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**AMICUS CURIAE BRIEF OF
THE PRESBYTERIAN LAY COMMITTEE**

**I.
STATEMENT OF INTEREST OF THE AMICUS CURIAE**

The Presbyterian Lay Committee (PLC) was established in 1965 to inform and equip Presbyterians regarding issues facing the denomination, and actively assists local congregations and members in their dealings with the regional and national entities within the Presbyterian Church (USA) (“PCUSA”). The PLC publishes the *Layman*, a monthly magazine that has maintained a circulation of more than 250,000, and operates *The Layman Online*, an Internet resource that records approximately 30,000 hits daily. The PLC also owns and operates *PLC Publications and Reformation Press*, a publishing house specializing in resource material on Reformed Theology. The PLC regularly reports on judicial decisions concerning church property issues and publishes a legal guide regarding disaffiliation and property issues: "*A Guide to Church Property Law: Theological, Constitutional and Practical Considerations.*"

The PLC has been asked by local churches to advocate on their behalf, representing their interests in church property litigation where misrepresentations or misunderstandings may adversely affect local church property rights. Here, the property rights of numerous PCUSA churches in Indiana will be adversely impacted if the lower court’s misapplication of law and misinterpretation of polity is affirmed.

The PLC is concerned that an oversimplification of church polity by courts, in general, will affect the rights of many, many churches other than the litigants and denomination involved in this property dispute. Consequently, the PLC advocates here on behalf of neutral principles of law fairly and equitably applied to all, regardless of denominational affiliation, and free from

improper entanglement in religious disputes in accord with the Constitutions of the United States and Indiana.

II. **SUMMARY OF THE ARGUMENT**

The Court of Appeals gave improper and unconstitutional deference to the Presbytery as a hierarchical body and allowed it to impose a trust over property it did not own. In doing so, it ignored the requirements for a legally cognizable trust in Indiana and imposed a trust based solely upon an non-owner's unilateral declaration of an interest in the property. The Court of Appeals misconstrued a decision of the U. S. Supreme Court and thus felt compelled to allow a disputed provision of a religious constitution to trump all other evidence of ownership, including documents of record such as the deed. The Court of Appeals' reliance upon documents outside the chain of title could result in hundreds of Indiana churches being divested of their title to property against their intent and will. The doubt cast upon their ownership by the decision below will also impede their ability to obtain financing and hinder the security interests of third parties. This Court should grant transfer and issue an opinion which properly applies the neutral principles of law approach.

III. **ARGUMENT**

1. Why the Case Should be Accepted for Review. There are thousands of churches and scores of denominations in Indiana. Each has its own unique polity, practices, traditions, and concepts of connectionalism. Virtually every one of those churches gathers its members for worship in a building owned and titled in the name of that local church body with ownership and succession contingencies individually set up to reflect the intentions and desires of the owner. While there has been certainty for the owners in this arrangement, the certainty of

that ownership has now been cast into doubt. The doubt is not due to any lack of specificity in title, but rather has been created by the Indiana Court of Appeals' illogical decision in the present case to elevate a non-owner's claim of a trust interest above that of the titled owner's legal interests.

Legal title to local Presbyterian church property is almost always held by the local church and in the name of the local church alone. Throughout its history in the United States, Presbyterianism has been marked by a multiplicity of regional and national organizations that have come and gone, and among which local congregations have chosen to affiliate entirely based upon the dictates of the conscience of the congregants. *See generally* Lunceford, *A Guide to Church Property Law* 2d. The imposition of a trust upon church property, by operation of law, against the express desires of the members of the entity which actually holds legal title to that property fundamentally and unfairly restricts substantial rights of the Presbyterian citizens of this state.

The PLC is concerned that the Court of Appeals misconstrued the neutral principles of law approach and rendered a decision which improperly recognizes an unconstitutional and *de facto* form of "hierarchical deference." In any event, that decision does not reflect the intent of the parties, contradicts Indiana's traditional neutral principles approach to church property disputes, and does not reflect Indiana trust law.

Speaking on behalf of churches which stand to be adversely impacted by the over-arching interpretation of trust law and polity interpretation, we urge the Supreme Court of Indiana to accept this case for review, examine the underlying principles, and make a proper pronouncement of law.

2. **Why the Case Should be Overturned: *Neutral Principles of Law Require a Finding that the Claimed Trust Interest Fails.*** Everyone agrees that “neutral principles of law” should govern the decision of this dispute. The question is what constitutes “neutral principles” and how should they be applied. The general rule is that ordinary indicia of ownership and trust elements should be examined without regard to ecclesiastical standing. Property law does not recognize an “ecclesiastical trust” as a different instrumentality – a trust is a trust, and should be created pursuant to normal means. Yet the court below found that a non-owner’s claim of a trust interest in property operated to divest the titled owner of the land of that interest based solely upon the denomination’s claim that it had that interest, irrespective of the owner’s desires. In giving dispositive credence to the denomination’s claim the Court of Appeals negated the doctrine of neutral principles and instituted a form of “denominational deference” of questionable constitutional validity.

