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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 10, 2025 Decided April 25, 2025

No. 23-7173

David O'Connell,
Appellee

v.

United States Conference of
Catholic Bishops, Appellant

Appeal from the United States District Court for the
District of Columbia
(No. 1:20-cv-01365)

Daniel H. Blomberg argued the cause for appellant. With him on the briefs were *Kevin T. Baine*, *Emmet T. Flood*, *Laura Wolk Slavis*, *Colten L. Stanberry*, *Kelly R. Oeltjenbruns*, and *Kelsey Baer Flores*. *Mark S. Storslee* entered an appearance.

Daniel F. Mummolo, *Christopher G. Michel*, and *Rachel G. Frank* were on the brief for *amicus curiae* Federal Courts Professor Derek T. Muller in support of appellant.

Aaron M. Streett and *Matthew M. Hilderbrand* were on the brief for *amicus curiae* Dr. Lael Weinberger in support of appellant.

Michael J. Showalter, *Victoria N. Lynch-Draper*, and *Joel S. Nolette* were on the brief for *amici curiae* Seven Religious Organizations in support of appellant.

Thomas G. Hungar, *Russell B. Balikian*, and *Cameron J. E. Pritchett* were on the brief for *amici curiae* Law & Religion Scholars in support of appellant.

Gabriel Z. Doble argued the cause for appellee. With him on the brief were *Martin Woodward* and *Simon C. Franzini*.

Jenny Samuels and *Alex J. Luchenitser* were on the brief for *amicus curiae* Americans United for Separation of Church and State in support of appellee.

Before: SRINIVASAN, *Chief Judge*, CHILDS, *Circuit Judge*, and EDWARDS, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* EDWARDS.

EDWARDS, *Senior Circuit Judge*: This case involves an action by Appellee, David O'Connell, against Appellant, United States Conference of Catholic Bishops ("USCCB"), for fraudulent solicitation of donations. In his complaint, O'Connell claims that, at the urging of USCCB, he and others donated money to Peter's Pence Collection for the purported purpose of helping those in immediate need of assistance in disaster-stricken parts of the world. O'Connell contends, however, that USCCB fraudulently

concealed that most of the donations to Peter's Pence were not for victims of war, oppression, natural disaster, or disease, as he and others allegedly had been told. Rather, according to O'Connell, most of the donated money was "diverted into various suspicious investment funds, which in turn have funneled the money into such diverse ventures as luxury condominium developments and Hollywood movies while paying fund managers hefty, multi-million dollar commissions." Complaint ¶ 4.

Before discovery and trial, USCCB moved to dismiss the case in District Court. USCCB contended that the court had no subject matter jurisdiction because O'Connell's action was barred by the church autonomy doctrine. Without in any way addressing the merits of the parties' claims, the District Court denied the motion to dismiss. The court found that, at this stage of the litigation, O'Connell's claims raised a purely secular dispute that could be resolved according to neutral principles of law. However, the District Court made it clear to the parties that it could not and would not address purely religious questions, should they arise during litigation. Thereafter, rather than proceeding with trial, USCCB filed an appeal with this court seeking interlocutory review. For the reasons explained below, we dismiss this appeal for want of jurisdiction and remand the case to the District Court for further proceedings.

Section 1291 of the Judicial Code confers on federal courts of appeals jurisdiction to review "final decisions of the district courts." 28 U.S.C. § 1291. "A 'final decisio[n]' is typically one 'by which a district court disassociates itself from a case.'" *Mohawk*

Indus., Inc. v. Carpenter, 558 U.S. 100, 106 (2009) (alteration in original) (quoting *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 42 (1995)). The collateral order doctrine, however, provides a limited exception to this final decision rule for a "small class" of collateral rulings that, although they do not end the litigation, are appropriately deemed "final." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). This "small category includes only decisions that are [1] conclusive, [2] that resolve important questions separate from the merits, and [3] that are effectively unreviewable on appeal from the final judgment in the underlying action." *Swint*, 514 U.S. at 42 (citation omitted). The Supreme Court has made it clear that these requirements are stringent. *Will v. Hallock*, 546 U.S. 345, 349 (2006). The Court has also stressed the importance of the third *Cohen* requirement, *i.e.*, a decision that can be effectively reviewed on appeal is not covered by the collateral order doctrine. *See, e.g.*, *Mohawk Indus.*, 558 U.S. at 107-08. The Court has openly acknowledged that many trial court rulings "may burden litigants in ways that are only imperfectly reparable by appellate reversal of a final district court judgment." *Digit. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 872 (1994) (citations omitted). Nevertheless, the Court has been resolute in saying that "the mere identification of some interest that would be 'irretrievably lost' has never sufficed to meet the third *Cohen* requirement." *Id.* (quoting *Richardson-Merrell Inc. v. Koller*, 472 U.S. 424, 431 (1985)).

USCCB attempts to bring a collateral order appeal to challenge the District Court's order denying its motion to dismiss based on the church autonomy doctrine. The church autonomy doctrine protects

against government interference in matters of faith, doctrine, and internal management. It may be raised as a defense in a civil suit, but it does not immunize religious organizations from civil actions. Pleading-stage denials of a church autonomy defense, such as the contested motion to dismiss in this case, do not satisfy the strict requirements of the collateral order doctrine. They are neither conclusive nor separate from the merits and, most importantly, they can be reviewed upon post-judgment appeal.

Neither the Supreme Court nor any circuit has ever expanded the collateral order doctrine to categorically cover alleged denials of a church autonomy defense. This is hardly surprising. The limited scope of the collateral order doctrine reflects a healthy respect for the virtues of the final decision rule, which serves as an important safeguard against piecemeal and premature review. USCCB's claimed rights can be adequately addressed on appeal after the District Court issues a final decision and, therefore, are not eligible for collateral order appeal.

I. Background

A. *Factual and Procedural History*

Appellant USCCB, headquartered in Washington, D.C., is an organization of Roman Catholic Bishops serving the United States and the U.S. Virgin Islands. As part of its mission to support the work of the Catholic Church, USCCB oversees the promotion of the Peter's Pence Collection, an annual offering given by the Catholic faithful to the Pope. Complaint ¶ 18-19. Specifically, USCCB creates materials, such as letters, web ads, and posters, promoting the

Collection which can then be used in parishes and dioceses. *Id.* ¶ 20.

