NOT YET SCHEDULED FOR ORAL ARGUMENT
No. 23-7173

In the United States Court of Appeals for the District of Columbia

DAVID O'CONNELL,
Plaintiff-Appellee,

v.

UNITED STATES CONFERENCE OF CATHOLIC BISHOPS,
Defendant-Appellant.

Appeal from the United States District Court for the District of Columbia
Honorable Jia M. Cobb
(1:20-cv-01365-JMC)

DEFENDANT-APPELLANT'S REPLY BRIEF

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INTRODUCTION AND SUMMARY OF ARGUMENT

David O'Connell says that he placed an unspecified amount of money in the collection basket at Mass to support the Pope's Peter's Pence collection. Now he wants a civil court to order the United States Conference of Catholic Bishops, which never touched the money, to give it back.

Why? Because he thinks a priest in the pulpit, whom he can't name, misled him about how the Pope was going to use his contribution. So what this case is all about is how the priest explains the purpose of offerings at Mass and how the Pope uses those offerings. A civil court has no business regulating what priests say in pulpits or how the Pope stewards the Church's offerings. These are internal Church matters.

A parishioner who feels misled can join with fellow concerned parishioners to speak with his pastor. He can withhold future contributions. He can change parishes. He can appeal to his Bishop. He can contact the Holy See. He can seek relief through ecclesiastical courts.

What he can't do is ask *civil* courts to intervene. That is the message of countless judicial decisions by the Supreme Court and the lower courts. If the separation of Church and State means anything, it means that the State cannot tell the Church how to govern itself and manage its affairs. Civil courts have no jurisdiction over those matters. That is why this Court should hear this appeal and direct dismissal of this lawsuit.

ARGUMENT

I. This Court has jurisdiction under the collateral-order doctrine.

Under the collateral-order doctrine, appellate courts have jurisdiction over pre-judgment orders that (1) concern important rights which would be effectively unreviewable on appeal from a final judgment, (2) conclusively determine the disputed question, and (3) are distinct from the action's merits. Br.18. This Court has jurisdiction here because allowing O'Connell's intrusive claims to proceed will threaten the Constitution's structural bar on judicial entanglement with matters of faith, doctrine, and church government. As the court correctly noted below, USCCB's First Amendment defense is a "threshold issue." A146. It must be resolved at the threshold to be fully vindicated. Br.18-23.

O'Connell acknowledges that this Court has exercised interlocutory jurisdiction over other orders restricting First Amendment rights "during the pendency of a case." Resp.17-18. But in his view, church-autonomy rights categorically fall outside that jurisdiction because they provide no protection from the process of litigation—meaning orders intruding on "matter[s] of faith and doctrine or church government" can always be fully vindicated "in a post-judgment appeal." Resp.15.

No court has taken such an extreme position. Instead, the Supreme Court, this Court, and numerous other circuits and state supreme courts have recognized that the Religion Clauses provide protection "not only"

from a civil court's "conclusions," but also against "the very process of inquiry leading to [those] findings and conclusions." *NLRB v. Catholic Bishop*, 440 U.S. 490, 502 (1979). Once it's recognized that the First Amendment injuries here cannot be cured after judgment, O'Connell's core jurisdictional objections fall way.

O'Connell also invokes (over fifty times) certain out-of-circuit cases declining to exercise collateral-order jurisdiction over certain categories of church-autonomy orders. But, again, those cases do not endorse his post-judgment-only rule. And in those cases—unlike this one—the (often divided) courts generally believed further factual development was needed before they could determine whether the church-autonomy defense applied. That is not the case here, when the entanglement leaps from the pages of the Complaint. This Court has jurisdiction.

A. USCCB's church-autonomy defenses will be effectively unreviewable absent immediate appeal.

O'Connell doesn't dispute that the "decisive consideration" for effective unreviewability is whether a "substantial public interest or some particular value of a high order" would be "imperil[ed]" by "delaying review." Br.19 (citing *Mohawk Indus. v. Carpenter*, 558 U.S. 100, 107 (2009)). USCCB showed it met this test three times over—under this Circuit's protection for "alleged injur[ies] to First Amendment rights" caused by delayed review, under the Religion Clauses' special solicitude for religious organizations' rights, and under the structural

limits on judicial power in religious matters analogous to those imposed by separation-of-powers principles. Br.19-23.

O'Connell concedes the collateral-order doctrine's general protection for First Amendment rights. Resp.17-18. And he doesn't meaningfully dispute that the Religion Clauses set structural limits akin to the separation of powers, as he fails entirely to address the line of cases on that score. Instead, he focuses his fire on contesting the Religion Clauses' long-recognized protection against intrusive and entangling litigation into religious matters.

1. Church autonomy protects from the burdens of litigation in cases like this.

a. As USCCB explained, binding precedent recognizes that church autonomy protects against the burdens of litigation. Br.20-23. The Supreme Court has repeatedly made clear that "religious controversies are not the proper subject of civil court inquiry." *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713 (1976). Far from blessing the lower court's "lengthy trial" (*contra* Resp.16), *Milivojevich* condemned its "detailed review" of evidence regarding internal church procedures as "*exactly* the inquiry that the First Amendment prohibits." *Id.* at 713, 717-18 (emphasis added). Thus, "[a]ny attempt" by courts to "scrutiniz[e] whether and how a religious [organization]" advances its religious mission raises serious constitutional problems, *Carson v. Makin*, 596 U.S. 767, 787 (2022), as the judiciary may not even "influence" matters

of faith, doctrine, and church governance, *Our Lady of Guadalupe v. Morrissey-Berru*, 591 U.S. 732, 746 (2020).