Neutral principles avoid the situation where a court gives preference to one church faction over another based upon the court’s perception of how church entities are related. Neutral principles keep courts free from deferring to one party’s claim simply because that party is viewed by the court as “the church.” The problems of potential entanglement and improper preferential establishment are avoided by using standard civil law principles applicable to all, without regard to ecclesiastical status. Here, the Court of Appeals only gave credence to the presbytery’s over-reaching claim of a trust without applying standard evidentiary rules and legal methodology or analysis. Although it claimed it was applying neutral principles, even the most cursory review shows it merely deferred to the presbytery’s claim because it was perceived as the denomination, which the court below assumed was capable of claiming the property it never

bought. This approach, and the publication of the opinion, stands to divest hundreds of churches in Indiana of their property - against the will of the owners and intent of the local congregations.

3. The Court of Appeals Ignored Indiana’s Law Regarding the Creation of Trusts. Indiana recognizes two basic types of trusts – express and implied. An express trust is created by the affirmative acts of one or more parties to the trust and must be evidenced by a written instrument which either expressly or by plain implication demonstrates an intention to create a trust. 28 I.L.E. *Trusts* § 4. The material terms of the trust must be reasonably certain. Those terms must thus make clear the property embraced within the trust, identify the beneficiaries of the trust, the interests the beneficiaries are to have, and the manner in which the trust is to be performed. 28 I.L.E. *Trusts* § 12. The vague and general terms contained in the Book of Order fall far short of the requirements for an express trust in Indiana. *See infra*.

Logic dictates that unless the trust is created within a conveyance, the property to be held by the trustee must be transferred to the trustee by a legally sufficient conveyance. For real property, this generally requires the execution of a deed in trust by the creator of the trust. *See* Ind. Code § 32-21-1-1 *et seq.* regarding the basic requirements of a deed. This never occurred in this case.

An implied trust may either be a “resulting trust” designed to give effect to the parties’ intent when they failed to create a valid express trust or where one party pays the purchase price for property placed in another’s name or a “constructive trust” imposed as a matter of equity because the designated trustee has committed a wrongful act. 28 I.L.E. *Trusts* § 4. The Presbytery never requested the imposition of a resulting trust.

Without *any* analysis of Indiana trust law the Court of Appeals declared that

“notwithstanding the language of the deed” the language in the Book of Order was “clear and unambiguous” and that “all property held by entities of the PC(USA) is held in trust for the use and benefit of the PC(USA).” (Op. at 15). It then imposed a constructive trust upon the property in question without even considering whether there was any sort of wrongful act upon which such a trust could be based. Even though there was competing evidence of ownership and proof that the property in question had never actually be conveyed into a trust, the Court of Appeals allowed the purported beneficiary’s self declaration of ownership to trump all other evidence. Gone was the requirement of Indiana trust law for an express trust that there be evidence of intent with reasonable certainty; gone was the requirement that land subject to a trust be stated in a written instrument; and gone was the need for there be an actual conveyance of the property into a trust. Gone also was the requirement for a constructive trust that there be a wrongful act. The self-declared trust just “happened.”

The Court of Appeals sought to justify this deviation by citing to *Jones v Wolfe*, 443 U.S. 595 (1979), which, in dicta, postulated that national church charters could be amended to establish trusts. But the Court of Appeals overlooked the courts critical caveat that to be enforced the trust would need to be “embodied in some legally cognizable form.” *Id.* at 606. The U. S. Supreme Court did not set out to modify state law for trust creation, but did the opposite by recognizing the primacy of the existing state laws on “legally cognizable forms.” That begs two questions which the Court of Appeals failed to even address: “what constitutes a legally cognizable trust in Indiana and what documentation is necessary to convey property into that trust?”

Nowhere in the opinion below did the court assess whether the purported trust was in a form which would be recognized by Indiana courts or whether the property had ever been

transferred or conveyed into the purported trust. Instead, it applied circular logic. While stating it was applying neutral principles, the Court of Appeals bowed to a self-declaration of trust over property by a hierarchical entity that clearly did not hold title to that property, and simply assumed that the trust declared by the beneficiary was a valid trust because the *Jones v Wolfe* case said it would have to be to pass legal muster.