Appellee David O'Connell donated to Peter's Pence at a Rhode Island church in the summer of 2018. *Id.* ¶ 34. On January 22, 2020, O'Connell filed a class action complaint in federal district court against USCCB, asserting claims of fraud, unjust enrichment, and breach of fiduciary duty. He seeks to represent a class of all persons in the United States who have donated money to the Peter's Pence Collection. O'Connell initially sued USCCB in the U.S. District Court for the District of Rhode Island. On USCCB's motion, the case was transferred to the U.S. District Court for the District of Columbia.

According to O'Connell, he was led to believe by USCCB that his donations to Peter's Pence would be used only "for emergency assistance" to "the poor" and "victims of war, oppression, natural disaster, or disease throughout the world." *Id.* ¶¶ 35-36, 48. However, in 2019, news organizations published stories revealing that Peter's Pence funds were used to support the Vatican's administrative budget, placed in various investments including Hollywood films and real estate, or used to pay hefty commissions for fund managers, with only ten percent going to the charitable causes featured in USCCB's promotional materials. *Id.* ¶¶ 27-30. O'Connell alleges that "USCCB has always known the difference between a donation for emergency assistance and a donation to defray Vatican administrative expenses. But USCCB hid this distinction in its promotion, oversight, and administration of the Peters [sic] Pence collection in the United States." *Id.* ¶ 36. He also maintains that if USCCB had disclosed the actual purposes for which

the funds would be used, he would not have donated to the Collection. *Id.* ¶ 35. O'Connell does not allege that the church cannot use collected funds for particular purposes, such as for investments or overhead expenses – only that USCCB cannot misrepresent how the funds will be used. *See* Br. for Plaintiff-Appellee 5-6.

USCCB answered the complaint in July 2020. Shortly thereafter, O'Connell served document production requests. Those requests sought documents showing the Peter's Pence promotional materials that USCCB created; lists of donors and amounts received; USCCB's knowledge of how the funds would be used; and how the funds were used. The District Court has had no occasion to rule on these requests. There has been no discovery.

After answering the complaint, USCCB moved to dismiss for lack of subject matter jurisdiction and for judgment on the pleadings. USCCB argued that the complaint was barred by the church autonomy doctrine, which is grounded in the First Amendment and prevents civil courts from hearing matters of church doctrine and internal governance. USCCB also argued that O'Connell had failed to adequately plead his claims.

The District Court denied USCCB's motions in an oral ruling and minute order on November 17, 2023. Tr. of Hearing (Nov. 17, 2023). The court ruled that it had subject matter jurisdiction because, at least at this stage of the litigation, O'Connell's claims raised a purely secular dispute involving affirmative misrepresentations and fraudulent omissions, which the District Court could resolve by applying "neutral principles of law." *Id.* at 5-7. In other words, the

District Court saw "no need" to "inquire into church operations, religious doctrine, religious hierarchy, or religious decisionmaking to evaluate the merits of [plaintiff's] claim. Instead, this is a case about what defendant represented, what it knew, and the relationship between defendant and plaintiff as a putative class representative." *Id.* at 6. As such, the District Court found that "at this stage, it's not apparent . . . that the resolution of the claims will involve impermissible religious entanglement." *Id.* at 7. Accordingly, it declined to dismiss the case on the basis of the church autonomy doctrine.

The District Court also took care to recognize the limitations imposed by the church autonomy doctrine. It made clear that it would not – and could not – answer purely religious questions, should they arise during litigation. *Id.* at 6. For example, the court would not and "could not rule that the church could only exercise its financial discretion in one way or another." *Id.* The District Court made it clear, however, that it does not believe religious determinations are required for it "to determine, under straightforward common-law principles, whether or not fraud took place." *Id.*

In addition, the District Court denied USCCB's motion for judgment on the pleadings because material disputes of fact remained as to O'Connell's claims. *Id.* at 7. It also concluded that O'Connell had adequately pleaded his claims.

USCCB timely appealed the District Court's decision and advances three arguments on appeal. It argues that this court has jurisdiction over the interlocutory appeal; that O'Connell's claims are barred by the church autonomy doctrine; and that

O'Connell failed to adequately plead his claims. O'Connell, in turn, disagrees with each of these arguments.

B. *Legal Background*

This case primarily concerns two doctrines: the collateral order doctrine and the church autonomy doctrine.

1. Collateral Order Doctrine

As noted above, the appellate jurisdiction of the federal courts of appeals is generally limited to "final decisions of the district courts of the United States." 28 U.S.C. § 1291. A final decision is typically one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). Known as the final decision rule, this limitation on the jurisdiction of federal appellate courts has long served an important purpose: It protects against piecemeal and premature review.

As the Supreme Court has explained,

> Congress from the very beginning has, by forbidding piecemeal disposition on appeal . . . , set itself against enfeebling judicial administration. Thereby is avoided the obstruction . . . that would come from permitting the harassment and cost of a succession of separate appeals . . . . To be effective, judicial administration must not be leaden-footed.

Cobbledick v. United States, 309 U.S. 323, 325 (1940). Beyond concerns of judicial economy, the final decision rule also "emphasizes the deference that

appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981). It would be unwise for an appellate court to prematurely jump into the fray, without the benefit of the trial court's rulings and with only the guidance of a partially developed record. Thus, as a fundamental principle of the federal courts system, the final decision rule does not accommodate exceptions for issues merely because they are important and deserving of attention. The exceptions to the rule that do exist are few and far between.

This case implicates one exception – the collateral order doctrine. "[A]n expansive interpretation of [section 1291's] finality requirement" first announced in *Cohen*, the collateral order doctrine allows appeals "from orders characterized as final . . . even though it may be clear that they do not terminate the action or any part of it." 15A Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure § 3911, Westlaw (database updated June 2024); *see also Cohen*, 337 U.S. at 545-46. This exception to the final decision rule is limited to a "narrow and selective" class of orders that (1) are "effectively unreviewable on appeal from a final judgment"; (2) "conclusively determine the disputed question"; and (3) "resolve an important issue completely separate from the merits of the action." *Will*, 546 U.S. at 349-50 (internal quotation marks omitted); *see also United States v. Trump*, 88 F.4th 990, 1000 (D.C. Cir. 2023). These requirements are meant to be difficult to satisfy, as "the narrow exception should stay that way and never be allowed

to swallow the general rule that a party is entitled to a single appeal" after "final judgment has been entered." *Digit. Equip. Corp.*, 511 U.S. at 868 (internal quotation marks and citation omitted).