The Court made the point emphatically in *Catholic Bishop*, stating that "the very process of inquiry" can "impinge on rights guaranteed by the Religion Clauses." 440 U.S. at 502. And that understanding led the Court to bar a federal agency's claim of jurisdiction over relationships between religious schools and certain teachers.

Applying *Catholic Bishop*, this Court has recognized that the litigation process can infringe church-autonomy rights. Br.21-22. *University of Great Falls v. NLRB*, 278 F.3d 1335, 1341 (D.C. Cir. 2002), rejected "intrusive inquiry" into religious mission; *Carroll College v. NLRB*, 558 F.3d 568, 572 (D.C. Cir. 2009), prohibited "[p]robing into … religious views"; and *Duquesne University of the Holy Spirit v. NLRB*, 947 F.3d 824, 829-30, 833 (D.C. Cir. 2020), recognized that the government cannot "dig" into religious issues. And *EEOC v. Catholic University of America*, 83 F.3d 455, 466-67 (D.C. Cir. 1996), held that the *process of civil inquiry alone* violated the Establishment Clause—a holding for which O'Connell has no answer.

b. Persuasive authority reaches the same result. The Fifth Circuit recognized that "forced discovery" into matters protected by "structural" church-autonomy principles are "effectively unreviewable on appeal from the final judgment" and thus eligible for interlocutory appeal. *Whole Woman's Health v. Smith*, 896 F.3d 362, 367, 373 (5th Cir. 2018).

Far from hinging on nonparty interests, *contra* Resp.44, it was the "substantial First Amendment implications" at stake that required *deviating* from the circuit's rule against interlocutory appeal of nonparty discovery orders, *Leonard v. Martin*, 38 F.4th 481, 487 (5th Cir. 2022), firmly "reaffirm[ing]" circuit precedent allowing appeal of "pre-trial orders arguably infring[ing] on First Amendment rights," *X Corp. v. Media Matters*, 120 F.4th 190, 196 (5th Cir. 2024).

Likewise, the Seventh Circuit allowed immediate appeal of a church-autonomy defense in *McCarthy v. Fuller* to prevent "irreparable" judicial "intrusion into religious affairs" via the process of litigation. 714 F.3d 971, 975-76 (7th Cir. 2013). And *McCarthy* didn't turn on the Holy See's nonparty status, *contra* Resp.41, but instead on the principle that "[r]eligious questions" belong to "religious bodies," *id.* at 976.

In a line of cases O'Connell ignores, the Third, Fourth, and Sixth Circuits agree that the Religion Clauses set structural limits on the process of litigation. Br.22. This "structural understanding" of church autonomy "immunizes" religious groups from entangling merits litigation, because "[t]he 'very process of [judicial] inquiry'" in such matters "takes a civil court outside its proper role." *Billard v. Charlotte Catholic High Sch.*, 101 F.4th 316, 325-26, 329 (4th Cir. 2024); *contra* Resp.23-24.

Five state high courts concur. Br.25-26. Those courts are (*contra* Resp.45) just as bound by the Religion Clauses' scope as federal courts

and have similar policy interests against piecemeal appeals. And leading scholars, including Professors Michael McConnell and Douglas Laycock, have concluded that church-autonomy protections are "effectively lost if a case is erroneously permitted to go to trial." *See* Law & Religion Scholars Br.12; Muller Br.18-21.

c. Finally, O'Connell's position—that orders "overrul[ing] a religious organization on a matter of faith and doctrine or church government" can always and only be fully vindicated "in a post-judgment appeal" (Resp.15)—is unsupported even in the few published cases he cites. To the contrary, those cases allow that denials of church-autonomy rights presenting pure questions of law may be subject to immediate appeal.

For instance, *Garrick v. Moody Bible Institute* acknowledged that, under circuit precedent, some church-autonomy defenses are "reviewable before a final judgment." 95 F.4th 1104, 1114 (7th Cir. 2024); *accord Herx v. Diocese of Fort Wayne*, 772 F.3d 1085, 1091 (7th Cir. 2014). Likewise, *Belya v. Kapral* suggested that "further proceedings" could lead to a pre-trial order that satisfied the collateral-order factors. 45 F.4th 621, 632-34 (2d Cir. 2022). And *Tucker v. Faith Bible* explained that it was not addressing "a defense under the broader church autonomy doctrine" at all, 36 F.4th 1021, 1031, 1032 n.7 (10th Cir. 2022), a necessary clarification given circuit precedent that courts should "resolv[e] the question of the doctrine's applicability early in litigation"

to "avoid excessive entanglement," *Bryce v. Episcopal Church*, 289 F.3d 648, 654 n.1 (10th Cir. 2002).[1]

Moreover, *Moody*, *Belya*, and *Tucker* all stated that their cases were unfit for appellate resolution due to case-dispositive fact disputes, rendering appeal premature. But this case presents a purely legal question: whether the Complaint, on its face, threatens church autonomy. *See Ashcroft v. Iqbal*, 556 U.S. 662, 672-74 (2009) (qualified-immunity defense at the motion-to-dismiss stage was "an issue of law" eligible for interlocutory appeal).

