed in the divine character of slavery to "repent and forsake these sins." Id. at 691. A majority of the local church was willing to comply with the directive. A minority faction, however, deemed the resolution of the Assembly a departure from the doctrine held at the time the local church first joined with the general church. The minority's legal theory was that the general church held an interest in the property of the local church subject to an implied trust. The implied condition of the trust was that the church adhere to its original doctrines. Any departure-from-doctrine by the general church meant a breach of trust and thus forfeiture of its interest in the property occupied by the local church. Accordingly, the minority faction claimed that the majority relinquished any right to control the property when the general church repudiated the original, pro-slavery doctrine. Because they were the "true church," the minority faction maintained that they should control the local church real estate. Id. at 691-94.

[51] In Watson, the federal trial court had diversity jurisdiction. The rule of decision was based on federal common law rather than the First Amendment. This is because Watson was decided prior to Erie Ry. Co. v. Tompkins, 304 U.S. 64 (1938). In following the old rule of Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), federal courts sitting in diversity could deviate from state substantive law. Further, the First Amendment Religion Clauses had not yet been applied to the states through the Due Process Clause of the Fourteenth Amendment.

The implied-trust theory, with its origin in English law (id. at 727-28) and the established Church of England, was rejected by the U.S. Supreme Court because its departure-from-doctrine feature required the civil adjudication of a religious question. The Watson Court gave three bases for refusing to take subject-matter jurisdiction: (1) civil judges are unschooled in religious doctrine, and thereby not competent to resolve disputes concerning religious doctrine nor to properly interpret church documents and canon law (id. at 729, 730 and 732); (2) for the law to award the property to the faction adhering to original doctrine would entail the government "taking sides," thereby "establishing" one creedal position while severely inhibiting inevitable changes in religious doctrine (id. at 728, 730 and 735); and (3) both clerics and lay members of a church have voluntarily joined the entire church, the general as well as the local body, thus giving implied consent to the system of polity of the entire church and its internal administration (id. at 729).[52] These bases for church autonomy are rooted, said the Court, in the American political system--unlike the English system--that separates the institutions of church and of state, thereby sharply limiting the involvement by civil courts in the affairs of religious bodies (id. at 728-29 and 730).

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[52]See also Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696, 714-20 (1976); Patterson v. Bethel Baptist Church, 389 N.W.2d 729, 733 (Minn. App. 1986)(dismissing claim for reinstatement filed by individual ousted from membership in church; when joining church plaintiff impliedly consented to terms of church's constitution and bylaws). The Supreme Court has held that consent to be governed by the church polity and its authorities is sufficient to protect an individual's right to conscience, so long as the individual has the unmitigated right to leave the church at any time. Order of Saint Benedict v. Steinhauser, 234 U.S. 640, 647-51 (1914). Departing from a church, of course, means a cleric or church member leaving behind the "work of one's hands," both spiritual and material. But leaving behind one's spiritual and material works is what is impliedly consented to at the outset when one voluntarily joins both the churchwide units and local congregations of a denomination. See Laycock, supra note 47, at 1403.

Henceforth, the application of church-autonomy law should relate back to one of the above-stated rationales: lack of judicial competence on polity and doctrinal questions; not "taking sides" in disputes nor inhibiting inevitable changes in religious doctrine; or the implied consent of individuals to be bound by the internal decision-making processes within the church's polity.

The elevation of Watson to a principle of First Amendment stature began with Kedroff, 344 U.S. at 116. In Kedroff, the Supreme Court struck down a New York statute that displaced control of the Russian Orthodox Churches from the central governing hierarchy located in the Soviet Union with a church organization limited to the diocese of North America. The perceived need to transfer control of ecclesiastical authority was linked to the Revolution of 1917 and doubt concerning whether Moscow had "a true central organization of the Russian Orthodox Church capable of functioning as the head of a free international religious body" (id. at 106). Because the statute did more than just "permit the trustees of the Cathedral [in New York City] to use it for services consistent with the desires of the members" and transferred control over domestic churches by legislative fiat (id. at 119), the Court held that the statute violated the "rule of separation between church and state" (id. at 110). The Watson Court had repudiated the implied-trust rule used to sanction the departure-from-doctrine standard, but only as a matter of federal common law. A number of states had continued to follow the implied-trust rule as a matter of common law. Kedroff, however, clearly foreshadowed the sweeping aside of the common law in those states still following the implied-trust rule.

