MINUTES

COMMISSION ON CONSTITUTIONAL MATTERS
Internet Conference Meeting (Zoom.us)
March 30, 2023

168. Call to Order and Opening Prayer

Commission Chairman Dr. George Gude called the meeting to order with all members present. Dr. Gude opened the meeting with prayer and introduced the agenda, as follows.

169. Scope of Board of Directors Authority to Approve Usage of Lutheran Church Extension Fund Assets under Bylaw 3.6.4.4.1 (23-3003)

By an email of January 30, 2023, the president and chief executive officer of the Lutheran Church Extension Fund—Missouri Synod (LCEF) requested, on behalf of the LCEF Board of Directors, an opinion on the following question:

Background:

Over the past year, LCEF has engaged in conversation with another confessional Lutheran church body (not in altar and pulpit fellowship with the Synod) regarding the ability of LCEF to provide loans to its congregations, schools, and affiliated ministries (organizations akin to the recognized service organizations of the Synod).

Bylaw 3.6.4.4.1, addressing the use of LCEF assets, reads, "The assets of the Lutheran Church Extension Fund—Missouri Synod shall be used exclusively to provide financing and services for the acquisition of sites, for the construction of facilities, for the purchase of buildings and equipment, for operating expenses, for professional church worker education, for the residential housing needs of professional church workers, for promoting strategic ministry planning and assisting in capital campaigns; *and for other purposes approved by its governing board consistent with the ministry and mission of the Synod under policies approved by the Board of Directors of the Synod.*" [emphasis added]

Because lending to ministries of the other church body would require the use of LCEF assets beyond the LCMS, clarity on the intended scope of Bylaw 3.6.4.4.1 and the authority of the Synod Board of Directors in that regard is being requested.

Question: May the Synod Board of Directors, in exercising its authority under Bylaw 3.6.4.4.1, determine that a certain use of assets by LCEF is consistent with the ministry and mission of the Synod? (The instant "certain use" refers to the lending of LCEF assets "beyond the LCMS," within another confessional Lutheran church body that is not in altar and pulpit fellowship with the Synod.)

Opinion: The commission finds that the question, although apparently simple in form, requires a three-part analysis.

The first question that must be answered is, Who interprets the Constitution and Bylaws of Synod? The answer is simple and found at Bylaw 3.9.2: "The Commission on Constitutional Matters exists to interpret the Constitution, Bylaws, and resolutions of the Synod…"

The second question is, What is "the ministry and mission of the Synod" as it relates to the scope of "other activities" to which assets of LCEF may permissibly be applied (Bylaw 3.6.4.4.1)? Most broadly speaking, this is asking, What is the purpose of the Synod? The purpose of Synod is found in the first Bylaw, under Section 1.1, "Purpose of the Synod." Bylaw 1.1.1: "Committed to a common confession and mission, congregations of The Lutheran Church—Missouri Synod join with one another in the Synod to support one another and to work together carrying out their commonly adopted objectives. The Synod is organized to

work in support of and on behalf of [such] congregations to assist them in carrying out their ministries…" Bylaw 1.1.1(a): "The Synod functions in support of its member congregations…" Bylaw 1.1.1(b): "The Synod on behalf of its member congregations administers those ministries that can be accomplished more effectively in association with other member congregations through the Synod. In this way member congregations utilize the Synod to assist them in carrying out their functions of worship, witness, teaching and nurture, service, and support." Bylaw 1.1.1 makes clear that Synod exists for and on behalf of *member congregations*.

That concept is naturally and properly reiterated in Bylaw 3.6.4, "The Lutheran Church Extension Fund—Missouri Synod…was established to further the objectives and duties of the church extension fund *within the Synod*…It is formed to provide financial resources and related services for ministry, witness, and outreach *of The Lutheran Church—Missouri Synod*. [emphasis added]" It is *within that framework* (i.e., "church extension *within the Synod*," providing "financial and related services for ministry, witness, and outreach *of [the Synod]*" [emphasis added]) that the LCEF assets "shall be used exclusively to provide financing and services for the acquisition of sites, for the construction of facilities, for the purchase of buildings and equipment, for operating expenses, for professional church worker education, for the residential housing needs of professional church workers, for promoting strategic ministry planning and assisting in capital campaigns; and for other purposes approved by its governing board consistent with the ministry and mission of the Synod under policies approved by the Board of Directors of the Synod." Finally, Bylaw 3.6.4.4.2 makes clear that the assets of LCEF (as to distribution of operating results) are for the exclusive use of LCMS "…member districts, congregations, and corporate Synod, as determined by its governing board." Thus, the third necessary part of this analysis—the relation, under the Bylaws, between the mission and ministry of the Synod and the scope of possible legitimately authorized operations of LCEF, especially as it regards the instant question—is concluded.

Because the church body in question is not "*within the Synod*" (Bylaw 3.6.4; CCM Op. 00-2189) or serving the "ministry, witness, and outreach *of* [*the Synod*]" (Bylaw 3.6.4.4.2; CCM Op. 13-2696), the commission, consistent with the cited opinions, finds that Synod's Bylaws prohibit LCEF funds being loaned to the church body or its congregations or other ministries. Only within said bounds, namely, *within the Synod* and serving the ministry, witness, and outreach *of the Synod*, is the Board of Directors able by policy to permit the "other uses" of LCEF assets described in Bylaw 3.6.4.4.1.

170. <u>Lutheran Church Extension Fund Canada Corporation</u> (23-3005)

By email dated February 14, counsel for the Lutheran Church Extension Fund—Missouri Synod (LCEF) submitted for the commission's review proposed Articles of Incorporation and Bylaws for The Lutheran Church Extension Fund—Missouri Synod Canada Corporation ("CanCorp"), which would be a Canadian not-for-profit corporation. The commission thanks the LCEF and its counsel for this submission, along with the detailed and thoughtful accompanying memorandum that was provided to the commission.