2. O'Connell's contrary arguments are wrong.

a. O'Connell *never* addresses the repeated commands of the Supreme Court, this Court, and numerous others that "the very process of inquiry" can offend the Religion Clauses. And his attempts to distinguish the underlying cases are unpersuasive.

First, he doesn't grapple with *Catholic University*'s holding that the process *was* the punishment. Instead, he argues *Catholic University* and other circuit precedent barred only "investigations by political agencies." Resp.25. Setting aside that this argument implicitly concedes that the Religion Clauses bar more than just liability, church autonomy also concerns *judicial* interference—exactly what O'Connell demands here.

[1] *Klein v. Oved*'s unpublished order would not prohibit an interlocutory appeal in an identical case, much less all future cases. 2024 WL 1092324 (11th Cir. Mar. 13, 2024).

Catholic University, 83 F.3d at 460 (citing *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190, 191 (1960)).

Second, he contends a footnote in *Hosanna-Tabor v. EEOC* deeming the ministerial exception non-jurisdictional means the First Amendment bars only liability, not inquiry. Resp.19-20 (citing 565 U.S. 171, 195 n.4 (2012)). But the same opinion flatly decries "inquiring into … religious controversies," *id* at 187, which Justices Alito and Kagan warn can "dangerously undermine … religious autonomy," *id.* at 205 (concurring). The footnote thus doesn't "cast doubt on the exception's structural basis, or its importance in partitioning civil authorities from religious ones." *Billard*, 101 F.4th at 326. And other non-jurisdictional defenses like qualified immunity enjoy immediate appeal. *See Nevada v. Hicks*, 533 U.S. 353, 373 (2001).

Third, O'Connell argues that *Ohio Civil Rights Commission v. Dayton Christian Schools*, 477 U.S. 619 (1986), "held that religious autonomy rights can be adequately vindicated after the fact." Resp.27. But *Dayton* concerned whether federal courts should apply federalism-grounded *Younger* abstention. It didn't confront collateral-order analysis or the merits of church-autonomy defenses. And *Dayton* abstained because the school would have an "adequate opportunity to raise its constitutional claims" in the state forum. 477 U.S. at 628. That's not true here.

Finally, lacking precedent, O'Connell insinuates that a denial of certiorari adopted his view of church autonomy. Resp.16 (discussing

Gordon Coll. v. DeWeese-Boyd, 142 S.Ct. 952 (2022) (Alito, J., statement respecting denial)). But the questions presented there concerned the merits of a ministerial-exception defense (not whether church-autonomy rights receive collateral-order review under Section 1291), and answering those questions was "complicate[d]" by the jurisdictional issues that arise when reviewing state-court judgments. *Gordon Coll.*, 142 S.Ct. at 955. Still, even in that more complicated context, Justice Alito later expressed openness to immediate appeal of non-final "state court order[s] that violate[] the Constitution." *Yeshiva Univ. v. YU Pride All.*, 143 S.Ct. 1, 3 (2022) (Alito, J., dissenting); *see also Roman Catholic Archdiocese v. Feliciano*, 589 U.S. 57 (2020) (interlocutory appeal under 28 U.S.C. § 1258).

b. O'Connell's liability-only view of church autonomy infects the bulk of his counterarguments. For instance, it explains why he's wrong in excluding church autonomy from other First Amendment protections that may be harmed "during the pendency of a case." Resp.17-18. So too for the separation of powers, which this Court has long held can warrant collateral-order review, Br.22, and which courts have expressly analogized to church autonomy, Br.22-23.[2]

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[2] O'Connell's separation-of-powers cases are inapposite because they don't concern rights protecting from the burdens of trial. Resp.28-30; *Doe v. Exxon Mobil*, 473 F.3d 345, 351-52 (D.C. Cir. 2007) (distinguishing political-question doctrine from separation-of-powers principles "based

O'Connell doubles down on the same flaw when he insists that church autonomy "does not implicate" any "public interests in avoiding trial" because it is a "private interest held by private religious organizations." Resp.22. But that claim conflicts with long-permissible appeals protecting "private" interests. *See Abney v. United States*, 431 U.S. 651, 659-62 (1977). Regardless, church autonomy "does not protect the church alone"—it also safeguards "important institutional interests *of the court*" by "limiting courts to their proper sphere." *Billard*, 101 F.4th at 325-26 (emphasis added). This "constitutional protection is not only a personal one; it is a structural one," *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 836 (6th Cir. 2015), protecting courts from "second-guessing" religious "matters about which [they have] neither competence nor legitimacy," *Duquesne*, 947 F.3d at 835.

That protection is why, for instance, appellate courts can bypass the "general rule" against waiver to resolve church-autonomy defenses *sua sponte*, respecting "structural concerns" about "staying in [their] proper lane." *Billard*, 101 F.4th at 325-26; *accord EEOC v. R.G. &. G.R. Harris Funeral Homes*, 884 F.3d 560, 581-82 (6th Cir. 2018); *Lee v. Sixth Mount Zion Baptist Church*, 903 F.3d 113, 118 n.4 (3d Cir. 2018); *Tomic v. Catholic Diocese*, 442 F.3d 1036, 1042 (7th Cir. 2006).

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on immunity"); *United States v. Cisneros*, 169 F.3d 763, 767, 770 (D.C. Cir. 1999) (similar; criminal context also requires "utmost strictness" for interlocutory appeals). The same goes for O'Connell's *Noerr-Pennington* analogue (at 19), which he concedes doesn't involve immunity from suit.