In Presbyterian Church v. Mary Elizabeth Blue Hull Church, 393 U.S. 440 (1969), the rule in Watson was unequivocally established as a First Amendment principle. Presbyterian Church presented a hierarchical church dispute between a general church and two of its local congregations over the right to control the local churches' properties. The controversy began when the local churches claimed that the general church had violated the organization's constitution and had departed from accepted doctrine and practice. Id. at 442 n.1. Georgia followed the implied-trust rule with its requisite fact finding into alleged departures from doctrine. On the basis of a jury finding that the general church had abandoned its original doctrines, the Georgia courts entered judgment for the local congregations. On appeal, the Supreme Court held that the First Amendment does not permit a departure-from-doctrine standard as a substantive rule of decision. The "American concept of the relationship between church and state" (id. at 445-46) "leaves the civil court no role in determining ecclesiastical questions in the process of resolving property disputes" (id. at 447).

In a dispute more akin to the ecclesiastical differences in Kedroff, the Supreme Court in Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976), rejected a bishop's resistance to the reorganization of the American-Canadian diocese of the Serbian Eastern Orthodox Church and his removal from office. Milivojevich involved the concerns of internal church administration and clerical appointment, matters also insulated from civil review under the

First Amendment. Id. at 709, 713, 720 and 721. In Milivojevich, there was no dispute between the parties that the Serbian Eastern Orthodox Church was a hierarchical church and that the sole power to remove clerics rested with the ecclesiastical body that had decided the bishop's case. Id. at 715. Nor was there any question that the matter at issue was a religious dispute. Id. at 709. Nevertheless, the state court decided in favor of the defrocked bishop because, in its view, the church's adjudicatory procedures had been applied in an arbitrary manner. On appeal, the Supreme Court rejected the "arbitrariness" exception to the judicial-deference rule of Watson when the question concerns church polity or administration. Id. at 712-13. When the issue is within one of the spheres of autonomy, there may be no examination by civil courts into whether the church judicatory body properly followed its own rules of procedure. Id. at 713. For a civil court to accept jurisdiction over such subject matters is not "consistent with the constitutional mandate [that] the civil courts are bound to accept the dictions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law." Id. In reasoning similar to Watson, the Court explained that the bases for a First Amendment prohibition to jurisdiction are three-fold. First, civil courts cannot delve into canon law or church documents. Id. These matters are too sensitive to permit any civil probing because inquiry may prove entangling and thus have the court "taking sides." Second, civil judges have no training in canonical law and theological interpretation. Id. at 714 n.8. Finally, the "[c]onstitutional concepts of due process, involving secular notions of 'fundamental fairness'" cannot be borrowed from the civil law as if they were twigs to be grafted onto a church's polity with no concern for the principle of church-state separation. Id. at 714-15. The Supreme Court also reversed the state court's overruling of the diocesan reorganization, holding that the Illinois Supreme Court had impermissibly "delved into the various church constitutional provisions" relevant to "a matter of internal church government, an issue at the core of ecclesiastical affairs." Id. at 721. The enforcement of ambiguous church documents cannot be accomplished "without engaging in a searching and therefore impermissible inquiry into church polity." Id. at 723.

Previous panels of this Court have applied the foregoing principles of church-autonomy law in intrachurch matters. See Geraci v. Eckankar, 526 N.W.2d 391 (Minn. App. 1995)(claim by former employee for employment discrimination brought against church dismissed because reason proffered for termination was excommunication of employee, and discipline of church member could not be probed by court because it would prove excessively entangling); Schoenhals v. Mains, 504 N.W.2d 233 (Minn. App. 1993)(dismissing breach of contract and defamation claims brought by members against church and pastor because First Amendment bars inquiry into church's reasons and motives for disfellowshiping plaintiffs); Dignity Twin Cities v. Newman Center, 472 N.W.2d 355 (Minn. App. 1991)(ordinance prohibiting discrimination in public accommodations on basis of sexual preference could not be enforced