Over the years, the Supreme Court has provided the courts of appeals with general guideposts to follow when assessing these three stringent conditions. First, an order is "effectively unreviewable" where the "legal and practical value" of the asserted right "would be destroyed if it were not vindicated before trial." *Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495, 498-99 (1989) (internal quotation marks and citations omitted). As noted above, the fact that a ruling "may burden litigants in ways that are only imperfectly reparable by appellate reversal of a final district court judgment" is not sufficient. *Mohawk Indus.*, 558 U.S. at 107 (citation omitted). Nor is it sufficient for litigants to rest on the importance of the asserted right when seeking interlocutory review. *See id.* at 108. Rather, "[t]he crucial question" is "whether deferring review until final judgment so imperils the interest [at stake] as to justify the cost of allowing immediate appeal of the entire class of relevant orders." *Id*. Second, a conclusive determination is required. An order is conclusive when it is the "complete, formal, and, in the trial court, final rejection of" the issue. *Abney v. United States*, 431 U.S. 651, 659 (1977). The decision must "not constitute merely a 'step toward final disposition of the merits of the case.'" *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 171 (1974) (quoting *Cohen*, 337 U.S. at 546). Finally, the order must involve a "claim[] of right separable from, and collateral to, rights asserted in the action." *Cohen*, 337 U.S. at 546. Orders are "entwined with the merits" when "courts

of appeals will often have to review the nature and content of" the merits to determine the issue on appeal. *Richardson-Merrell*, 472 U.S. at 439. Although complete separation is not required, the asserted interest on appeal must be "conceptually distinct." *Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985).

When assessing these three requirements of the collateral order rule, "we do not engage in an 'individualized jurisdictional inquiry.'" *Mohawk Indus.*, 558 U.S. at 107 (citation omitted). "As long as the class of claims, taken as a whole, can be adequately vindicated by other means, the chance that the litigation at hand might be speeded, or a particular injustic[e] averted, does not provide a basis for jurisdiction under § 1291." *Id.* (alteration in original) (internal quotation marks omitted). The question of whether an order is appealable is thus "determined for the entire category to which a claim belongs" rather than for individual cases. *Digit. Equip. Corp.*, 511 U.S. at 868. For our purposes, the relevant category of orders involves denials of a pleading-stage motion to dismiss based on the church autonomy defense.

Front of mind when applying *Cohen*'s collateral order doctrine is the Supreme Court's command that "the class of collaterally appealable orders . . . remain 'narrow and selective in its membership.'" *Mohawk Indus.*, 558 U.S. at 113 (quoting *Will*, 546 U.S. at 350). The Court's admonition "reflects a healthy respect for the virtues of the final-judgment rule": "Permitting piecemeal, prejudgment appeals . . . undermines efficient judicial administration and encroaches upon the prerogatives of district court

judges, who play a special role in managing ongoing litigation." *Id.* at 106 (internal quotation marks and citations omitted); *see also Richardson-Merrell*, 472 U.S. at 436 ("[D]istrict judge[s] can better exercise [their] responsibility [to police the prejudgment tactics of litigants] if the appellate courts do not repeatedly intervene to second-guess prejudgment rulings.").

As mentioned earlier, an interlocutory appeal "risks additional, and unnecessary, appellate court work either when it presents appellate courts with less developed records or when it brings them appeals that, had the trial simply proceeded, would have turned out to be unnecessary." *Johnson v. Jones*, 515 U.S. 304, 309 (1995). Too many interlocutory appeals can thus cause serious harm and, as such, they "are the exception, not the rule." *Id.*

Accordingly, the Supreme Court has rarely extended the collateral order doctrine to cover new categories. Indeed, there are presently less than ten categories of orders falling under the collateral order doctrine – none of which are applicable to this case. *See Belya v. Kapral*, 45 F.4th 621, 629 n.5 (2d Cir. 2022) (collecting cases); *see, e.g.*, *Abney*, 431 U.S. at 659 (orders denying a criminal defendant's claim of double jeopardy); *Nixon v. Fitzgerald*, 457 U.S. 731, 742 (1982) (orders denying a public official's claim of absolute immunity); *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144-45 (1993) (orders denying a state's claim of Eleventh Amendment immunity).

Moreover, Congress has authorized the Supreme Court to promulgate rules "defin[ing] when a ruling of a district court is final for the purposes of appeal

under [28 U.S.C. § 1291]." 28 U.S.C. § 2072(c). "Congress' designation of the rulemaking process as the way to define or refine when a district court ruling is 'final' and when an interlocutory order is appealable warrants the Judiciary's full respect." *Swint*, 514 U.S. at 48. Thus, as the Supreme Court has made clear, rulemaking, rather than expansion by court decision, is "the preferred means for determining whether and when prejudgment orders should be immediately appealable." *Mohawk Indus.*, 558 U.S. at 113. As relevant here, the Supreme Court has not promulgated any rules that would grant this court appellate jurisdiction over a district court's pleading-stage denial of the church autonomy defense.

2. Church Autonomy Doctrine

The church autonomy doctrine derives from the Religion Clauses of the First Amendment. Church autonomy protects against government interference in "matters of faith and doctrine and in closely linked matters of internal government." *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 747 (2020). Accordingly, secular courts may not interpret religious law or wade into religious disputes. *See Serbian E. Orthodox Diocese for the U.S. & Can. v. Milivojevich*, 426 U.S. 696, 708-09 (1976); *see also Korte v. Sebelius*, 735 F.3d 654, 677 (7th Cir. 2013) (noting that secular courts must "respect[] [religious institutions'] autonomy to shape their own missions, conduct their own ministries, and generally govern themselves in accordance with their own doctrines as religious institutions"). The First Amendment also protects against employment discrimination claims brought by ministers against their religious

employers. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190 (2012). This protection is known as the ministerial exception, a narrower offshoot of the broader church autonomy doctrine. *See Our Lady of Guadalupe*, 591 U.S. at 747.

These protections afforded by the First Amendment do not grant religious institutions a general immunity from secular laws. *See id.* at 746. Courts may adjudicate secular disputes involving religious institutions where resolution of the case does not require inquiry into doctrinal disputes. *See Jones v. Wolf*, 443 U.S. 595, 602-04 (1979) (holding that courts may apply neutral principles of law to resolve church property disputes); *see also Huntsman v. Corp. of the President of the Church of Jesus Christ of Latter-Day Saints*, 127 F.4th 784, 792 (9th Cir. 2025) (en banc) ("Because nothing in our analysis of [plaintiff's] fraud claims delves into matters of Church doctrine or policy, our decision in this case does not run afoul of the church autonomy doctrine."). So long as a court relies "exclusively on objective, well-established [legal] concepts," or neutral principles of law, it steers clear of any violations of the church autonomy doctrine. *Jones*, 443 U.S. at 603; *see, e.g.*, *McRaney v. N. Am. Mission Bd. of the S. Baptist Convention, Inc.*, 966 F.3d 346, 349 (5th Cir. 2020) (allowing claims of defamation, intentional infliction of emotional distress, and intentional interference that "ask[] the court to apply neutral principles of tort law to a case that, on the face of the complaint, involves a civil rather than religious dispute").