4. The Court of Appeals Incorrectly Utilized a Hybrid Implied Trust / Constructive Trust to Divest the Title Holder of Ownership. The Court of Appeals erroneously assumed the purported trust clause in the Book of Order was valid and, by doing so, overlooked the fact that its validity and enforceability was the main issue in dispute. Yet Presbyterian churches in dozens of states have been challenging the Book of Order clause as neither valid nor enforceable, arguing with much success that it did not reflect the intent of the property owner and was legally insufficient to bind the property. *See, for example: Hudson Presbyterian Church v. Eastminster Presbytery*, 2009 Ohio 446 (Ohio CA 9, 2009); *Christensen V. Rounfort*, 485 N.E.2d 270 (Ohio Ct. App. 1984); *Presbytery of Beaver-Butler v. Middlesex Presbyterian Church*, 489 A. 2d 1317 (pa. 1985); and *First Presbyterian Church of Schenectady v. United Presbyterian Church in the U.S.*, 464 N.E.2d 454 (N.Y. 1984); additional unreported decisions available upon request.

The Court of Appeals then went on to apply the “trust” as if it were a reverter, divesting the property owner of any and all rights in the property titled in its name. (Op. at p. 18). The neutral principles of law approach requires courts to apply the ordinary laws of property ownership and trust laws to determine ownership issues, reviewing neutral non-ecclesiastical evidence to see if the title to the property is in one party’s name or the other, or if it is imposed with a trust. The Court of Appeals bypassed traditional legal methodology.

Should the decision below stand, a precedent will have been established which would allow a court to imply a trust and divest title holder owner of property. This effects not only the obvious ownership interests of the landholder, but all who may have financial dealings with the landowner secured by that title. Any mortgage holder for church property is placed at risk by uncertainty of title. Obtaining loans will be complicated, all to the detriment of the various church entities, because of a potential cloud on title by virtue of their possible association with a denomination. Given that courts struggle with interpretation of denominational structures, passing that burden on to banking and commercial loan institutions will only aggravate the problems - all to the detriment of the local church. (Generally speaking - almost universally - it is the local churches which obtain loans, raise funds, and pay for their property; thus the burden of a more complicated loan process will be born by the local churches in the financing of property development, but the non-owner stands to gain).

Accepting review of this case presents an opportunity to avoid the adverse consequences created by the decision of the Court of Appeals.

5. The Court of Appeals Opinion Entangles Itself in Religious Practices. A troubling aspect of the Court of Appeals opinion is its entanglement of the court with church relations, interpreting the effect of Book of Order provisions on local churches, determining that the congregation, having been a part of the PCUSA, automatically was subject to the purported trust clause, even though the court acknowledged that “when [Olivet] purchased the property in 1968, neither the PC(USA), its Constitution, nor the Property Trust Clause existed.” (Op. at 15).

Relying upon the Book of Order to establish a legal trust over property contradicts a provision it contains which clearly indicates it is not to have civil law effect: “Governing bodies of the church are distinct from the government of the state and have no civil jurisdiction or

power to impose civil penalties. They have only ecclesiastical jurisdiction for the purpose of serving Jesus Christ...” (PCUSA Book of Order G-9.0102a). This limitation would seem to prevent an ecclesiastical entity from divesting a church from its property as a civil penalty. Yet the decision of the court below does precisely that. And in so doing it effectively establishes Presbyterian ecclesiastical law over civil law.

This precedent raises the specter of giving effect to ecclesiastical declarations of trust based upon interpretation of church laws (constitutionally questionable) and without ever examining the sufficiency of the legal elements ordinarily required to establish a trust. For this reason, a review of the case by this court is of the utmost importance.

6. The Neutral Principles of Law Correctly Applied. Although Indiana has previously adopted the neutral principles of law, the court below did not apply that test when it essentially ignored the deeds (which contain no trust language), state trust law, and articles of incorporation. Instead, the Court of Appeals misinterpreted neutral principles and *Jones* to give determining weight to the one paragraph in the PCUSA’s Book of Order, unbalanced against the contrary evidence. In doing so, the court below entangled itself in a dispute over the effect and reach of religious polity and ignored the deed language and other indicators of mutual intent, including the text of the denominational constitutions “scrutinized in purely secular terms.” *Jones*, 443 U.S. at 604.

In describing the doctrine of neutral principles Justice Brennan’s concurring opinion in *Maryland & Virginia Eldership of the Churches of God v. Sharpsburg Church of God, Inc.*, 396 U.S. 367 (1970) (adopted by the majority in *Jones*) explained how courts can resolve church property disputes without any involvement in matters of doctrine: “Under the ‘formal title’ doctrine, civil courts can determine ownership by studying deeds, reverter clauses, and general

state corporation laws." *Id.* at 370 (Brennan, J., concurring). Strict and neutral reliance on formal title, corporate structure, and explicit agreement by the title-holder of the type chargeable to any other property holder is in fact the only method of determining property disputes that is consistent with contemporary Establishment Clause jurisprudence.