against Roman Catholic center that denied worship space to homosexual organization); Black v. Snyder, 471 N.W.2d 715 (Minn. App. 1991)(dismissing claims by female pastor brought against church based on theories of breach of contract, retaliation, and defamation, but reinstating limited claim for damages alleging sexual harassment during predischarge employment period); Patterson v. Bethel Baptist Church, 389 N.W.2d 729 (Minn. App. 1986)(dismissing claim for reinstatement filed by individual ousted from membership in church); cf. Lewis ex rel. Murphy v. Buchanan, 21 Fair Employ. Prac. Cases (BNA) 696 (Minn. D. Ct. 1979)(declining to adjudicate question of whether homosexual status, as distinct from homosexual conduct, is inconsistent with Roman Catholic moral teaching).

Plaintiffs' contract theory and their sought-after remedy will compel a court to interfere with matters of church polity, as well as intervene in a dispute over the proper application of ELCA doctrine to the sin of apartheid. Consistent with the foregoing Minnesota and U.S. Supreme Court cases, such questions must be dismissed for want of subject-matter jurisdiction.

C. The "Neutral-Principles" Approach Cannot Avoid The First Amendment Problems In This Case.

The Supreme Court has said that states are permitted, in limited instances, to devise "neutral principles of law" that when followed permit the adjudication of intrachurch disputes affecting property. Jones v. Wolf, 443 U.S. 595, 602-06 (1979).[53] However, the neutral-principles approach may never be used in a manner that transgresses into any of the spheres of church autonomy. Id. at 602 ("It is clear...that 'the First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes.'"). In other words, an adjudication over property rights is not "neutral" unless it avoids issues of doctrine, polity, clergy, and church membership. The nature of plaintiffs' legal theory and the remedy they have requested renders a neutral-principles approach impossible for three reasons.

[53] In Jones v. Wolf, 443 U.S. at 602, the Court made it clear that the neutral-principles approach was not mandated by the First Amendment, but rather was an alternative to the judicial-deference rule of Watson.

First, to grant plaintiffs' their sought-after relief will effectively gut ELCA's polity as it appears in Chapter 17.60 of the Constitution. Plaintiffs seek an order permitting them to withdraw their account balances from the pension plan, presumably to then deposit the amount in a self-directed pension account.[54] If every time the Pension Board acts to meet its doctrinal responsibilities to the Churchwide Assembly, Church Council, Committee on Social Responsibility, etc., and plan members thereby have a court-established right to withdraw their account balances, then a civil judge will have profoundly altered ELCA's polity by transferring both authority and responsibility from the Pension Board to the individual plaintiffs.[55] In short, a victory for plaintiffs will cut the heart out of the ELCA's polity, especially Chapter 17.60. That, of course, is what plaintiffs have sought, going back at least as far as April 1987, namely a Pension Board that is essentially independent of the ELCA.

[54]See supra note 14 (discussing plaintiffs' requested relief and documenting in plaintiffs' own words the sought-after remedy).

[55]See supra note 14 (elaborating on this point as to members of the plan not parties to this lawsuit).