As this court has twice made clear, the neutral principles approach "permits a court to interpret provisions of religious documents involving . . . nondoctrinal matters as long as the analysis can be done in purely secular terms." *Minker v. Balt. Ann. Conf. of United Methodist Church*, 894 F.2d 1354, 1358 (D.C. Cir. 1990); *see EEOC v. Cath. Univ. of Am.*, 83 F.3d 455, 466 (D.C. Cir. 1996) (same). "Thus, simply having a religious association on one side of the 'v' does not automatically mean a district court must dismiss the case or limit discovery." *Belya*, 45 F.4th at 630.

II. Analysis

The threshold issue in this case is whether this court has jurisdiction, pursuant to the collateral order doctrine, to address USCCB's challenge to the District Court's pleading-stage denial of its church autonomy defense. We do not. Accordingly, we dismiss the appeal and remand the case to the District Court for further proceedings. We do not reach the merits of USCCB's church autonomy claims, nor do we consider USCCB's argument that O'Connell's complaint fails to state a claim.

A. *Standard of Review*

We determine *de novo* whether this court may properly exercise jurisdiction over this interlocutory appeal.

B. *This Court Has No Jurisdiction to Entertain Appellant's Interlocutory Appeal*

As explained at the outset of this opinion, collateral order appeals are permissible only in a very

small number of cases that involve decisions that are conclusive, resolve important questions separate from the merits, and are effectively unreviewable on appeal from the final judgment in the underlying action. *Swint*, 514 U.S. at 42. USCCB's interlocutory appeal to challenge the District Court's order denying its motion to dismiss based on the church autonomy doctrine does not satisfy these rigid requirements. The most obvious impediment to USCCB's action is that it can get effective review under 28 U.S.C. § 1291 if the District Court issues a final decision against it. USCCB seeks to protect the right of the church to manage its own non-secular affairs free from governmental interference. This is not a right that will be destroyed if not vindicated before trial.

Our determination that the right to church autonomy is effectively reviewable upon appeal is well-supported by existing caselaw. Every circuit to have considered this issue has ruled that district court determinations regarding disputes over the church autonomy defense are properly reviewed upon post-judgment appeal, not pursuant to the collateral order doctrine. *See Garrick v. Moody Bible Inst.*, 95 F.4th 1104, 1117 (7th Cir. 2024), *reh'g en banc denied*, No. 21-2683, 2024 WL 1892433 (7th Cir. Apr. 30, 2024); *Belya*, 45 F.4th at 634, *reh'g en banc denied*, 59 F.4th 570 (2d Cir. 2023), *cert. denied sub nom. Synod of Bishops of the Russian Orthodox Church Outside of Russ. v. Belya*, 143 S. Ct. 2609 (2023); *Tucker v. Faith Bible Chapel Int'l*, 36 F.4th 1021, 1036 (10th Cir. 2022), *reh'g en banc denied*, 53 F.4th 620 (10th Cir. 2022), *cert. denied*, 143 S. Ct. 2608 (2023); *Herx v. Diocese of Fort Wayne-South Bend, Inc.*, 772 F.3d 1085, 1091-92 (7th Cir. 2014); *Klein v. Oved*, No. 23-14105, 2024 WL 1092324, at *1 (11th Cir. Mar. 13,

2024). We find the unanimity of our sister circuits on this question to be notable and their reasoning persuasive.

It is also notable that the Supreme Court has repeatedly "insisted that" a collateral order appeal may not be pursued unless "the right asserted [will be] essentially destroyed if its vindication must be postponed until trial is completed." *Lauro Lines s.r.l.*, 490 U.S. at 499. The possibility that a district court ruling before a final decision "may be erroneous and may impose additional litigation expense is not sufficient to set aside the finality requirement." *Richardson-Merrell*, 472 U.S. at 436. In this case, USCCB has suggested that the value of the church's rights will be seriously diminished if this court does not review and overturn the District Court's pleading-stage denial of its motion to dismiss based on a church autonomy defense. This claim has been rejected by all of the courts that have addressed the matter in other cases. *See, e.g.*, *Belya*, 45 F.4th at 633; *Garrick*, 95 F.4th at 1117; *Tucker*, 36 F.4th at 1036; *Herx*, 772 F.3d at 1091-92.

The point is that it does not matter that litigation may impose some burdens on a party before a final decision issues. This is insufficient to justify immediate review. In *Mohawk Industries*, for example, the Supreme Court recognized that, during trial, parties may be ordered to disclose privileged information that intrudes on the confidentiality of attorney-client communications. 558 U.S. at 109. Despite the burden of having to produce such information, the Court nevertheless concluded that post-judgment appeals "suffice" to protect the rights of the litigants. *Id.* A showing that a party may be

burdened by having to comply with the final decision rule is not proof that the party's contested rights will be destroyed. *See Digit. Equip. Corp.*, 511 U.S. at 871-72.

Furthermore, if we were to allow collateral appeals to function as an escape valve from adjudicative burdens – or if any potential burden on the right at stake were enough to justify immediate review – then the collateral order exception would expand to swallow the rule. *See id.* at 868. Church autonomy is not the only area in which adjudication may by itself pose a significant cost. The same concern exists for orders on personal jurisdiction, statutes of limitation, claim preclusion, and the right to a speedy trial, to list a few examples. We would risk a dramatic expansion of the collateral order doctrine by hinging it on concerns of encumbrance – and expansion of the collateral order doctrine is precisely the outcome the Supreme Court has consistently rejected. The Court has been quite clear in saying that the final decision rule may not be bypassed in favor of collateral order review merely because it "may impose significant hardship on litigants." *Richardson-Merrell*, 472 U.S. at 440.