Prior to addressing the proposed articles and bylaws, there are several threshold matters that need to be addressed. These matters were not raised specifically by LCEF in the request; however, the commission has itself raised them as necessary matters to be determined before it is appropriate to review the proposed articles and bylaws.

<u>Background</u>: LCEF has been approached by both the English District and the Lutheran Church—Canada (LCC) to inquire if it would consider offering loans to congregations, other affiliated entities, and church workers of the English District in Canada and of LCC. (While the SELC District was not part of the request to LCEF, LCEF has indicated that if it were to make the requested loans, it would also make similar loans to congregations, affiliates, and church workers of the SELC District in Canada.) After consultation with U.S. and Canadian counsel, LCEF has determined that, if it were to provide such lending services, it would be simplest to utilize CanCorp rather than having LCEF itself register and qualify as a lender in various Canadian provinces and satisfy the requirements of Canadian tax law and nonprofit corporate law. (The

commission notes that LCEF itself would not be prohibited by any LCMS Bylaw from lending to members of the LCMS in Canada, cross-border regulatory and business issues notwithstanding.)

CanCorp is an existing nonprofit corporation (under the name "English District of The Lutheran Church—Missouri Synod") that is registered as a charitable organization with the Canada Revenue Agency (the Canadian equivalent of the IRS). Currently, all Canadian congregations of the English District are eligible to be members of CanCorp. If this process is followed, the name will change and LCEF will become the only member of CanCorp.

Question 1: Is the creation/conversion of CanCorp the creation of a new synodwide corporate entity under Bylaw 3.6.1.1?

Opinion: The commission is of the opinion that CanCorp would not be a new synodwide corporate entity. While a new/newly converted entity, CanCorp would not be, in essence, different than LCEF, the sole member of CanCorp. The functions CanCorp would be doing are the same as those given to LCEF under the Bylaws. LCEF would just be using CanCorp as an instrumentality that it determined is necessary or convenient for carrying out its charge under the Bylaws. However, this does not mean that CanCorp is not subject to the Bylaws (or that LCEF or any other agency can circumvent the requirements of the Bylaws by creating subsidiary entities). As an instrumentality of an agency of the Synod, it would be required to comply with the Synod's Constitution and Bylaws to the same extent as its parent, LCEF, is. (Cf. "The Articles of Incorporation and Bylaws of the new corporation shall provide that the Board, officers, and all employees and agents of the corporation, as well as the activities of the corporation, are subject to the Bylaws and resolutions adopted by the Synod in convention, and that all of their provisions as to the supervision or coordination of personnel or activities will be applicable to the new corporation to the same extent as if they were directly those of the new corporation." Synod Board of Directors Policy 6.12.1.3, "Approval of New Corporations as Agencies of the Synod," [d]; policy pursuant to 1981 Res. 5-07)

Question 2: Would CanCorp be able to make loans to Lutheran Church—Canada (inclusive of its congregations, other affiliated entities, and church workers)?

Opinion: This question is essentially the same as the question asked in Op. 23-3003. The only distinction is that LCC is in altar and pulpit fellowship with Synod—and indeed, LCC, along with partner churches in Brazil and Argentina were once part of Synod—whereas the church body of Op. 23-3003 is not. LCC is now, however, an established, independent partner church. The noted distinction is therefore without a difference. Being no longer "within the Synod," LCC and its congregations, other affiliated entities, and church workers as such are no longer within the scope of lending activity permitted to LCEF under Bylaw 3.6.4.

Question 3: Would CanCorp be able to provide "district support functions" to the English District?

Opinion: The memorandum accompanying the request states that the English District would like to continue to work with CanCorp "to facilitate the support of its Canadian congregations." It is not specified within the memorandum what such support functions entail. If such support functions are limited to providing financial resources and related services, then that would not be problematic as that is LCEF's purpose under Bylaw 3.6.4. If such support functions encompass activities beyond providing financial resources and related services, then that would be beyond LCEF's scope and would not be permissible. Further information is needed from LCEF on this point before a decision can be rendered.

Review of Proposed Articles

With respect to the proposed articles, the commission notes the following:

- CanCorp Special Provision (a) provides that LCEF, as the sole member, would have no right with respect to the assets of CanCorp. This is potentially problematic because, as discussed above, CanCorp is really an instrumentality of LCEF. However, this Special Provision would have the effect of converting any LCEF assets given to CanCorp to assets that LCEF would no longer have

a right to or access to (particularly in connection with the dissolution provisions discussed below). Such irrevocable changing of the character of assets is more akin to creation of a new synodwide corporate entity rather than an instrumentality of LCEF. It is the commission's understanding from the memorandum accompanying the request that LCEF would principally, aside from minimal inputs to facilitate basic operations of CanCorp, make loans to CanCorp, rather than contributing assets irrevocably to CanCorp as its sole member. Such loan structure would allow LCEF to retain rights to such assets (since they would contractually need to be repaid). If this structure is used, the commission does not think it would cause issues with allowing this arrangement to move forward. However, the commission would like to see such a restriction either in CanCorp's bylaws or in LCEF's bylaws.