Second, the theory of plaintiffs' case will saddle the trial court with difficult questions involving the interpretation of church documents. Assuming, arguendo, that there is a "contract" between plaintiffs and defendants, the four cardinal documents comprising the contract are Chapter 17.60 of the Constitution, the Pension Plan, the Pension Trust, and the Pension Board's Articles of Incorporation.[56] Each is a church document and requires interpretation to sort out the responsibilities of the Pension Board to plaintiffs, on the one hand, and to the Assembly, Council, and other church units, on the other. In reading the terms of these documents, in many situations it is not self-evident where the several responsibilities of the Pension Board lie. The documents interweave religious considerations with the temporal, thereby making familiarity with Lutheran tradition and use of language within the church critical to ascertaining the true intent of the parties.[57] What is self-evident is the Supreme Court's admonition that civil magistrates are never to resolve issues concerning the meaning of language in a church document when it entails interpreting or weighing questions of polity, church tradition, or doctrine. See, e.g., Jones, 443 U.S. at 604 ("[T]here may be cases where the deed, the corporate charter, or the constitution of the general church incorporates religious concepts in the provisions relating to the ownership of property. If in such a case 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."); Milivojevich, 426 U.S. at 712-13 (That "the decisions of the Mother Church were 'arbitrary' was grounded upon an inquiry that persuaded the Illinois Supreme Court that the Mother Church had not followed its own laws and procedures" and thus must be overturned.); Md. & Va. Churches of God v. Church at Sharpsburg, 396 U.S. 367, 369 (1970)(Brennan, J., concurring)("To permit civil courts to probe deeply enough into the allocation of power within a church so as to decide where religious law places control over the use of church property would violate the First Amendment in much the same manner as civil determination of religious doctrine."); id. at 369 n.2 ("Only express conditions [in a church document] that may be effected without consideration of doctrine are civilly enforceable" in a state court); Pearson v. Church of God, ___ S.E.2d ___, 1995 WL 235086 (S.C. App. 1995)(dismissing breach of contract claim brought by pastor seeking reinstatement of pension benefits becuase First Amendment prohibits civil courts from construing terms in church documents said to comprise the contract).

Finally, plaintiffs' contract theory and requested remedy are hopelessly entangled with a dispute over the application of ELCA

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[56]See supra notes 30 and 31.

[57]See supra note 31 for an example of mixed religious and temporal language in the Pension Trust document. See also Art. II of the Pension Board's Articles of Incorporation quoted in para. 6 of the First Amended Complaint.

doctrine on apartheid. Plaintiffs aver that the church's position on apartheid cannot override fiduciary duties of the common law. Then, in an about-face, many of the plaintiffs admit that the Pension Board should not, consistent with Lutheran beliefs as they view them, invest in gambling, pornographic movies, alcohol, tobacco, military matériel, and the like.[58] Plaintiffs thereby concede that the fiduciary duty is not violated by adherence to Lutheran beliefs as to some types of immoral behavior. But they continue to aver that the duty is violated when adhering to Lutheran beliefs on apartheid. Are we to believe that the neutral principle of law the plaintiffs would have this Court impose is "neutral" as to religious beliefs about apartheid because that is a doctrine they view as less binding on Lutherans than doctrines on gambling, alcohol, pornography, etc.? This makes no sense. It would be patently unconstitutional for a civil magistrate to determine which particular acts of immorality Lutherans regard as more sinful than others and then adjust the fiduciary standard accordingly.

The highest legislative body of the church, the Churchwide Assembly, expressed its unqualified opposition to the sin of apartheid. Unquestionably this is the ELCA view of religious doctrine on apartheid. The Pension Board responded to this view by adopting the equivalency policy. A civil court must give the decision of ELCA and the response of the Pension Board due deference, not the demands of a splinter group within the ELCA.

II. THE REMEDY PLAINTIFFS SEEK WILL BURDEN DEFENDANTS' EXERCISE OF RELIGION, AND CANNOT BE JUSTIFIED AS SERVING A "COMPELLING STATE INTEREST" BY THE "LEAST RESTRICTIVE MEANS."

[58] See supra note 33.

The Free Exercise Clause protects more than just a church's abstract freedom to believe. And it protects more than just freedom to profess sacred beliefs--the Free Speech Clause is wholly sufficient to protect the mere articulation of religious belief. The Free Exercise Clause has an independent reach of its own, namely, being able to take actions that are consistent with the church's declarations and confessions of faith.[59]

In accord with Lutheran beliefs and pursuant to ELCA polity, the Pension Board adopted the equivalency policy and the paragraph on proxy voting. Plaintiffs allege that this act was violative of the common law of contracts and seek equitable relief. A judgment for plaintiffs would be more than just a mild inconvenience to defendants. Such a judgment would compel defendants to act directly contrary to Lutheran doctrine and to defy their own polity.

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[59]This point was first stated by Justice White in Welsh v. United States, 398 U.S. 333 (1970):

> It cannot be ignored that the First Amendment itself contains a religious classification. The Amendment protects belief and speech, but as a general proposition, the free speech provisions stop short of immunizing conduct from official regulation. The Free Exercise Clause, however, has a deeper cut: it protects conduct as well as religious belief and speech.