In addition, district courts have ample tools at their disposal to limit discovery, tailor jury instructions, and dismiss claims as necessary to safeguard against infringements of the church autonomy doctrine. *See, e.g.*, *Garrick*, 95 F.4th at 1117. And "[w]hen a case can be resolved by applying well-established law to secular components of a dispute, such resolution by a secular court presents no infringement upon a religious association's independence." *Belya,* 45 F.4th at 630. If

infringements nevertheless occur, then litigants, once armed with a final decision, can seek relief through the standard review process. *See Gordon Coll. v. DeWeese-Boyd*, 142 S. Ct. 952, 955 (2022) (Alito, J., concurring) (agreeing that nothing "would preclude [defendant] from . . . seeking review . . . when the decision is actually final" (citation omitted)).

Moreover, the Supreme Court has reminded us "that litigants confronted with a particularly injurious or novel [adverse] ruling have several potential avenues of review apart from collateral order appeal." *Mohawk Indus.*, 558 U.S. at 110. Although post-judgment appeals are the norm, a litigant who is faced with an adverse church autonomy ruling can ask the district court to certify, and the court of appeals to accept, an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Section 1292 review requires "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). The church-defendant in *Demkovich v. St. Andrew the Apostle Parish, Calumet City* pursued this approach and successfully availed itself of immediate review. 3 F.4th 968, 974 (7th Cir. 2021).

Litigants can also petition the courts of appeals for a writ of mandamus under 28 U.S.C. § 1651 when a disputed order "amount[s] to a judicial usurpation of power or a clear abuse of discretion" or otherwise works a manifest injustice. *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 390 (2004) (internal quotation marks and citations omitted); *Mohawk Indus.*, 558 U.S. at 111.

The Supreme Court has said that these case-specific mechanisms provide "'safety valve[s]' for promptly correcting serious errors" and "will continue to provide adequate protection to litigants" in the absence of collateral order appeals. *Mohawk Indus.*, 558 U.S. at 111, 114 (alteration in original) (quoting *Digit. Equip. Corp.*, 511 U.S. at 883). And they do so without incidentally creating an entire category of immediately appealable orders. USCCB has not sought section 1292 review or a writ of mandamus in this case, so we need not address the viability of any such claims here.

Our decision to abide by the final decision rule, even when an admittedly important right is at stake, is utterly unexceptional. The Supreme Court and this court have "routinely require[d] litigants to wait until after final judgment to vindicate valuable rights." *Mohawk Indus.*, 558 U.S. at 108-09; *see, e.g.*, *Flanagan v. United States*, 465 U.S. 259, 262-63, 270 (1984) (Sixth Amendment right to effective assistance of counsel); *United States v. MacDonald*, 435 U.S. 850, 856-57 (1978) (Sixth Amendment right to speedy trial); *Mohawk Indus.*, 558 U.S. at 114 (attorney-client privilege); *Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 348 (D.C. Cir. 2007) (political question doctrine). Like these other interests, the interest of a church in its religious autonomy is undoubtedly important, but deferring review until final judgment does not so imperil the interest as to justify the cost of allowing immediate appeal of an entire class of relevant orders.

C. *Church Autonomy Functions as a Defense to Liability, Not an Immunity from Suit*

USCCB argues that the church autonomy doctrine "protects not only from the consequences of litigation's results but also from the burden of defending from suit." Opening Br. of Defendant-Appellant 20 (internal quotation marks and citation omitted). It argues that post-trial review of an order denying such protection is insufficient to vindicate the constitutional rights at stake. In other words, in an effort to avoid the applicable strictures of the final decision rule, USCCB attempts to characterize the church autonomy doctrine as a right not to be tried, *i.e.*, as an immunity from suit rather than a defense to liability. The church autonomy doctrine, however, does not confer immunity from trial such that immediate review is warranted.

No federal court has ever held that the church autonomy doctrine establishes a constitutional right to immunity from suit in cases concerning secular claims. Quite the contrary. Several circuits have explicitly declined to characterize church autonomy as an immunity from trial. *See Garrick*, 95 F.4th at 1116 (rejecting argument that the church autonomy doctrine confers "immunity from trial"); *Herx*, 772 F.3d at 1090 (rejecting argument that the First Amendment "provides an immunity *from trial*, as opposed to an ordinary defense to liability"); *Tucker*, 36 F.4th at 1025 (rejecting "novel argument that the 'ministerial exception' . . . immunizes religious employers altogether from the burdens of even having to litigate such claims"); *Klein*, 2024 WL 1092324, at *1 (church-autonomy doctrine "does not

immunize religious groups or figures from suit"). As the Second Circuit has explained, "[w]hen a case can be resolved by applying well-established law to secular components of a dispute, such resolution by a secular court presents no infringement upon a religious association's independence." *Belya*, 45 F.4th at 630.

Put simply, if a plaintiff can plausibly assert a secular claim capable of resolution according to neutral principles of law, the First Amendment does not bar judicial examination of that claim. The church autonomy doctrine protects against judicial interference in ecclesiastical matters; it does not provide religious organizations with a blanket immunity from suit, discovery, or trial.

Treating church autonomy as a defense rather than an immunity is also consistent with Supreme Court precedent. In *Hosanna-Tabor*, the Supreme Court made clear that the ministerial exception "operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar." 565 U.S. at 195 n.4. Even though *Hosanna-Tabor* concerned the ministerial exception, the Supreme Court has since recognized the exception as a mere "component" of the church autonomy doctrine. *See Our Lady of Guadalupe*, 591 U.S. at 746. Thus, when the two decisions are considered together, it seems clear that the Court confirmed the church autonomy doctrine is not jurisdictional; it is an affirmative defense. And, like any other defense, a defense based on church autonomy can be adequately addressed after trial.

D. *The Cases Cited by USCCB Do Not Change the Legal Landscape*

Despite the mountain of precedent against its position, USCCB argues that there is caselaw that supports its view in favor of collateral order appeals of church autonomy orders. We disagree. The cases cited by USCCB clearly do not change the result in this case.

First, USCCB cites *Whole Woman's Health v. Smith*, where the Fifth Circuit allowed an interlocutory appeal of an order enforcing a subpoena against a third-party religious organization. 896 F.3d 362 (5th Cir. 2018). A key distinction, however, exists between *Whole Woman's Health* and this case: There, the Fifth Circuit rested its decision on "the predicament of third parties" who "cannot benefit directly from [post-trial] relief." *Id.* at 367-68. As the Seventh Circuit explained in *Garrick*, when distinguishing *Whole Woman's Health*, "[a]n order conclusively determining that a *nonparty* religious organization must be subjected to extensive discovery . . . is not comparable to the class of order at issue here." 95 F.4th at 1116 n.9 (emphasis added). At issue here – and in *Garrick* – is a class of orders concerning a party to the litigation capable of benefiting directly from a post-judgment appeal. Accordingly, *Whole Woman's Health* is inapposite to the issue at hand.