- CanCorp Special Provision (g) is in conflict with Bylaw 1.5.3.6 (b)(2). As a corporation formed by an agency, either (1) CanCorp's governing documents need to include that upon dissolution its assets go to LCEF (as the parent agency) or to the Synod if LCEF is not then in existence or (2) LCEF must obtain Synod Board of Directors permission to exclude or modify such dissolution provisions. Unless and until LCEF obtains such permission from the Board of Directors, CanCorp Special Provision (g) would need to be revised to comport with option (1) in the preceding sentence.
- Similarly, Bylaw 1.5.3.6 (a) provides that CanCorp's governing documents must either (1) include provisions that its governing documents are subject to the provisions of the Constitution, the Bylaws and resolutions of Synod in convention, or (2) LCEF must obtain Synod Board of Directors permission to exclude or modify such provisions. Unless and until LCEF obtains such permission from the Board of Directors, CanCorp's articles would need to be revised to comport with option (1) in the preceding sentence.

Review of Proposed Bylaws

With respect to the proposed bylaws, the commission noted the following:

- For CanCorp Bylaw 2.01, similar to the discussion above regarding the articles, either (1) CanCorp Bylaw 2.01 must be revised to delete the introductory clause thereof (starting with "To the extent permissible…"), or (2) LCEF must obtain Synod Board of Directors permission to exclude or modify such provisions. In the memorandum accompanying its request, LCEF argues that a clause such as the introductory clause is inherent in all statements of subordination, whether expressly included or not. This argument proves too much and if followed, would render the final paragraph of Bylaw 1.5.3.6 a nullity, which is an approach the commission simply cannot accept. The intent of Bylaw 1.5.3.6 is that an agency's governing documents contain these provisions in unqualified language. Either this must be done, or the Board of Directors must be petitioned for an exception.
- CanCorp Bylaw 3.01 provides for the appointment of additional members by the membership. LCEF has assured the commission that LCEF, which is intended to be the sole member shortly after revision of the documents, intends to appoint no further members. The purpose for this allowance of further appointments is therefore unclear and contrary to Synod BOD Policy 6.12.1.3 (b), which allows for no further membership beyond the forming entity as the "sole member."
- For CanCorp Bylaw Articles 4, 5, and 6, as discussed in the opinion relating to Question 1 above, an agency cannot use a subsidiary to circumvent the requirements of the Bylaws. Were CanCorp to be *managed* by its sole member, LCEF, then requirements under the Bylaws related to an agency's board would not be applicable (since there would not be one, and any action taken by the subsidiary would need to be directed by the agency, which would act through its governing documents in accordance with the Bylaws). However, having chosen to include a board here, then the requirements of Bylaws related to an agency's (and specifically, LCEF's) board cannot be avoided. With that understanding, there are a number of provisions in the Bylaws that would need to be addressed in CanCorp's Bylaws:
    - Bylaw 3.6.4.3 provides that three directors of the LCEF board shall be elected by Synod in convention and include one ordained or commissioned minister and two laypersons, the

remaining voting directors shall be chosen by the members of LCEF, and the Chief Financial Officer of the Synod shall serve as a nonvoting member of the board. Here, to avoid circumventing Bylaw requirements as discussed above, CanCorp's board should have three members elected by the Synod in convention (and include one ordained or commissioned minister and two laypersons), the remaining voting directors chosen by the members of LCEF, and the Chief Financial Officer of the Synod serving as a nonvoting member of the board. (See CanCorp bylaw 5.01 and would also impact the ability to have a staggered board under CanCorp bylaws 5.02 and 5.05.) As the "cloning" of the LCEF board for CanCorp does not seem to be a realistic solution, the fundamental governance relationship of LCEF and CanCorp needs to be revisited to ensure the control appropriate to an agency of an agency.

  - Bylaw 3.6.1.8(a) requires that every member of the governing board shall be a member of a congregation of the Synod. This requirement is not explicitly in the "Qualifications" of board members provision in CanCorp bylaw 4.03. Instead, CanCorp bylaw 5.06 (on nominations of directors) requires that each candidate for the board be a member of a congregation of the Synod. It appears to the commission that the intent was that any vacancy in the CanCorp board (whether initial, following expiration of a term, following removal or following resignation) be filled through election where the nomination provision would be applicable (hence resulting in all directors being members of congregations of the Synod). LCEF may wish to make those connections clearer in the CanCorp bylaws, perhaps by using cross-references to CanCorp bylaw 5.06.
  - Also for requirements of board members, Bylaw 3.6.4.3.2 requires that all board members have an understanding of the church extension program and/or have expertise in related fields. No such similar requirement is included in the CanCorp bylaws.
  - Bylaw 3.6.4.3.1 provides that board members elected by the members of LCEF may be removed by a 2/3 vote of the board for cause. CanCorp bylaw 4.05(a) permits removal for any reason (not just for cause) by a simple majority of the members.
  - Bylaw 3.6.4.3 imposes a maximum term limit for directors of four 3-year terms, whereas CanCorp Bylaw 5.04 allows for unlimited terms.
  - Bylaw 1.5.3 requires meetings at least quarterly, whereas CanCorp Bylaw 6.03 only requires one meeting per year.

- It is unclear to the commission why the President of the English District and the LCEF Vice President for the English District are afforded special rights (e.g., CanCorp bylaws 6.04 and 7.05). Perhaps this is because CanCorp would be the same entity (with a new name) as the existing English District entity in Canada. While not violative of the Bylaws, LCEF may want to review those provisions and determine if such special rights should be retained (and if so, whether they should be extended to similar positions related to the SELC District, which also has congregations in Canada).
- Under CanCorp Bylaw 8.01, the CanCorp board has broad discretion in making policies, being limited only by applicable law and the CanCorp Bylaws. However, as an agency of the Synod, it should be subject to the Synod's Constitution and Bylaws and resolutions enacted by the Synod in convention (see, e.g., Bylaw 3.6.1.8 [b]).
- Additionally, CanCorp Bylaw 8.01 gives the CanCorp board authority to institute policies with respect to conflicts of interest "in consultation with" the Synod. However, Bylaw 1.5.2 requires every agency of the Synod to implement the synodwide conflict of interest policy, so the CanCorp board would not have discretion there, whether or not the Synod was "consulted" with (see also CanCorp Bylaw 11.01).
- With respect to CanCorp Bylaw 9.01(a)(i), to the extent (as discussed below with respect to CanCorp Bylaw 9.02) the Chair of the Board is really the chief executive of the agency, then Bylaw 1.5.1.1 would prohibit that person from serving on the CanCorp board as well.