O'Connell would sweep this all aside, licensing courts to "improperly overrule[] a religious organization on a matter of faith and doctrine or church government" and to "contradict[] a church's religious determination," with no realistic relief before "a post-judgment appeal." Resp.15, 18. The Religion Clauses do not tolerate such "commingling of religious and secular justice." *McCarthy*, 714 F.3d at 976.

B. The district court's order conclusively determined that USCCB must defend against this case on the merits.

O'Connell correctly concedes that the foregoing "immunity from suit" analysis ultimately resolves the conclusiveness prong too. Resp.37. Because the district court's order foreclosed USCCB's "claim of right" not to "face the other burdens of litigation," that order was "final[] and conclusive[]" for purposes of interlocutory appeal. *Mitchell v. Forsyth*, 472 U.S. 511, 526-27 (1985); Br.24.

On the way to his concession, O'Connell makes two detours. First, he "conflat[es] jurisdiction with the merits," Muller Br.23-24, by asking this Court to weigh the *correctness* of USCCB's church-autonomy defense to resolve its *jurisdictional* analysis. Resp.36-37 (citing *Minker v. United Methodist Church*, 894 F.2d 1354 (D.C. Cir. 1990) and *McRaney v. NAMB*, 966 F.3d 346, 349 (5th Cir. 2020)). That is a category error. Courts "must be careful at this stage to avoid letting [their] views about the merits influence the jurisdictional decision." *United States v. Durenberger*, 48 F.3d 1239, 1242-43 (D.C. Cir. 1995). The relevant

jurisdictional question is not whether the church-autonomy defense is correct, but whether it is "colorable." *United States v. Trump*, 91 F.4th 1173, 1187 (D.C. Cir. 2024), *vacated on other grounds*, 603 U.S. 593 (2024). Because USCCB, with a substantial basis in the language of the Complaint, contends that continued proceedings will "destroy[] the immunity [the First Amendment] sought to confer," *Durenberger*, 48 F.3d at 1243, it easily meets that standard.

Second, O'Connell suggests USCCB can always argue later that its rights are being violated. Resp.35. That's beside the point. Because it's evident from the face of the Complaint that his claims *already* threaten church-autonomy interests, appeal is appropriate now.

C. USCCB's church-autonomy defenses are distinct from the merits of O'Connell's claims.

USCCB's church-autonomy defense turns on a question of law, not the veracity of O'Connell's allegations, and is thus collateral to his claims. Br.24. O'Connell responds that, because the court will consider his allegations to evaluate USCCB's church-autonomy defense, the two are entwined. Resp.38. That argument "cannot be squared" with the many interlocutory appeals of denials of motions to dismiss based on immunity, where courts evaluate the immunity based on the complaint's allegations. *Iqbal*, 556 U.S. at 672-74. "[T]he issue of immunity," like the protection of the Religion Clauses, is "conceptually distinct" from underlying claims of liability. *McCarthy*, 714 F.3d at 975.

D. O'Connell's arguments for ignoring collateral-order jurisdiction are wrong.

O'Connell eventually gives up on collateral-order analysis and makes a series of arguments for ignoring it altogether. For instance, he argues (at 12-13) "that because mandamus is available, the collateral-order doctrine is not"—a contention rejected as incorrect, *Process & Indus. Devs. v. Fed. Republic of Nigeria*, 962 F.3d 576, 582 (D.C. Cir. 2020), seen as unnecessary to reach, *United States v. Trump*, 88 F.4th 990, 1001 n.3 (D.C. Cir. 2023), or just ignored, *Trump*, 91 F.4th at 1183-88.

O'Connell next asserts that post-1992 new categories of interlocutory appeal are better left to the rulemaking process. Resp.12-13. But he has no response for the Supreme Court's recognition of new categories since then, *Clinton v. Jones*, 520 U.S. 681, 707 n.41 (1997), nor this Circuit's recent new categories protecting both non-constitutional interests, *Abdelhady v. George Wash. Univ.*, 89 F.4th 955, 957 (D.C. Cir. 2024), and First Amendment ones, *In re Sealed Case*, 77 F.4th 815, 825-26 (D.C. Cir. 2023). And like all other statutes, the statutory "policy … to avoid piecemeal litigation" must "be reconciled with … the Constitution." *Digit. Equip. Corp. v. Desktop Direct*, 511 U.S. 863, 879 (1994); *accord McClendon v. City of Albuquerque*, 630 F.3d 1288, 1296 (10th Cir. 2011) (Gorsuch, J.) (courts are "bound" to "reconcile" constitutional protections from trial "with § 1291").

Finally, O'Connell worries that hearing this appeal will unlock the floodgates for "any case" where church autonomy is raised, "no matter how tenuous." Resp.33. But, as shown, courts must independently ensure church-autonomy issues are both colorable and ripe. Further, even if courts could "sacrifice [religious autonomy] for efficiency," *but see Arizona Free Enterprise v. Bennett*, 564 U.S. 721, 747 (2011), there is no flood behind these gates. Since the District of Columbia Court of Appeals permitted interlocutory review of church-autonomy defenses over 30 years ago, it has heard only a handful of such appeals.

* * *

The church-autonomy doctrine protects against the process of merits litigation here. This Court has jurisdiction to consider whether church autonomy bars O'Connell's claims.

