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To the leadership of the Lutheran Church-Missouri Synod:

My clients are grateful that many of you have given careful consideration to my February 3, 2004 correspondence to Dr. Kieschnick and to the supporting correspondence from Missouri lawyers, Prof. Carl Esbeck and Mr. Michael Whitehead. In those letters, we explained there was a beneficent confluence of values between the Synod's teachings, the flexibility provisions of the Missouri Non-Profit Corporation Act, the Missouri Religious Freedom Restoration Act, and the First Amendment Doctrine of Church Autonomy. We also explained that this confluence ensures that the Synod has freedom to govern itself in accordance with historical Lutheran teaching and practice and not as dictated by a one-size-fits-all state corporation code. We have tried to show that the attempt by some within the Synod to hand over to the Missouri legislature the ability to define the governance of the Synod is not only contrary to the religious beliefs important to the Synod, it is also neither required by the Missouri Non-Profit Code nor permitted by either the Missouri Religious Freedom Restoration Act or the First Amendment Doctrine of Church Autonomy.

My clients have instructed me to widely distribute my analysis to the leadership of the Lutheran Church-Missouri Synod so that each member of the Synod might be fully informed and empowered to maintain an evangelical dialogue about these important subjects. My clients request that the Board of Directors likewise publish the report and analysis on these subjects which it received from the Bryan Cave law firm. Absent publication of the Bryan Cave report, dialogue about these important issues will be under informed, and there will be little ability to test Bryan Cave's analysis which the Board apparently relies upon to justify its unprecedented rejection of selected opinions of the Commission on Constitutional Matters. It appears that the Board is wrapping itself in secrecy while provoking a constitutional crisis within the Synod. I respectfully suggest that secrecy regarding any organization's governance is almost always unwise and, in the present circumstances, suggests a lack of confidence in the Board's position. The Bryan Cave report was purchased at significant cost to the Synod. My clients request that it be promptly shared with the Synod's members.

In the meantime, my clients ask the following questions to those who are privy to the Bryan Cave report.

- Does the Bryan Cave report consider the Synod's steady determination that its polity, governance, and allocation of authority has been informed and should continue to be informed by Biblical principles and the historical Lutheran Confessions? If so, how does

that consideration take into account the Board's decision to unilaterally reject the authority granted by the Synodical Convention to the Commission on Constitutional Matters? If so, does the Bryan Cave report, for example, recommend that the Synod's historical practice of holding triennial Synodical Conventions must be changed to annual meetings in order to comport with Missouri Non-Profit Corporation Act §§ 355.231(1) and 355.226(1)?

- Does the Bryan Cave report recognize the great latitude that the Missouri legislature has given to all non-profit corporations to organize themselves as they will? Does it consider the twenty-six provisions from that statute identified in footnote two of my previous correspondence? Does it give weight to Missouri Non-Profit Corporation Act § 355.096(3)(3) which permits every non-profit corporation to set forth in its articles of incorporation its own provisions regarding "managing and regulating the affairs of the corporation" and §355.116 which permits the bylaws to "contain any provision for regulating and managing the affairs of the corporation" so long as such provisions are not inconsistent with the law?
- Does the Bryan Cave report consider the effect of Klix v. Polish Roman Catholic St. Stansilaus Parish, 118 S.W. 1171, 1178 (Mo. 1909) (reaffirmed by Struempf v. McAuliffe, 661 S.W.2d 559, 566 (Mo. Ct. App. 1984)) which requires courts to adopt "a view of the law as will permit religious bodies to be incorporated, and yet preserve their original form of church government, instead of revolutionizing it from a hierarchial or synodical into a congregational form; and [requires courts to] ask whether [Missouri] statutes can be so construed without doing violence to their language and intention"?
- Did the Bryan Cave report consider Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in North America, 344 U.S. 94, 107 (1952) or Northside Bible Church v. Goodson, 387 F.2d 534 (5th Cir. 1967) both of which squarely hold that the First Amendment Doctrine of Church Autonomy bars a state legislature from modifying the polity of a church or denomination?
- Did the Bryan Cave report discuss whether the Missouri Religious Freedom Restoration Act would likely exempt the Lutheran Church-Missouri Synod from any provision of the Missouri Non-Profit Corporation Act that burdened the Synod's right to organize and govern itself in accordance with Biblical principle and the historic Lutheran confessions?
- Did the Bryan Cave report recognize that when one is dealing with a church or religious denomination it is almost impossible to separate secular and religious responsibilities within a denomination? *See, e.g., University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002). Did it recognize that such seemingly secular activities as establishing budgets and making staffing decisions necessarily affect the character and content of ministry and, therefore, is permeated with religious values? Did it recognize that civil courts have consistently recognized the difficulty of bifurcating the religious and secular aspects of a denomination by, for example, dismissing minister suits against churches even when the disputes involved such seemingly "secular" matters as breach of contract claims and claims involving violation of civil rights statutes?

- Did the Bryan Cave report recognize that the Lutheran Church-Missouri Synod has itself repeatedly and successfully invoked the First Amendment Doctrine of Church Autonomy to avoid government oversight of how it deals with its ministers and how it interprets its own constitution, articles of incorporation, and bylaws? See Knuth v. The Lutheran Church-Missouri Synod, 643 F.Supp. 444 (D. Kans. 1986);<sup>1</sup> Hafner v. The Lutheran Church-Missouri Synod, 616 F.Supp. 735 (N.D. Ind. 1985) (court dismisses claims of minister and his wife that Synod violated its Constitution by failing to provide minister welfare when he fell ill); Drevlow v. The Lutheran Church-Missouri Synod, 991 F.2d 468 (8th Cir. 1993) (court dismisses minister's claims based on allegation that Synod violated its own bylaws by removing his name from its list of eligible ministers); and Ehrens v. The Lutheran Church-Missouri Synod, 269 F.Supp.2d 328 (S.D.N.Y. 2003). Did the Bryan Cave Report discuss these cases or explain why these cases would not support the conclusions we have put forth?

Finally, my clients reiterate that this matter brought by the Board of Directors and the legal opinions it acquired impose great cost on the Synod. With probably more than \$50,000 spent by the Board, as well as countless hours of time and attention taken from the ordinary business of the Board, the CCM, the COP, and others, it is with a heavy heart that my clients are required to remind all of the mission and ministry opportunities being ignored. My clients believe, and my report affirms, that the many of the recent actions of the Board are contrary to the Synod's own organizing documents and beliefs and not required by civil law.

My clients request that the Board publish the Bryan Cave report and that it reverse its actions challenging the authority of the Commission on Constitutional Matters.

Sincerely yours,

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<sup>1</sup>In Knuth, a case against the Lutheran Church-Missouri Synod before the United States District Court in Kansas, the court found: "To entertain plaintiff's complaint, this court would be forced to inquire into the procedures set forth by canon or ecclesiastical law, which plaintiff alleges the various church organs and representatives are bound to follow. **The Constitution of the Lutheran Church-Missouri Synod is the organic document of that church and is 'basically and fundamentally a religious doctrine.'** In construing these religious documents and doctrines, the court would usurp the rights of the highest religious bodies to construe their own church laws." Id. (emphasis added).