Second, USCCB cites *McCarthy v. Fuller*, 714 F.3d 971 (7th Cir. 2013). In *McCarthy*, a United States representative of the Holy See, the central governing body of the Roman Catholic Church, issued a declaration that Fuller was not a nun or religious sister. 714 F.3d at 973-74. Nevertheless, the district

court planned to instruct the jury to determine whether Fuller was a nun in good standing with the Catholic Church. *Id.* at 976. In light of these facts, the Seventh Circuit held in *McCarthy* that the order "requir[ing] a jury to answer a religious question" was immediately appealable. *Id.*

However, as the Seventh Circuit later explained in *Garrick*, "[t]he circumstances [in *McCarthy*] were remarkably extreme—the judge had determined that the jury's judgment could preempt that of the Holy See on a decidedly doctrinal question, in clear violation of church autonomy." 95 F.4th at 1113-14. The Seventh Circuit also made it clear that "*McCarthy* did not create a new category subjecting denials of a church autonomy defense to immediate appeal." *Id.* at 1114.

Third, USCCB argues that "this Court has 'long allowed' interlocutory appeal of 'alleged injur[ies] [sic] to First Amendment rights during the pendency of a case.'" Opening Br. of Defendant-Appellant 20 (quoting *In re Stone*, 940 F.3d 1332, 1340-41 (D.C. Cir. 2019)). According to USCCB, infringing First Amendment rights for even minimal periods of time results in irreparable harm. As such, an appeal filed after a time-consuming trial is not an effective remedy. Our precedent, however, has never gone so far as to say that a mere alleged violation of the First Amendment is sufficient for collateral order appeal.

In each of the cases cited by USCCB, this court indicated that an interlocutory appeal would be permissible only because there was a dispute over an order restricting speech during the pendency of the case. *See Trump*, 88 F.4th at 1001; *In re Stone*, 940

F.3d at 1340; *In re Rafferty*, 864 F.2d 151, 154 (D.C. Cir. 1988); *see also Marceaux v. Lafayette City-Parish Consol. Gov't*, 731 F.3d 488, 490-91 (5th Cir. 2013). In these cases involving orders restricting speech, waiting for post-judgment review would have effectively defeated the right to any review at all. By the time judgment was entered, the party complaining would have already lost its right to speak while the case was pending. We have no such scenario in this case.

USCCB also cites a similar case, *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14 (2020), which concerned a district court's denial of a preliminary injunction. Even though the order did not involve a restriction on speech, it did involve a restriction on the ability of the faithful to attend religious services during the pendency of litigation – a right that could not be restored after trial. No such restriction on speech or religious practice is present in this case to justify interlocutory review. Furthermore, the courts of appeals have jurisdiction under 28 U.S.C. § 1292(a)(1) to address interlocutory appeals challenging the issuance of a preliminary injunction by a district court. The District Court in this case has not issued an injunction against USCCB.

Fourth, USCCB cites some cases in which we have noted that there is an "immediate harm arising from the process of inquiry into religious disputes." Br. of Defendant-Appellant 21 (citing *Cath. Univ. of Am.*, 83 F.3d at 466-67; *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341-43 (D.C. Cir. 2002); *Duquesne Univ. of the Holy Spirit v. NLRB*, 947 F.3d 824, 829-30 (D.C. Cir. 2020)). Importantly, none of these cases

involved an application of the collateral order doctrine. Rather, all three cases involved an appeal after a final decision had been issued. None of the cited cases even suggests that "harm arising from the process of inquiry into religious disputes" warrants immediate review. Br. of Defendant-Appellant 21.

Finally, USCCB argues that its "specific First Amendment rights imperiled here are structural protections akin to the separation of powers, which have long received interlocutory review." Opening Br. of Defendant-Appellant 22. Even if we were to accept USCCB's claim that church autonomy is a structural protection, "[m]ost separation-of-power claims are clearly not in [the] category" of collaterally appealable orders. *United States v. Cisneros*, 169 F.3d 763, 769 (D.C. Cir. 1999).

In *Cisneros*, a former Secretary of Housing and Urban Development argued that "the very conduct of the trial" against him would "violate the separation of powers by causing the courts to invade the exclusive constitutional province of coordinate branches." *Id.* Like Cisneros, USCCB makes a separation-of-powers claim to avoid trial. Such reliance on the separation of powers, however, was not enough in *Cisneros* and it is not enough here. This court held in *Cisneros* that "[n]othing Cisneros argue[d] amount[ed] to a right not to be tried." *Id.* "Cisneros, like any criminal defendant, may raise separation of powers as a defense. But it scarcely follows that whenever a defendant relies on the separation-of-powers doctrine, the defendant's right must be treated as if it rested on an explicit guarantee that trial will not occur." *Id.* (cleaned up) (internal quotation marks and citation omitted). In other words, invoking separation

of powers is not enough to transform a defense into an immunity. Rather, any "constitutional affront" to the separation of powers "flowing from an adjudication" would be "fully reviewable on appeal should the defendant be convicted." *Id.* Thus, even assuming a violation of the church autonomy doctrine is akin to a violation of the separation of powers, that violation can be reviewed upon post-judgment appeal.

To conclude, the federal courts of appeals – and the Supreme Court – routinely reject parties' efforts to invoke the collateral order doctrine for a wide variety of important rights. And each circuit that has considered extending the collateral order doctrine to cover the right to church autonomy has declined. We join our sister circuits in doing the same: Claims regarding the right to church autonomy are reviewable upon final judgment and, accordingly, not subject to collateral order appeal. And, as explained above, should extreme circumstances arise where immediate relief is required, litigants have alternative appellate options at their disposal.

E. ***Final Considerations***

We have already made the point that a pleading-stage denial of the church autonomy defense is clearly reviewable upon final judgment. This holding is sufficient to decide this case. However, lest the point be missed, it is important to note that a pleading-stage denial also lacks the conclusiveness required for collateral order appeal. This case remains at the earliest stages of litigation with many more steps before the finish line. USCCB can continue to assert the church autonomy defense during discovery, in future dispositive motions, before trial, and during trial. The contested District Court

order therefore is not "conclusive" because it is not a "final rejection" of USCCB's asserted church autonomy defense. Indeed, for an order to conclusively determine the issue, there must be "no further steps that can be taken in the District Court to avoid" infringing on USCCB's religious autonomy. *Mitchell*, 472 U.S. at 527 (internal quotation marks omitted). Here, it is possible that at some later stage, USCCB's church autonomy defense may require limiting the scope of the suit or the extent of discovery, or even warrant dismissal of the suit in its entirety; these are "further steps" that remain available to the District Court to safeguard against First Amendment violations.