Denominational governing documents are also to be examined, but are to be "scrutinized in purely secular terms." *Jones*, 443 U.S. at 604. As stated in that opinion, "the neutral principles of law method, properly understood and applied, looks to the mutual intention of the parties as ascertained by "well-established concepts of trust and property law," and "thereby promises to free civil courts completely from entanglement in questions of "religious polity." *Id.* at 603. The neutral principles approach "obviates entirely the need for an analysis or examination of ecclesiastical polity." *Id.* at 605.

Misreading other passages in *Jones*, however, the Court of Appeals held that a denomination may unilaterally assert a trust for its own benefit over property titled in the name of a local church organization, simply by declaring the trust in the general church canons or constitution. That contention snatches a twig from the *Jones* opinion without regard for the surrounding forest. The whole point of the neutral-principles analysis is that "the outcome of a church property dispute is not foreordained." *Id.* at 606. Rather than depending on the preference of a purported religious hierarchy, i.e. the "mode of church government," a property dispute would turn on the express intentions of the property owner as well as the body claiming spiritual supremacy. Indeed, in the relevant passages, *Jones* extolled a secular, neutral-principles approach for its "flexibility in ordering private rights and obligations to reflect the *intentions of the parties*" not just the preferences of an assertive hierarchy. *Id.* at 603 (emphasis added).

The Court in *Jones* explored ways in which "the *parties* can ensure, if *they* so desire, that the faction loyal to the hierarchical church will retain the church property." *Jones*, 443 U.S. at 606 (emphasis added). The *Jones* court did not fore-ordain an outcome, but postulated possibilities "if they [the parties - plural] so desire." Thus it was clearly the intent of *Jones* to give effect to the intended outcome of the parties, both of whom would be in assent, and not to give preference to one party's self-declared intent as to the outcome. By any logical reading, the parties would necessarily include the property owner as one of the parties whose intentions are to be given effect. And, whatever the parties decided to do, it would have to be "*embodied in some legally cognizable form.*" *Id.* at 606 (emphasis added). The Court did not suggest that such a recitation, made unilaterally by the purported beneficiary, could have legal effect irrespective of the operation of neutral principles of state law in contravention of the intent of the property owner. A statement by a purported beneficiary unilaterally asserting a trust in its own favor over the property of another legal owner is not "legally cognizable" under the principles applicable to trusts in general and is certainly not legally cognizable in Indiana.¹

The PCUSA's Book of Order contains a unilateral assertion of a trust over property not owned by the PCUSA (the purported settler). This is the same type of unilateral assertion found in the ECUSA, which is facing its own spate of litigation. (Other Presbyterian denominations, such as the PCA and EPC did not seek to insert some sort of property trust clause and have no problematical litigation over property rights). The unilateral trust clause was made after *Jones*

¹ By now, any religious organization that actually intends to hold its property in trust for some governing body has had nearly three decades to impress that property with an express trust. A denomination that actually had the power to control its affiliated congregations' property would have no difficulty instructing them to take that step. That a particular local congregation has not done so indicates that an asserted hierarchy does not have the power that it claims in litigation.

held that a church being "connectional" is not sufficient grounds to establish a trust. If the relationship between the local church and the denomination alone is insufficient to establish a property trust, then the document which the proponent of the trust claims establishes that trust must be scrutinized in the same manner as any other non-ecclesiastical entity's claim of trust. And in no instance would a non-ecclesiastical entity be permitted to claim that a self-declaration of a trust over property it did not own was sufficient to create a trust.

Imposition of a trust where there is no written signed trust document and the property owner has not transferred property into a trust and has expressed a disagreement over the validity of the claim is certainly contrary to the intended constitutional effect of *Jones v. Wolfe*, and hardly sufficient to justify a trust under Indiana law. Thus, by giving undue weight to the words of PCUSA's self-issued beneficial interest of G-8.0201, the Court of Appeals unwittingly reintroduced a form of denominational deference to Indiana jurisprudence that has otherwise long been abandoned, and directly contradicts the civil law requirements for trust creation applicable to all citizens, corporations and organizations in Indiana.

IV. CONCLUSION

The Court of Appeals deviated from the neutral principles of law test and erroneously gave deference to the denomination's assertions. The PLC urges this Court to reverse the trial court and reaffirm that the neutral principles of law test remains the law in Indiana.

Respectfully submitted this 12th day of January, 2011.

Respectfully submitted,

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WORD COUNT CERTIFICATE

I verify that this Amicus Curiae Brief contains no more than 4,200 words pursuant to
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading or paper has been served upon the
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