II. O'Connell's claims are barred by the church-autonomy doctrine.

O'Connell does not and cannot dispute the canon law, encyclicals, and other Vatican documents describing the lengthy history and meaning of Peter's Pence, the Pope's unique role in performing charitable works, or the spiritual underpinnings of charity. Br.8-9, 34, 36. He leaves undisputed that Peter's Pence offerings were used for religious purposes, Br.34, and concedes that at least *some* of the offering *has* gone to his approved-of "charitable works," A24 ¶30; Resp.5. And he acknowledges that proving his claims requires scrutinizing a message given "from the

pulpit" during a worship service to a parishioner about a religious offering for the Pope. Resp.4; A19 ¶24.

Yet O'Connell argues his Complaint involves not a single "religious issue." Resp.58. But while he invokes the word "secular" twenty-seven times, he cites no case permitting anything like the pervasive intrusion he seeks. For good reason: O'Connell's claims raise a host of inescapable religious questions this Court has "no jurisdiction" to answer. *Milivojevich*, 426 U.S. at 713-14.

A. O'Connell's claims interfere with matters of faith, doctrine, and internal church governance.

Church autonomy is a "broad" protection against "any attempt" by courts to "influence" a religious organization's "independence in matters of faith and doctrine and in closely linked matters of internal government." *Our Lady*, 591 U.S. at 746-47; Br.31-33. The First Amendment's "scrupulous policy … against a political interference with religious affairs," *Duquesne*, 947 F.3d at 827-28, bars entanglement with "internal church decision[s] that affect[] the faith and mission of the church itself," *Hosanna-Tabor*, 565 U.S. at 190. O'Connell's unusually intrusive claims violate these principles several times over.

1. The claims call for second-guessing the use and meaning of religious offerings.

Religious Spending. O'Connell contends his claims don't require second-guessing the Pope's use of Peter's Pence offerings. Resp.49-51. But the *sole* basis of his fiduciary duty claim is that USCCB "fail[ed] to

ensure that the charitable contributions … *were spent* in accordance with USCCB's promises." A33 ¶63 (emphasis added). And *all* his claims turn on the idea that it was "improper" stewardship, Opp'n to Mot. to Dismiss, Dkt.24 at 22, for the Pope to invest portions of Peter's Pence, A24 ¶¶30-31, instead of "immediately" and "exclusively" using them elsewhere. Br.34. Assessing those claims requires "the same 'intrusive inquiry' and the '*exact* kind of questioning into religious matters'" this Court has repeatedly found unconstitutional. *Duquesne*, 947 F.3d at 830; Br.34-38.

Religious Meaning. O'Connell also confirms his claims require civil courts to "determine the meaning" of words spoken from the pulpit to parishioners during worship about a millennium-old offering to the Pope. Resp.48-49. His Complaint identifies "exactly" the words he wants courts to construe: an invitation to "assist the charitable works of Pope Francis" and "witness[] to charity and help[] the Holy See reach out compassionately to those who are marginalized," including "[f]or example" by "helping the Holy Father bring aid to" those struck by famine. A18 ¶22. As USCCB explained via canon law, the catechism, and Church tradition, the meaning of that specific invitation is deeply religious. Br.8-9, 35-36; Religious Organizations Br.12-15 (explaining "charity often involves deeply complex matters of faith," as illustrated by Jewish, Muslim, and Latter-day Saint traditions). Civil courts cannot determine the meaning of such words spoken in that context.

O'Connell's responses prove the point. He complains church law, teaching, and tradition don't sufficiently confirm "the 'religious' meanings" of "charitable works" or being a "witness to charity." Resp.53. And he asserts the Pope is wrong to think "that the religious meaning of 'charitable works' includes" investments. *Id.*; A49 ¶31. So he wants a civil court and civil jury to assess under civil law whether the Vatican's uses of the offerings count as "assist[ing] the charitable works of Pope Francis" and "witness[ing] to charity." A17-18 ¶21-22; Resp.51-52. But to make that determination, a civil court must "choos[e] among 'competing religious visions'" of charity, *Catholic Univ.*, 83 F.3d at 465—the Vatican's spiritual understanding, Br.8-9, and O'Connell's, Resp.48-49. These are "matters of internal [church] government" and issues of "faith and doctrine," *Our Lady*, 591 U.S. at 747, that lie "far outside the competence" of judges and juries, *Duquesne*, 947 F.3d at 835.

Finally, O'Connell waves away cases demonstrating courts' reluctance to adjudicate similar claims testing the use of church funds. Resp.49-50. Contrary to O'Connell's suggestion, those cases *did* involve alleged false statements. Br.37-38. And as in each of those cases, O'Connell directly challenges how the Church—here, the Supreme Pontiff—chose to steward funds given by the faithful for religious uses, which "necessarily reflects an array of decisions … that a civil court cannot arbitrate without entangling itself in doctrinal interpretations." *Bible Way Church v. Beards*, 680 A.2d 419, 429 (D.C. 1996).

2. The claims interfere in religious speech and polity.

Church autonomy is "rooted" in protecting the "First Amendment rights of the church to discuss church doctrine and policy freely," *Bryce*, 289 F.3d at 658, especially when the religious speech issues from the pulpit during a worship service, Br.38-39. Those protections are even more clearly applicable here, where O'Connell's claims would require a court and jury to scrutinize USCCB Guidelines and canon law, and to compare the unspecified statement he heard at Mass with other statements made by Church leaders.