Id. at 372 (White, J., dissenting).

As a matter of both state and federal law, a substantial burden on sincerely held religious practices can only be justified by "compelling state interests" achieved by means "least restrictive" on the practice in question. Minn. Const. Art. I ' 16; Religious Freedom Restoration Act [RFRA], 42 U.S.C. '' 2000bb to 2000bb-4 (1994 Supp.); Free Exercise Clause of the First Amendment to the U.S. Constitution. The standard of review under the Minnesota Constitution was held to be "strict scrutiny" in State v. Hershberger, 462 N.W.2d 393 (Minn. 1990), as is the standard under RFRA. The lower free-exercise standard adopted by the U.S. Supreme Court in Employment Division v. Smith, 494 U.S. 872 (1990), does not apply to what the Court called a "hybrid" claim involving both religious exercise and other First Amendment rights Id. at 881.[60] In a hybrid case such as this one,[61] strict scrutiny is still the standard of review under the Free Exercise Clause.

The compelling-interest test is not a balancing of the importance of the uniform enforcement of a general rule of law against the extent of adverse effect the law has on the claimant's religious practices. Courts are absolutely barred from sifting and weighing the extent of injury to a claimant's spiritual development, nor are judges to evaluate the relative degree of metaphysical harm to defendants should plaintiffs get their way. Employment Division v. Smith, 494 U.S. 872, 885-87 (1990)(civil courts not competent to measure centrality of particular tenet to claimant's religion or harmful effects on claimant if religious commands cannot be obeyed).

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[60]Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 472-73 (8th Cir. 1991).

[61]In this case the "hybrid" claim involves both free speech and the freedom to associate. In implementing the equivalency policy and the paragraph on proxy voting, the Pension Board and ELCA sought to "send a message" of disapproval to corporations doing business in South Africa, and through these corporations defendants sought to pressure the government of South Africa to adopt racial reforms. This is the exercise of speech at its most basic, and this use of money or other capital has long been a recognized form of speech. See, e.g., NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982)(economic boycott); Buckley v. Valeo, 424 U.S. 1 (1976)(per curiam)(caps on political campaign expenditures and contributions); First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978)(limits on corporate contributions to influence ballot initiatives).

The Pension Board and ELCA were also concerned that they not profit from the sin of apartheid and that the prophetic witness of the church to the larger society not be dulled by being perceived as in complicity with apartheid. Freedom of association includes the freedom not to associate with the endeavors of others with whom the church is in opposition, as well as the right not to be perceived as in apparent complicity with the cause of other organizations. See, e.g., Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 116 S. Ct. ____, 63 U.S.L.W. 4625, _____ (1995)(sponsor of private parade may exclude would-be entrants with whom the sponsor does not want to be associated).

Rather, the compelling-interest test is a wholly secular assessment of the importance to society of the general rule of law in question being enforced without any exceptions, including exceptions for churches.[62]

[62]Concerning the governmental interest in regulating church pension plans, when Congress passed the Employee Retirement Income Security Act in 1974, church-plans were permitted to opt-out of the act. 29 U.S.C. '' 1003(b)(2), 1321 (1988). Accordingly, Congress saw no "compelling interest" to force ERISA's regulation upon churches.

Given the legal posture of this case, defendants are the free-exercise claimants. When applying the compelling-interest test, the party resisting the free-exercise claim has both the burden of producing evidence and the burden of persuasion.[63] Accordingly, it is plaintiffs that bear the risks of nonproduction and of nonpersuasion. Rule 56.05 of the Minnesota Rules of Civil Procedure does not permit parties opposing a motion for summary judgment to rest on the averments in their pleadings. Plaintiffs did file a brief and affidavits opposing the summary judgment, but their papers do not raise any arguments that attempt to meet the "strict scrutiny" standard of review. Before the trial court, plaintiffs did not identify what they thought the society's "compelling interest" in their lawsuit might be. Plaintiffs' papers go on at length about their grievances against ELCA and the Pension Board, but there can be no "compelling state interest" in the courts taking sides in an internal church dispute.