USCCB argues that collateral order review is warranted because the District Court "conclusively determined . . . whether USCCB may be compelled to defend on the merits." Opening Br. of Defendant-Appellant 24. The defendants in *Belya* made the same argument before the Second Circuit: "[T]heir claim is that the district court's orders are the final decision on whether discovery can proceed; thus, Defendants contend, the orders constitute a final rejection." 45 F.4th at 631 (internal quotation marks omitted). Our sister circuit rejected that argument in *Belya*, and we do so here as well.

USCCB cites *Process & Industrial Developments Ltd. v. Federal Republic of Nigeria*, 962 F.3d 576 (D.C. Cir. 2020), in support of its position that it has a right to collateral order review to ensure that it will not be required to go through discovery. This decision is inapposite because it involves the application of foreign sovereign immunity. *Id.* at 581. Unlike the church autonomy doctrine, questions of sovereign

immunity have long been held by the Supreme Court and this court to be immediately appealable. *See, e.g.*, *P.R. Aqueduct*, 506 U.S. at 147; *Foremost–McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C. Cir. 1990). As we have explained, however, pleading-stage denials of a church autonomy defense do not satisfy the requirements of the collateral order doctrine.

III. Conclusion

Because USCCB's appeal falls outside of the collateral order doctrine's narrow and selective class of claims subject to interlocutory review, we dismiss the appeal for lack of jurisdiction without reaching the merits of USCCB's church autonomy defense or USCCB's argument that O'Connell failed to state a claim.

So ordered.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

David O'Connell, Plaintiff, v. United States Conference of Catholic Bishops, Defendant.	CA No. 20-1365 (JMC) Washington, D.C. Friday, November 17, 2023 2:30 p.m.

TRANSCRIPT OF STATUS HEARING BEFORE
THE HONORABLE JIA M. COBB
UNITED STATES DISTRICT JUDGE

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Court Reporter:

Proceedings reported by stenotype shorthand.
Transcript produced by computer-aided transcription.

PROCEEDINGS

(Via Videoconference)

THE DEPUTY CLERK: Good afternoon, Your Honor. We're on the record in civil action 20-1365, David O'Connell versus United States Conference of Catholic Bishops.

Starting with Plaintiff, please state your appearance for the record.

MR. WOODWARD: Martin Woodward, Kitner Woodward PLLC, for the plaintiff.

MR. FRANZINI: Good afternoon, Your Honor. Simon Franzini, from Dovel & Luner, for the plaintiff.

MR. BAINE: Good afternoon, Your Honor. Kevin Baine from Williams & Connelly for the defendant.

MR. FLOOD: Good afternoon, Your Honor. Emmet Flood from Williams & Connelly, also for the

defendant, and with me in my office is a colleague from Williams & Connelly, Richard Cleary.

THE DEPUTY CLERK: Your Honor, before you get started, counsel, there is someone in the waiting room, a William Quinn. Is Mr. Quinn with someone.

MR. FLOOD: Ms. Franklin, Mr. Quinn is our client.

THE DEPUTY CLERK: Okay. I'm admitting Mr. Quinn.

THE COURT: Okay. Good afternoon, everyone. So we are here to allow me to resolve the pending motions. And this case has been stuck for quite some time, and that is certainly on the court. So I'm happy to move things along and again hope you can appreciate that I'm still relatively new here in dealing with kind of onboarding backlog that we're working through. But, certainly, I recognize that you've been very patient and appreciate that patience.

So I set this hearing so that I could issue my ruling orally as to the pending motions. Defendant has brought a motion to dismiss for lack of subject matter jurisdiction, for judgment on the pleadings, and in the alternative for summary judgment. I'm going to deny those motions at this time and explain my reasoning briefly on the record.

After putting my reasoning on the record, however, I do want to discuss not only next steps in terms of discovery, but also this was filed as a putative class action and I want to discuss a way in which, as you have your conferences for discovery, can determine whether or not that motion for class certification can be briefed as early as possible. Because I imagine that

if this is not a class action that that changes a lot about this case. We can deal with that after I put my reasoning on the record.

I'll jump right to my reasoning. The factual background the parties are well aware about. The motion to dismiss for lack of subject matter jurisdiction is a threshold issue, so I'll start there.

As the parties recognize, federal courts lack jurisdiction over disputes that cannot be resolved without extensive inquiry into religious law and polity. This is the ecclesiastical abstention doctrine, and I reserve the parties to *Serbian E. Orthodox Diocese for U.S.A. and Canada v. Milivojevich*, 426 U.S. 696 (1976).

There are, however, narrow exceptions top this. The Court can decide church-related disputes if they can do so without being unduly entangled in matters of ecclesiastical cognizance, or if they can apply neutral principles of law. And these questions are treated as jurisdictional.

Accordingly, when a defendant moves to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), the plaintiff bears the burden of establishing that a court has subject matter jurisdiction.

Although I can consider matters outside the pleadings and the motion bears closer scrutiny than a motion under, say, Rule 12(b)(6), I am still required to accept the complaint's factual allegations as true, and the plaintiff is afforded the benefit of all reasonable inferences.

In its motion, defendant argues that the Court lacks subject matter jurisdiction over this case

because, on its face, the dispute raises two basic questions about how the highest authorities of the church may choose to allocate funds.

And defendant is correct that the doctrine would prevent me from reviewing decisions involving matters of church government as well as those of faith and doctrine, and this would include any decisions about the organization's determination of whose voice speaks for the church, whether someone may worship at church, matters that are purely ecclesiastical even if they affect civil rights. But the doctrine does not prevent the Court from reviewing decisions when it's possible to do so using completely neutral principles of law. And that's a proposition from *Jones v. Wolf* at 443 U.S. 595 (1979).

Importantly for this case, alleged fraud or collusion may fall into the neutral principles category where civil court review is appropriate. And the reasoning for that exception is that when a dispute is purely secular, even if it involves a religious-affiliated organization, the perceived danger that, in resolving interchurch disputes, the state will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal belief is diminished.