O'Connell grudgingly concedes (at 49) that some religious speech from the pulpit about religious offerings, such as "what it means to 'glorify God,'" *may* possibly receive First Amendment protection. But he then repeats his *ipse dixit* argument that the invitation to "assist[] the charitable works of Pope Francis" as "witness[es] to charity" involves only "secular statement[s]" on a "non-religious topic." Resp.51-54. Again, O'Connell's wishing cannot make it so.

O'Connell's contention that he "does not have to show that USCCB violated Canon law or internal guidelines to prove" his claims blinks reality. Resp.52. It's undisputed that the Guidelines are the only source for O'Connell's belief that his donation would go "immediately" to the needy, Br.35, and O'Connell can't answer USCCB's explanation that he blatantly misread those Guidelines, Br.35-36.

That is entanglement enough for dismissal. But there's more. Whereas O'Connell claims USCCB "administers" Peter's Pence funds, A14, 16 ¶¶11, 19, and "directed" dioceses to follow its orders, Resp.54, canon law says it does not and cannot, Br.11. O'Connell contends that his undisputed requests for all communications between the "Holy See, Vatican City, [and] Apostolic Nunciature" about Peter's Pence, Br.40, do not require the Court to "'scrutiniz[e]' internal deliberations concerning religious speech," Resp.52-53. Yet he cannot explain how these statements would not be used to ask "what one minister … said to another" in the search for "subjective motive[s]," *Demkovich v. St. Andrew the Apostle Parish*, 3 F.4th 968, 977-78, 983 (7th Cir. 2021) (en banc), particularly when his Complaint quotes Church leaders to (seemingly) allege falsity, A24-25 ¶¶31, 33. Nor does he explain how consideration of such intra-church communications is not "trolling through the beliefs of the [Church]" to make "determinations about" whether and how various leaders followed "its religious mission." *Great Falls*, 278 F.3d at 1342.

3. The claims' elements call for other entangling inquiries.

O'Connell fails to show that the elements of his claims don't pose an "inevitable risk" of religious entanglement. *Catholic Univ.*, 83 F.3d at 465-66; Br.40-42. For instance, he asserts his fiduciary duty claim involves no questions regarding "ecclesiastical authority," Resp.55, but nowhere explains how a civil court could determine whether USCCB had

a "special relationship" supporting a fiduciary duty without probing canonical relationships among USCCB, dioceses, parishioners, and the Holy See, Br.41, *infra* at 29-30. Similarly, O'Connell claims determining retained benefit "is a purely factual question," Resp.55, but ignores that answering that question requires prying into the Church's position on transmitting funds directly from dioceses to the Holy See, Br.42.

4. The claims call for entangling discovery.

O'Connell brushes aside USCCB's entangling discovery arguments as "purely speculative." Resp.55; *see* Br.42-44. But the Complaint inescapably steers the parties towards discovery into Church finances, A23 ¶28; speech and deliberations by USCCB, the Vatican, and Church leaders, A17-25 ¶¶20-25, 31-34; and issues of canonical control, A20-A25 ¶¶26, 34. Accordingly, O'Connell represented below that he "cannot" prove his claims without intrusive discovery, including "records of Defendant's collection, administration, accounting, or disposition of *any* donated funds," A172, internal communications regarding Peter's Pence, A175, lists of who made Peter's Pence offerings, and all church laws related to stewarding the offerings, *see* Br.15, 43. O'Connell insists that the district court can simply micromanage the inevitable conflict. Resp.55-56.

This entanglement-now, Constitution-later approach tramples the First Amendment's "special solicitude" for "the rights of religious organizations," *Hosanna-Tabor*, 565 U.S. at 189, especially when

coupled with O'Connell's erroneous view that all church-autonomy harms can be forced to await final judgment for protection. And it ignores the reality that "courts have limited ability" for "monitoring discovery" into religious groups' "internal deliberations" without entanglement. *Whole Woman's Health*, 896 F.3d at 368; *accord Catholic Univ.*, 83 F.3d at 466 (district court could not "filter out the religious elements from the secular ones sufficiently to avoid … entanglement with religious concerns"); Weinberger Br.13-20 (chronicling entanglement in *Faith Bible* and *Belya*).

Turning finally to *Catholic Bishop*, O'Connell accuses USCCB of misrepresenting that case's forbidden inquiries as being about the number of liturgies, when it really concerned "defining" liturgies. Resp.58 n.10. He's wrong on both the facts and the point. The facts: the short line of inquiry expressly began and ended by asking "how many liturgies are required at Catholic parochial high schools?" 440 U.S. at 507. The point: probing that question predictably devolved quickly into questions about liturgy, which even O'Connell acknowledges are forbidden. Resp.58 n.10. O'Connell's far more intrusive inquiries will necessarily be orders of magnitude worse.

O'Connell's cited authorities (at 56-58) cut against him. *Minker* merely allowed discovery necessary for the narrow purpose of determining whether an alleged contract "in fact exists." 894 F.2d at 1361. His tax-exempt-status cases all arose before Congress "scaled

back" IRS investigations precisely to avoid "intrusive inquiry into church affairs." *United States v. Church of Scientology*, 739 F.Supp. 46, 47 (D. Mass. 1990). And *Great Falls* refused to allow courts to look beyond a religious body's "public representations" concerning its religious mission, expressly *rejecting* inquiries far less intrusive than the sprawling discovery of religious membership lists and religious deliberations that O'Connell demands here. *See Duquesne*, 947 F.3d at 831 (explaining ruling).[3]

Finally, O'Connell worries that ruling for USCCB means religious organizations can always escape all discovery. Resp.56-57. Nothing so extravagant is required. All this Court need do is re-affirm the bar on "impermissible entanglement with judgments that [fall] within the exclusive province" of ecclesiastical institutions. *Catholic Univ.*, 83 F.3d at 467. Religious invitations to religious audiences during religious services about religious offerings are in that province's heartland.