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[63]See 42 U.S.C. ' 2000bb-2 (3) (the party resisting the religious claimant has both the "burdens of going forward with the evidence and of persuasion").

The situation can hardly be said to present a "compelling state interest" when pecuniary loss is wholly speculative. Plaintiffs do not seek damages, but portability.[64] Nor can it be said that portability is obviously the "least restrictive means" to effect a remedy for a harm that we can never be certain ever occurred.[65] Moreover, should plaintiffs be awarded their sought-after remedy, a majority could well be worse off should portability lead to reduced benefits for all 26,000 plan members.[66] Thus, to award plaintiffs portability could easily be a case of the "cure" being worse than the "disease." The first rule of a court sitting in equity ought to be to "Do no harm." By way of contrast, the equivalency policy fully acknowledged the Pension Board's duties to members of the plan, and South African holdings were divested only if the return was equal to other available investments--striking a balance that was fair to all the competing interests.

Plaintiffs neglected to advance any argument concerning whether portability is "in furtherance of a compelling governmental interest" and is "the least restrictive means of furthering that compelling governmental interest."[67] Accordingly, the free-exercise rights of the Pension Board and ELCA must prevail as a matter law.

CONCLUSION

[64] See supra note 14 (discussing plaintiffs' requested relief and documenting in plaintiffs' own words the sought-after remedy).

[65] Plaintiffs also complain of attempted voting of proxies by the Church Council and the Division for Church in Society. Basich Affidavit at p. 30. But again plaintiffs allege no damages as a result of the alleged conduct. Accordingly, harm to plaintiffs is too indeterminate to be "compelling."

[66] Affidavit of David G. Adams dated March 6, 1995, at para. 4.

[67] 42 U.S.C. ' 2000bb-1(b)(1) & (2) (1994 Supp.).

The First Amendment regiments the character and degree of involvement between the offices of government, be they legislative, executive or judicial, and the ecclesial functions of religious bodies. In the main, the nature of the involvement should be a limited one, although it is clear that the interaction cannot be eliminated altogether.[68] While the exact calculus of the desired relationship has proven to be a source of continuing debate, there is agreement upon the ultimate goal: the institutional separation of church and state.[69] The aim is for each to give the other sufficient breathing space. The ordering principle at work is one of mutual forbearance whereby "both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."[70] Those who were influential in our nation's history envisioned the churches and the states in a kind of parallelism, with neither subordinate to the other.[71] Each should eschew being co-opted by the other, and each should refrain from dependence upon the influence and offices of the other. Importantly, if the First Amendment's structural separation of these two centers of authority in society is reciprocal, then religious organizations will be afforded the open space in which they are free to operate. These spheres of liberty extend not just to modes of worship, but also to the fulfillment of a church's "spiritual mission to communicate divine truth and grace to the souls of men, and [to its] spiritual mission of social justice and peace" as each church understands its calling.[72]

In light of the foregoing arguments and authorities, Amici request that this Court reverse the trial court and order this cause dismissed, with prejudice, for lack of subject-matter jurisdiction.

Respectfully submitted,

Dated: July 12, 1995

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[68] School Dist. of Abington Township v. Schempp, 374 U.S. 203, 213, 225 (1963)(disallowing teacher-led prayer in public schools); id. at 305 (Goldberg, J., concurring); Zorach v. Clauson, 343 U.S. 306, 315 (1952) (upholding public school release-time for religious instruction).

[69] See Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871):

> The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority,

Id. at 730.

[70] McCollum v. Board of Education, 333 U.S. 203, 212 (1948)(disallowing religious instruction in public schools).

[71] Thomas Derr, The First Amendment as a Guide to Church-State Relations, CHURCH, STATE AND POLITICS 75, 82 (J. Hensel ed., 1981).

[72] John Courtney Murray, WE HOLD THESE TRUTHS 83 (Image Book ed., 1964).

Charles T. Nixon
Attorney Reg. No. 79339
800 Title Insurance Building
400 Second Avenue South
Minneapolis, Minnesota 55401
(612) 332-1177

Carl Howard Esbeck
Professor of Law
John K. Hulston Hall
Room 213
Ninth & Conley Streets
Columbia, Missouri 65211
(314) 882-3035

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