- Under CanCorp Bylaw 9.02, the "Chair of the Board" appears to the commission to be the chief executive officer of CanCorp (rather than just being the presiding director at meetings of the board). Under Bylaw 3.6.1.5, the President of the Synod has a role in making those appointments, which would need to be included in the CanCorp bylaws.
- CanCorp Bylaws 10.01 and 10.02 appear to be amalgamations of Bylaws 1.5.3.3 and 1.5.3.4. CanCorp Bylaw 10.03 makes clear that these Standing Committees and Ad Hoc Committees may have non-board members. In order for a committee to have non-board members, under Bylaw 1.5.3.4, those individuals must be specialists providing professional or technical assistance to the board. And while Bylaw 1.5.3.4 does allow for delegation to such committees, the board must retain supervision of that committee. Such committees shall also be reported to the President and Board of Directors of the Synod.
- Under CanCorp Bylaws 18.01 and 18.03, the CanCorp Bylaws and any future amendments are effective upon passage by the CanCorp board. However, Bylaw 3.6.1.7 requires that prior to becoming effective, all governing documents must be approved by the Board of Directors of the Synod and by the commission (see also Bylaw 3.6.1.8 [c], which imposes additional requirements on amendments affecting certain subject matters). CanCorp Bylaw 18.02 provides that amendments to the CanCorp articles may only be amended "in consultation with" the Synod. The commission is of the opinion that mere consultation is not sufficient for Synod's role in amendments. Consultation is the act of conferring or discussing with. It does not imply or bestow any authority on the person being consulted with (see, e.g., Bylaw 3.6.1.5 where it clearly draws a distinction between "consultation with" and "with the mutual concurrence of"). The Bylaws, however, provide for a greater role for the Synod. The Synod is given the power to accept or reject. An agency is not free to unilaterally disregard the decisions of the Synod. Similar changes regarding amendments would need to be made to Section 5 of the CanCorp Articles.
- CanCorp Bylaws do not contain the language required by Board of Directors Policy 6.2.1.3 [f] (which is pursuant to 1981 Res. 5-07), stating that "The Bylaws of the corporation shall provide that minutes of its Board of Directors or other governing board, and regular independently audited financial statements, shall be promptly furnished to the Board of Directors of [the member]. The Bylaws of the district, seminary, college, university, or other corporation of the Synod shall require its Board of Directors to review and to appropriately respond to the content of those minutes and financial statements."
- The commission notes that CanCorp Bylaw 19.01 should entirely repeal and replace the prior bylaws, not just to the extent they are inconsistent. If the repealing and replacing are only limited to prior bylaws that are inconsistent, there could be prior bylaws that are not inconsistent (such as those that address areas not covered by these bylaws) that are still effective and would therefore need to be reviewed and approved in light of the changes being proposed.

The commission appreciates the difficulties inherent in trying to operate across national boundaries. However, it is not the commission's task to evaluate whether something is a good idea or should be permissible; instead, the commission is to evaluate the request in light of the Bylaws as they currently stand. As it currently stands, the commission cannot approve the proposed CanCorp Articles and Bylaws.

171. University Board of Regents Unilateral Separation (23-3006)

The Board of Directors of the Synod has submitted a series of ten questions related to actions taken November 8, 2022, by the Board of Regents of Concordia University Texas (CTX), requesting an opinion from the Commission on Constitutional Matters. In conjunction with Bylaw 3.9.2.2 (b) the commission invited input from the President of the Synod, the Synod Board of Directors, the Concordia University System (CUS) Board of Directors, the Boards of Regents of all CUS Universities, Dr. Dean Wenthe, president of CUS, and Mr. Matthew Buesching (LCMS Counsel).

Before specifically addressing the questions submitted, the commission deems it necessary to provide as background a summary overview of the pertinent sections of the Constitution and Bylaws of the Synod

pertaining to the Synod Board of Directors, agencies of the Synod, and universities of the Synod, which apply to the questions submitted.

Summary Overview of Pertinent Sections of the Constitution and Bylaws Regarding the Synod Board of Directors, Agencies of the Synod, and Universities

Synod Board of Directors

Article XI E 2 identifies the Synod Board of Directors as "the legal representative and custodian of all the property of The Lutheran Church—Missouri Synod, directly or by delegation of such authority to an agency of the Synod." The Synod Board of Directors exercises "supervision over all property and business affairs" of the Synod "except in those areas where it has delegated such authority to an agency of the Synod or where the voting members of the Synod through the adoption of bylaws or other convention action have assigned specific areas to separate corporate or trust entities," and regarding these the Synod Board of Directors has "general oversight responsibility as set forth in the Bylaws."

Bylaw 1.2.1 (r) in relevant part defines the property of the Synod as "all assets, real or personal, tangible or intangible whether situated in the United States or elsewhere, titled or held in the name of corporate Synod, its nominee, or an agency of the Synod."