B. The district court erred.

O'Connell echoes the district court's erroneous conclusion that this Court can cast aside church autonomy for the "narrow" exception for "neutral" claims based on fraud. Br.44-45.

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[3] O'Connell's reliance on *Ambassador College v. Geotzke*, 675 F.2d 662 (5th Cir. 1982), is even further afield. "[A] strange decision on several grounds," the Fifth Circuit later rejected the notion that *Geotzke* meant the First Amendment doesn't shield churches from intrusive discovery. *Whole Woman's Health*, 896 F.3d at 369.

O'Connell doesn't identify precedent contesting *Milivojevich*'s confirmation that his fraud exception exists in "dictum only," without "concrete content" or "appli[cation]." Br.44; Resp.61. And he cites only dicta supporting his fraud-exception arguments, Resp.61.

Regardless, O'Connell doesn't show that the "neutral principles" approach can apply here. He ignores that the Supreme Court has refrained from applying "neutral principles" outside the trust and property context, Br.45-46, that decisions of other appellate courts agree, Br.48, and that *Catholic University* both expressly refused to expand the approach beyond "trust and property law" and made clear that the approach in any event "only" allows review of "non-doctrinal matters" that can be analyzed in "*purely secular terms*." 83 F.3d at 465-66. O'Connell's claims can't meet that standard.

His cited cases confirm as much. This is not a case where individuals exerted close personal influence "of a non-religious nature" with a victim seeking the individuals' help. *In re Bible Speaks*, 869 F.2d 628, 641, 645 (1st Cir. 1989). Nor does it involve a *quid pro quo*, *Tilton v. Marshall*, 925 S.W.2d 672, 682 (Tex. 1996), enforcing foreign judgments, *Ohno v. Yasuma*, 723 F.3d 984, 1009 (9th Cir. 2013), claims against an individual about a narrow solicitation, *Schmidt v. Catholic Diocese*, 18 So.3d 814, 831 (Miss. 2009), or claims of self-dealing, *United States v. Ballard*, 322

U.S. 78, 95 (1944) (Jackson, J., dissenting).[4] Rather, this case concerns an ancient worldwide religious offering to support the Pope's religious work, an invitation to assist that work which was broad and deeply religious, and alleged uses of the offering which were both religious and authorized by the Pope. There is no way to "filter out the religious elements from the secular" here. *Catholic Univ.*, 83 F.3d at 466-67.[5]

To avoid that conclusion, O'Connell pretends there are no religious elements here. But that doesn't respect church-state boundaries—it nullifies them. That's why *Hosanna-Tabor* barred invoking neutral principles of disability law to justify supplanting "an internal church decision that affects the faith and mission of the church itself." 565 U.S. at 189-90. It's why *Milivojevich* barred a bishop from couching the interpretation of church guidelines as involving merely "neutral principles." 426 U.S. at 721. And it's why *Catholic University* barred focusing on "objective criteria" to the exclusion of inescapable underlying "religious concerns." 83 F.3d at 466. The same rule applies here.

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[4] This is also not a criminal-law case (*contra* Americans United Br.8-9), one of the "parade of horribles" invoked "for [over] 40 years" without "giv[ing] rise to … dire consequences." *Hosanna-Tabor*, 565 U.S. at 195.

[5] This is why Americans United's cases (at 5-6) are irrelevant: there is "no neutral principle of law that could assist in evaluating" such religious matters, *Askew v. Trustees of General Assembly*, 684 F.3d 413, 419 (3d Cir. 2012), or allow courts to assess "the 'reasonableness' of the religious practices" informing the Pope's judgment, *Puri v. Khalsa*, 844 F.3d 1152, 1167 (9th Cir. 2017); *McRaney v. NAMB*, 2023 WL 5266356, at *4 (N.D. Miss. Aug. 15, 2023) (barring claims under church-autonomy doctrine).

III. O'Connell failed to adequately plead his claim.

A. This Court has pendent jurisdiction.

Pendent jurisdiction is proper here because such review will likely terminate the entire case and substantial considerations of fairness and efficiency demand it. Br.49-50. And, as in *Whole Woman's Health*, resolving the case on O'Connell's deficient pleadings will serve judicial values in avoiding resolution on constitutional grounds. *See* 896 F.3d at 374 (accepting appeal to protect church-autonomy interests, resolving appeal on other grounds).

O'Connell asserts pendent jurisdiction is limited to non-merits issues. Resp.64-65. But *KiSKA Construction Corporation-U.S.A. v. WMATA* exercised pendent jurisdiction over merits issues. 167 F.3d 608, 611 (D.C. Cir. 1999). And it did so for reasons like those in *Whole Woman's Health*: avoiding a "difficult and complicated" legal question when easier and narrower questions disposed of the case. *Id.* That makes particular sense here, as the difficult legal issues have implications for foreign relations with the Holy See. *Rendall-Speranza v. Nassim*, 107 F.3d 913, 917 (D.C. Cir. 1997). And review of the pleadings also "ensure[s] meaningful review" of the church-autonomy issues. *Nat'l R.R. Passenger Corp. v. ExpressTrak*, 330 F.3d 523, 527 (D.C. Cir. 2003); *see also Navab-Safavi v. Glassman*, 637 F.3d 311, 315 (D.C. Cir. 2011) ("interlocutory jurisdiction extends to the question of the sufficiency of the allegations of the complaint" in immunity cases).