The Synod Board of Directors is the "legal representative" of the Synod and the "custodian of all property of the Synod." It is responsible for "the general management and supervision of the business affairs of the Synod except where management authority and duties have been delegated" to, here, an agency "by the Articles of Incorporation, Constitution, Bylaws of the Synod, or by resolution of a convention of the Synod." (Bylaw 1.4.4) When authorized by the Bylaws, an agency, to which this authority was delegated by this provision, is entrusted with the management and business affairs of the Synod "to the extent of its jurisdiction."

Bylaw 3.3.4.3 assigns to the Synod Board of Directors the responsibility to provide for "review and coordination of the policies and directives of the Synod authorized by the Constitution, Bylaws, and resolutions of the Synod, evaluating plans and policies and communicating to the appropriate boards and commissions suggestions for improvement…"

Bylaw 3.3.4.4 gives the Synod Board of Directors responsibility for the "general management of the business and legal affairs of the Synod." It is "authorized to take action on behalf of the Synod related to business and legal affairs which has not been expressly delegated by the Constitution, Bylaws, and resolutions of the Synod to other officers or agencies of the Synod," and to those it has "general oversight." Bylaw 3.3.4.7 designates the Synod Board of Directors as the custodian of all property of the Synod as defined in Bylaw 1.2.1 (r). However, it may delegate these powers to any agency of the Synod that has direct supervisory responsibility of that property.

Bylaw 3.3.4.10 authorizes the Synod Board of Directors to obtain from any agency of the Synod all records and other information relative to the property of the Synod and to matters over which the Board of Directors has general oversight.

Agencies

In the structure of the Synod an agency is defined in Bylaw 1.2.1 (a), which defines an agency as "any instrumentality other than a congregation or corporate Synod…caused or authorized to be formed" by the Synod in convention or by the Synod Board of Directors. A listing of agencies then follows, specifically including every board and university of the Synod.

Bylaw 1.4.1 states that Synod's delegate convention is "the legislative assembly" of the Synod, which alone "ultimately legislates policy, program, and financial direction" for the work of the Synod. It "reserves to itself the right to give direction to all officers and agencies of the Synod." Unless explicitly indicated in the Bylaws, all officers and agencies are "accountable to the Synod for all their actions." Bylaw 1.4.3 states

that "Officers of the Synod and its agencies serve in accordance with duties assigned to them or otherwise authorized by the Constitution and appropriate bylaws."

Because agencies were caused or authorized by the Synod, are given direction by the Synod via its Constitution, Bylaws, and Resolutions, and are accountable to the Synod, every agency is bound by the Constitution, Bylaws, and Resolutions of the Synod (Bylaw 1.4.5). An agency does not have authority to amend or alter the Bylaws of the Synod or the applicability of the requirements of the same to itself. Only a delegate convention of the Synod has authority to amend the Bylaws (Article XIV). Therefore, any action taken by an agency which contradicts the Constitution, Bylaws, or resolutions of the Synod is null and void, as is specifically stated in CCM opinion 05-2439 (from Question 2) "… any action or resolution by any officer, board, commission, district, or other agency of the Synod that is in violation of the Synod's Constitution and Bylaws is null and void."

Bylaw 1.5.2 requires all members of boards or commissions of every agency to avoid conflicts of interest as described in the Bylaw. Bylaw 1.5.2 (b) states that all board members of an agency must carry out their responsibilities "in a manner reflecting the highest degree of integrity and honesty consistent with the Scriptures, Lutheran Confessions, Constitution, Bylaws, and resolutions of the Synod…" Board members of an agency shall not enter into activities that "may be detrimental to the interests of the Synod." Inappropriate activity, if it does not cease, is a cause for removal. Bylaw 1.5.2 (c) requires that prior to accepting a position, all elected and appointed board members of an agency must sign a statement that they have received, understand, and agree to abide by this provision. Bylaw 1.5.7 describes the causes of and process for removal from membership on a board or commission, with a breach of fiduciary duty regarding responsibilities to the Synod or agency included among the causes for removal.

Universities as Agencies of the Synod

The Constitution, Bylaws and resolutions of the Synod are directly applicable and binding on all universities of the Synod, as agencies of the Synod (Bylaw 1.2.1 [a]), and to the boards of regents governing them. The confessional position of the Synod as stated in Article II, namely and without reservation, the Scriptures as the Word of God and the Lutheran Confessions as a true and unadulterated statement and exposition thereof, is applicable and binding on the entire Synod, which includes all its agencies, as well as the individual and congregational members of the Synod. Article III lists among objectives of the Synod the training of professional church workers (Const. Art. III 3) and the support of *synodical* colleges and universities (Const. Art. III 5) *subject to the Scripture and Lutheran Confessions*. The Synod's universities have been formed and incorporated into the Synod to serve these fundamental ecclesial purposes. (The formation of what would become Concordia University Texas was directed by resolution of the Synod Convention in 1923 [*Proceedings*, p. 30].) Constitutional and Bylaw provisions dealing with governance of the institutions—including the assignment of ecclesiastical supervision and oversight to responsible officers and the entrusting of institutional governance to the regents, jointly and severally, acting as fiduciaries of the Synod—are intended to preserve for the ministry and mission of the Synod the institutions that the member congregations, acting through the Synod, have created, sustained, and relied on (Bylaw 1.1.1 [b]).

A university which wishes to change its articles of incorporation (by amendment or restatement) or its bylaws is required to receive advance approval from the Commission on Constitutional Matters of the Synod (Bylaw 3.9.2.2.3 [a]). Failure to do so makes such a change null and void—as it has been adopted contrary to the Bylaws of the Synod, to which every agency is bound—and unable to be put into practice.

The Bylaws of the Synod prescribe membership of the board of regents, how members are elected or appointed, their term of office, and maximum number of consecutive terms an individual may serve (Bylaw 3.10.6.2). The only way by which any of these requirements prescribed in the Bylaws can be changed is by action of a delegate convention of the Synod amending the Bylaws of the Synod, since a delegate convention of the Synod is the sole legislative body of the Synod, and it alone has authority to change the Bylaws (Article XIV). Should an agency make any change to its Bylaws that violate the Bylaws of the Synod, such changes are null and void, as the Bylaws of the Synod control and supersede (Bylaws 1.4.3,

1.4.5, 1.5.2 [b], 1.5.3.6, etc.). Such a change could only be enacted if a future delegate convention of the Synod amended the Synod's Bylaws.

The members of the board of regents of a Synod university, who have signed a statement prior to taking office affirming they have received, understand, and agree to abide by the conflict of interest provisions of Bylaw 1.5.2, are required to operate the institution "as an agent of the Synod, in which ownership is primarily vested, and which exercises its ownership through the Board of Directors as the custodian the Synod's property" and then through "the Board of Directors of Concordia University System" and, finally, through "the respective board of regents." In operating the institution, the university board of regents is to "carefully exercise its fiduciary duty to the Synod." (Bylaws 3.10.6.4 [i] and 3.10.6.4 [i][1]) While the university board of regents does have ultimate responsibility and independence in operating the institution, it always remains subject to the pre-established Bylaws of the Synod (Bylaw 3.10.6.5).

The Bylaws of the Synod provide a specific procedure for the consolidation, relocation, separation, or divestment of a university (Bylaw 3.6.6.4 [i]), which does not allow a university to unilaterally separate itself from the Synod, or declare itself to be independent of the Synod. According to this prescribed procedure for a university to be divested it requires a two-thirds vote of approval by the Synod Board of Directors, along with the approval by two-thirds vote of one of the following three: the Council of Presidents, the board of regents of that university, or the Concordia University System Board of Directors.

Should such an action (separation or divestiture) be taken as prescribed in Bylaw 3.6.6.4 (i), the result would be that the university now separated or divested would no longer be an agency of the Synod, which in turn would have several repercussions. Some of these would include the loss of functions exclusively reserved to "colleges and universities *of the Synod,*" under its forms of ecclesiastical governance and ecclesiastical supervision:

- Graduates from the university or those satisfactorily completing an approved program would no longer be eligible to receive a call or be eligible for individual membership in the Synod as commissioned ministers. (Bylaws 2.7.1–3; 2.8; 2.9)
- Those individual members of the Synod, (commissioned or ordained) currently serving the university would no longer be eligible to be classified as active members of the Synod (Bylaw 2.11.1). If such individuals wished to continue as individual members of the Synod, they would need to apply for candidate status or if qualified for emeritus status. (Bylaws 2.11.2; 2.11.2.1; 2.11.2.2)
- The university would no longer be eligible for advisory representation at conventions of the Synod under Bylaw 3.1.4.2 (a).
- Finally, the university would no longer be entitled to participate in those services offered by the synodwide corporate entities, which are reserved to agencies of the Synod.

Questions Submitted

Question 1: Does a board of regents of a university of the Synod have authority to unilaterally change its governance model from that described in Synod Bylaw 3.10.6 (modifying the means of appointment of its board of regents, for example)?

Opinion: No. It is only a delegate convention of the Synod that, as the legislative body of the Synod, has authority to amend the Bylaws of the Synod (Article XIV) or the Constitution of the Synod (Article XV). Until such an action by a delegate convention of the Synod takes place, the members of a university board of regents have no authority or ability to change the governance model of Bylaw 3.10.6—which, as noted above, exists in the ultimate interest of furthering the Synod's ecclesial purposes—remains binding on any university of the Synod. Unless a university were to be separated or divested by the Synod under Bylaw 3.6.6.4 (i), any such changes by a board of regents to the governance model described in Bylaw subsection 3.10.6 would be null and void, and the Synod would continue to operate according to the Bylaws as adopted by the convention and published in the *Handbook* in all areas including elections and

membership on the board of regents. Individual regents act outside their authority and contrary to their individual fiduciary duties to the Synod when they affirm such an action (Bylaws 1.5.2 [b] and [b][1]; 3.10.6.4 [i] and [i][1–2]).

Question 2: Does a board of regents of a university of the Synod have authority to amend its articles or bylaws without the prior approval described in Synod Bylaw 3.9.2.2.3 (a)?

Opinion: No. As an agency of the Synod, the board of regents of a university of the Synod may only amend its bylaws or articles of incorporation with prior approval of the Commission on Constitutional Matters of the Synod. Any such change made without that approval would be null and void (Bylaw 3.9.2.2.3 [a]). If such a proposed change to the articles or bylaws of the university were contrary to the Constitution and Bylaws of the Synod as then current, the commission would be required to reject such change. Outside the convention itself, the commission has the sole authority to interpret the Constitution, Bylaws, and resolutions of the Synod and has no authority to alter or waive their requirements (Bylaw 3.9.2).

Question 3: Does a board of regents of a university of the Synod have an obligation to comply with the Constitution and Bylaws of the Synod, including without limitation Article II and Article III of the Constitution, when operating and managing and taking action on behalf of the university, including an action purporting to separate the university from the Synod?