B. O'Connell's claims fail on the pleadings.[6]

Fraud. O'Connell must plead "with particularity" the specific statements he claims are fraudulent. *United States v. Martin-Baker Aircraft Co.*, 389 F.3d 1251, 1256 (D.C. Cir. 2004). He doesn't.

First, O'Connell's fraud claim has changed dramatically. Below, it focused on the allegations that Peter's Pence would be "immediately" and "exclusively" spent on the needy, A30-32 ¶¶48, 49, 52, 53, 55, though its cited USCCB statements never said that, A17-20 ¶¶21-25. But on appeal, O'Connell leaves his supposedly supporting language undefended, and instead focuses on alleged statements from USCCB indicating that Peter's Pence would "help the Holy Father" serve others, *including* those suffering from "war and violence, natural disasters, and religious persecution." Resp.4; A19 ¶23. He also admits that "Peter's Pence funds" *were* "used as assistance for those in need." Resp.4-5. Thus, without his allegations of "immediacy" and "exclusiveness," there's no knowingly false misrepresentation.

Second, O'Connell's response (at 66-67) completely fails to address the deficiencies in the "who, what, when, where, and how" of his fraud claim. *Anderson v. USAA*, 221 F.R.D. 250, 253 (D.D.C. 2004); Br.50-55.

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[6] USCCB's pleadings-based argument is proper under Rule 12(c), *contra* Resp.66. *See Rollins v. Wackenhut Servs.*, 703 F.3d 122, 130 (D.C. Cir. 2012); *Johnson v. Mazza,* 2017 WL 663153, at *6 (C.D. Cal. Feb. 17, 2017).

As to the "what": O'Connell's brief now asserts he was "solicited from the pulpit" using "USCCB's 'specific instructions.'" Resp.66. But his Complaint alleges only that (a) he was invited to contribute to Peter's Pence from the pulpit, and (b) that USCCB provides guidance materials for dioceses. *See* A25 ¶34; A19 ¶24; Opp'n to Mot. to Dismiss, Dkt.24 at 15. O'Connell nowhere identifies the specific statement *by USCCB* which he claims *he actually heard*, and thus fails the particularity requirement.

As for the "who": O'Connell never identifies the *actual* speaker, meaning he has failed to "identify with specificity who precisely was involved in the fraudulent activity." *Martin-Baker*, 389 F.3d at 1257.

As to loss: O'Connell doesn't dispute that his claims give "no indication of … what costs [he] incurred," and thus lack required particularity. *Busby v. Capital One*, 772 F.Supp.2d 268, 275-76 (D.D.C. 2011).

As to fraudulent concealment: O'Connell fails to identify *any* allegations showing his requisite "special relationship" with USCCB. *Jefferson v. Collins*, 905 F.Supp.2d 269, 287 (D.D.C. 2012). There was no formal relationship between O'Connell and USCCB; O'Connell doesn't even allege he knew USCCB had any involvement in Peter's Pence before giving. USCCB couldn't have fraudulently omitted any fact because it owed no duty to O'Connell. *See Sundberg v. TTR Realty,* 109 A.3d 1123, 1131 (D.C. 2015).

Finally, O'Connell's doesn't plead USCCB's knowledge or intent and his supposed reliance—in fact, he fails to allege he knew *anything* about USCCB before giving his offering to the Pope.

Unjust enrichment and breach of fiduciary duty. These claims fail for two reasons. First, both claims rely on the fraud theory above and thus, as explained above, collapse. A32-33 ¶¶58, 63; *see Hayduk v. Lanna*, 775 F.2d 441, 443 (1st Cir. 1985).

Second, each claim depends on theories contradicted by the factual documents upon which the Complaint relies. *See Kaempe v. Myers*, 367 F.3d 958, 963 (D.C. Cir. 2004). For the unjust enrichment claim, O'Connell alleges USCCB "received" and "retain[ed]" Peter's Pence offerings. A32 ¶59. But the USCCB website—which O'Connell doesn't dispute was incorporated by reference into his Complaint—expressly states that USCCB doesn't retain such offerings. Br.56. With no funds collected or retained by USCCB, O'Connell's disgorgement cases (at 68) are inapposite. *See SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989). For the breach of fiduciary duty claim, O'Connell alleges USCCB "oversaw" Peter's Pence and "collected funds from donors." Br.58; *cf.* A33 ¶62. But the website, Church law, and Church polity make clear that USCCB neither collected Peter's Pence nor oversaw any dioceses' collection of it. Br.41-42.

CONCLUSION

This Court should exercise its jurisdiction and direct dismissal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

This brief complies with the requirements of Fed. R. App. P. 32(a)(7) because it has 6,493 words. This brief complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5), (6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point font.

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CERTIFICATE OF SERVICE

I certify that on November 27, 2024, a copy of the Reply Brief was filed with the Clerk of the Court's electronic filing system. That electronic filing system is designed to serve all counsel of record.

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