Opinion: Yes. The Constitution in all its articles, the Bylaws, and the resolutions of the Synod are binding on all agencies of the Synod, which includes every university. A board of regents of a university of the Synod operates the university as a fiduciary and an agent of the Synod, which includes being faithful to the confessional position (Article II) and the Objectives of the Synod (Article III) and faithfully maintaining and adhering to the model of governance set forth by the Synod (Bylaw 3.10.6.4 [i][1–2]). Ownership of the university remains primarily invested in the Synod, and is exercised first through the Synod's Board of Directors, which is the custodian of all property of the Synod, then through the CUS Board, and finally through the board of regents, operating with the authority set forth for it in the Bylaws of the Synod. In operating the institution as an agent of the Synod, a board of regents of a university and its members are bound to carefully exercise its fiduciary duty to the Synod. (Bylaws 3.10.6.4 [i] and 3.10.6.4 [i][1]) If a university board of regents were convinced that it was in the best interest of both the Synod and that institution for the institution to be divested or separated from the Synod, then it would be obligated to follow the process detailed in Bylaw 3.6.6.4 (i) and to submit to its conclusion.

Question 4: Do individual members of a Synod university board of regents have a duty to comply with the Constitution and Bylaws of the Synod, including without limitation Article II and Article III of the Constitution, when operating and managing and taking action on behalf of the university, including an action purporting to separate the university from the Synod?

Opinion: Yes. Constitutional and Bylaw provisions dealing with governance of the institutions—including the assignment of ecclesiastical supervision and oversight to responsible officers and the entrusting of institutional governance to the regents, jointly and severally, acting as fiduciaries of the Synod—are intended to preserve for the ministry and mission of the Synod the institutions that the member congregations, acting through the Synod, have created, sustained, and relied on (Bylaw 1.1.1 [b]). Any noncompliance with these provisions on the part of a board of regents or individual regent is therefore *not in the interest of the Synod*. Bylaw 1.5.2 (b) and (b)(1) require that every board member of every agency of the Synod shall, when operating and managing and taking action on behalf of such agency (in this case, the university), carry out responsibilities in a manner "reflecting the highest degree of integrity and honesty consistent with the Scriptures, the Lutheran Confessions, the Constitution, Bylaws, and resolutions of the Synod," and shall act consistently *in the interest of the Synod*. "Any inappropriate activity shall cease or the position will be vacated." (Bylaw 1.5.2 [b][1]) As a board of the Synod (Bylaw 3.2.2 [6]), a board of regents, which has been given authority to manage the university on behalf of the Synod, has a direct, "fiduciary" responsibility *to the Synod*, which is to be exercised carefully (Bylaw 3.10.6.4 [i][1]). Bylaw 1.5.1.3 requires each member of a board be sensitive in all activities to avoid "taking or giving offense,

giving the appearance of impropriety, causing confusion in the Synod, or creating potential liability." Regarding separating or divesting the university from the Synod, see the answer above.

Question 5: Is a university of the Synod and its board of regents an eligible party subject to the Dispute Resolution Process set forth in Synod Bylaw 1.10?

Opinion: Yes. Agencies of the Synod are included in those to whom the Dispute Resolution Process applies. (Bylaw 1.10.3)

Question 6: Assuming a university of the Synod and its board of regents are eligible parties to the Dispute Resolution process set forth in Synod Bylaw 1.10, does the Dispute Resolution process apply to a dispute between the Synod (or its President or Board of Directors) and a board of regents regarding that board of regents unilaterally amending or modifying its governance documents, and regarding whether the action of the board of regents is within the authority granted to it under the Constitution and Bylaws of the Synod?

Opinion: Essentially, no. The fundamental material question of whether a Synod university has the authority to unilaterally change its governance from that prescribed in the Constitution, Bylaws,and resolutions of the Synod, since such a question pertains fundamentally not to the presenting fact situation but to the interpretation and meaning of the Constitution, Bylaws, and resolutions of the Synod, is outside of the authority of the Dispute Resolution Process to arbitrate or adjudicate, as stated in the Bylaws. Authority to interpret the Constitution, Bylaws, and Resolutions of the Synod is specifically given by the Bylaws only to the Synod's Commission on Constitutional Matters (Bylaw 3.9.2.2). Any Dispute Resolution Process is subject in all its aspects to "Holy Scripture, the Lutheran Confessions, and the Constitution and Bylaws of the Synod" (Bylaw 1.10.18). As to the Constitution and Bylaws of the Synod, opinions of this commission are finally dispositive of any questions as to their interpretation that arise during a Dispute Resolution Process (Bylaw 1.10.18 [h], [h][1]). While the question of whether a board of regents has the authority described is thus finally resolved by this commission's interpretation of the Constitution and Bylaws in the negative, this is not to foreclose the applicability of the Dispute Resolution Process to disagreements or disputes, related to or arising out of this action, as may apply to the board of regents as a whole or to individual regents as "members of congregations of the Synod elected or appointed to positions with…an agency of the Synod" (Bylaw 1.10.2 [5]).

Question 7: Assuming that the noted parties and issue would be subject to the Dispute Resolution Process, would the outcome of the process, presuming that it is consistent with the Constitution, Bylaws, and resolution of the Synod, be binding on the parties involved.

Opinion: The Constitution and Bylaws of the Synod are of themselves generally, and as to the central material question noted above in particular, already binding on both the parties and on the outcome of any Dispute Resolution Process, as explained above. As to other aspects of related disagreements or disputes, the outcome of any Dispute Resolution Process, provided it is consistent with "Holy Scripture, the Lutheran Confessions, and the Constitution and Bylaws of the Synod" (Bylaw 1.10.18), would be binding on the parties.

Question 8: Can a university of the Synod and its Board of Regents avoid the Dispute Resolution Process set forth in Synod Bylaw 1.10 by taking unilateral action purporting to separate the university from the Synod (cf. Synod Bylaw 1.10.2)?

Opinion: No. "No person, congregation, *or agency* to whom or to which the provisions of this dispute resolution process are applicable because of their membership in the Synod may render this procedure inapplicable by terminating that membership during the course of the dispute resolution process" (Bylaw 1.10.2).

Question 9: What is the nature and scope of a board of regents' *fiduciary* duties to the Synod as stated in Synod Bylaw 3.10.6.4 (i)(1)? Are these fiduciary duties solely secular duties or do these

fiduciary duties also encompass operating and managing the institution as a fiduciary and an agent of the Synod in a manner consistent with Constitution and Bylaws of the Synod, including without limitation Article II and Article III of the Constitution?

Opinion: The term *fiduciary* is a commonly used legal term of art. *Black's Law Dictionary* (11th Ed.) offers two definitions, both of which inform the use of the term to describe the duties regents owe *to the ecclesial Synod*. A *fiduciary* is: "1. Someone who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another the duties of good faith, loyalty, due care, and disclosure. 2. Someone who must exercise a high standard of care in managing another's money or property." The commission finds that these common definitions are included within but may not exhaust the sense of "fiduciary duty" that may be inferred from the immediate context of Bylaw 3.10.6.4 (i)(1). More specifically, the context in Bylaws 3.10.6, 3.10.6.1, and 3.10.6.4 provides, without exhausting the full scope of said "fiduciary duties to the Synod," some particular aspects of the responsibilities regents owe the Synod in governing the respective institution in a manner that is faithful to the confession of the Synod (Const. Art. II) and fulfills its objectives (Const. Art. III; Bylaw 3.10.6.1). The fiduciary duties expected of regents are thus not purely secular but involve the comprehensive stewardship of the institution in the ecclesial interest of the Synod, which has put them in place to govern. Governing the institution as a "fiduciary" or "agent of the [ecclesiastical] Synod, in which ownership is primarily vested" (Bylaw 3.10.6.4 [i][1]) and, indeed, as a "governing board of the Synod" (Bylaw 3.2.2), they owe duties of "good faith, loyalty, due care, and disclosure" and a "high standard of care" to maintain the institution in faithfulness to the Synod's confession (Const. Art. II); in fruitfulness with regard to the accomplishment of the Synod's objectives (Const. Art. III and relevant Bylaws, resolutions, and policies, as such pertain to the operation of a Synod university); and consistent in every respect with the governance model Synod has set forth to assure the institution operates in its ecclesial interests (see above, "Universities as Agencies of the Synod" and Opinion to Question 4).

Question 10: If a board of regents of a university of the Synod fails to carry out or breaches its fiduciary duties to the Synod as required in Synod Bylaw 3.10.6.4(i)(1), who or what body, within the Synod, has the authority and responsibility to take action to address and correct the breach of fiduciary duty, including proceeding under the Dispute Resolution Process or, if appropriate, taking action in secular court?

Opinion: Bylaw 3.3.1.1.1 assigns ecclesiastical supervision of all officers of the Synod and its agencies to the President of the Synod. Bylaw 3.3.1.1.1 (c) gives the President the responsibility and authority to exercise ecclesiastical supervision over the doctrine taught and practiced at the universities of the Synod.

Bylaw 3.3.1.2 assigns to the President of the Synod oversight of all the agencies of the Synod to ensure that these agencies are acting in accordance with the Constitution, Bylaws, and resolutions of the Synod. Specifically in regard to the educational institutions of the Synod, the President is charged to officially visit or cause to be visited all these institutions to exercise oversight over their administration relative to adhering to the Constitution, Bylaws, and Resolutions of the Synod (Bylaw 3.3.1.2 [a]).

If the President of the Synod determines there is a violation of the Constitution, Bylaws, and resolutions of the Synod, he may call up for review any such action and request that this action be altered or reversed. If the matter is not resolved, the President of the Synod shall refer the matter, as he deems appropriate to the issues and party/parties to the matter involved, to the Synod Board of Directors, the Commission on Constitutional Matters, or to a convention of the Synod. He is also required to report to the Synod those who are not acting in accordance with the Constitution, Bylaws, and Resolutions of the Synod. (Bylaw 3.3.1.2 [c])

The unauthorized separation of a university of the Synod (which is included in property of the Synod) from the Synod inherently involves a legal and property matter properly to be referred by the President (Bylaw 3.3.1.2 [c][2]) to the Board of Directors as the legal representative and custodian of the property of the

Synod (Article XI E 2), which then carries out its constitutional authority in the interest of the Synod. Any conflict or uncertainty in determining the authorities of the officers and agencies of the Synod in this respect is to be resolved as set forth in Articles of Incorporation, Article V. Referral by the President of the legal and property matters involved to the Board of Directors does not exclude the President's authority otherwise to exercise, or see to the exercise of, ecclesiastical supervision (Bylaw 1.2.1 [j]) or detract from "the President's constitutional duty to report to the Synod those who do not act in accordance with the Constitution and do not heed his admonition, as prescribed in Constitution Art. XI B 2" (Bylaw 3.3.1.2 [c][3]).

The commission has treated the approach that most naturally, in its opinion, followed from the question, but notes that its answer is not to exclude other processes possible under the Bylaws, including the process under Bylaw 1.5.7.1 or other Dispute Resolution Processes (Bylaw section 1.10) among eligible parties involved in the matter.

172. <u>Closing Prayer and Future Meetings</u>

The commission noted its upcoming meeting, planned tentatively for April 28–29, 2023, in which the principal business will be review of convention overtures, with any intervening urgent business to be handled by an internet conference. The commission will next meet thereafter in connection with Floor Committee Weekend, meeting on Thursday, June 8, and Friday, June 9 (in joint session with the Commission on Handbook in the morning), and then joining the floor committees through Monday, June 12, with some members being released Sunday. The commission will also meet Thursday, July 27, in Milwaukee and then join the convention through Noon on August 3.

John W. Sias, *Secretary*