And that's from *General Council of the United Methodist Church v. California Superior Court*, also a Supreme Court case, 439 U.S. 1355 (1978). I do find, as pled, the complaint falls within the neutral principles category.

The plaintiff alleges, in short, that defendant made affirmative misrepresentations and fraudulent omissions, was unjustly enriched and breached a

fiduciary duty. The elements of these claims include falsity of statements, knowledge and intent on the part of the statement makers, reliance, whether a benefit was conferred and retained, and whether a fiduciary duty was created and breached. Those questions can be resolved using neutral principles of law.

In other words, there's no need that I inquire into church operations, religious doctrine, religious hierarchy, or religious decisionmaking to evaluate the merits of this claim. Instead, this is a case about what defendant represented, what it knew, and the relationship between defendant and plaintiff as a putative class representative.

I also understand that the case will not require me to consider church governance, the makeup of church congregations or anything related to membership and, importantly, to make any judgments whatsoever about the way the church chooses to use its funds.

To be sure, it would be improper for me to delve into those purely religious determinations in order to rule. For example, I could not rule that the church could only exercise its financial discretion in one way or another. But I don't believe that's required for the Court to determine, under straightforward common-law principles, whether or not fraud took place in this case or for a fact-finder to make that determination.

As such, at this stage, it's not apparent to me that the resolution of the claims will involve impermissible religious entanglement, and so I conclude that I do have subject matter jurisdiction in this case.

I'll turn next briefly to stating my reason for denying my motion for judgment on the pleadings and in the alternative for summary judgment. As the

parties are well aware, entering judgment on the pleadings is appropriate if the movant shows that there is no disputed material fact and they are entitled to judgment as a matter of law.

The D.C. Circuit has recognized that such motions -- I'm sorry -- that was the summary judgment standard. But for Rule 12(c), the D.C. Circuit has recognized that such motions are rare and that the party seeking judgment shoulders a heavy burden of justification.

I am required to accept the nonmoving party's allegations as true, and consider false the controverted assertions of the moving party. Judgment on the pleadings are not appropriate if there are any issues of fact that, if proved, would defeat recovery even if I am convinced that the opposing party is unlikely to prevail at trial.

In sum, if there are any material questions presented by the pleadings, I cannot grant a Rule 12(c) motion, and I find that to be the case.

I'm going to start with the fraud claims. As the parties are well aware, under D.C. law, a claim for fraudulent misrepresentation or omission requires a showing that a defendant made a false representation of, or willfully omitted, a material fact, had knowledge of the misrepresentation or willful omission, intended to induce another to rely on the misrepresentation or willful omission, that the other person acted in reliance on the misrepresentation or willful omission, and that damages were suffered as a result.

I understand plaintiff to be making two fraud-related claims: fraudulent misrepresentation and fraudulent concealment. The complaint alleges

fraudulent misrepresentation. O'Connell contends that defendant communicated to him that money he donated would be used exclusively for victims of war, oppression, natural disaster or disease, and that defendant knew or should have known that the proceeds were in fact used for noncharitable purposes; and the plaintiff contends that these representations constitute fraudulent misrepresentation. The plaintiff also contends that he donated to defendant based on these representations and that the defendant intended for him to rely on its statements in his decision to donate.

The requirement to plead fraudulent concealment are substantially the same. However, while fraudulent misrepresentation turns on a false representation, fraudulent concealment turns on an omission. And under D.C. law, mere silence does not constitute fraud unless there is a duty to speak. And a duty to speak attaches in an instance where a material fact is unobservable or undiscoverable by an ordinarily prudent person upon reasonable inspection -- and that's from *Sununu v. Philippine Airlines, Inc.*, 792 F.Supp.2d 39, (DDC 2011) -- or as a result of partial disclosure.

So, in this complaint, plaintiff alleges that defendant knew or should have known that the charitable fund was not used to fund charitable purposes exclusively as represented. And because of this knowledge, plaintiff alleges that defendant's failure to inform prospective donors of the true use of funds constitutes unlawful concealment.

Further, plaintiff alleges that the defendant had a duty to disclose because it had exclusive knowledge of the suppressed facts and made representations about

what the funds would be used for. Again, at this very early stage of the litigation, I'm required to draw all of those inferences in plaintiff's favor, and I do find that material disputes of fact remain based on the defendant's answer and the briefing, including whether any statements were in fact false, whether defendant was actually involved in the alleged statements, whether the defendant knew the statements were false, the defendant's intentions regarding the statements, and plaintiff's reliance on the representations.

For these reasons, taking the allegations as true, I deny the motion with respect to Count 1. And I'll briefly just say, with respect to the 9(b) requirements, I know there was some discussion in the pleadings about whether or not such a motion is appropriate after an answer. I do note that defendants did answer the complaint, but don't think it's necessary for me to resolve the question, because I find that the complaint contains enough detail to satisfy the heightened pleading requirements.

I do think the fact that there was an answer is relevant to the overall purpose of the rule, which is to provide enough information to the defendant to be able to respond to the complaint, which isn't done, but I think that Plaintiff has alleged a narrow time frame, persons involved, what was said; and all of this is, in my view, sufficiently detailed to satisfy a Rule 9(b).

My findings with respect to unjust enrichment are similar to my ruling on the first count. It's just simply at this stage, prediscovery in the case, where I'm required to take plaintiff's allegations as true, I believe that plaintiff's complaint checks the relevant boxes.

Under D.C. law, a claim for unjust enrichment requires that a plaintiff confer a benefit on a defendant who in turn retained the benefit. Further, it must be the case that, under the circumstances, the defendant's retention of the benefit is unjust; and in the complaint, plaintiff alleges that defendant retained the benefit of his donations to the fund, Peter's Pence fund, and he alleges that the donations were induced by false representations and omissions and that the retention of these donations was unjust.

And I know that there are disputes about whether in fact the defendant did retain the donations or whether the defendant is actually the proper defendant at all. These factual disputes do not allow me to grant the motion.

Finally, for breach of fiduciary duty, under District of Columbia law, the plaintiff must allege facts sufficient to establish that the defendant owed such a duty to a plaintiff and breached that duty. And they must also plead probable cause and injury, and plaintiff makes these allegations in his complaint, that a fiduciary duty was generated by certain promotions, advertisements, the overseeing and collection of funds, and that the defendant breached the duty by not ensuring that the charitable contributions were spent in accordances with promises made.

As plaintiff recognizes, this question about a fiduciary relationship is often a fact-intensive inquiry that's often based on a fuller record, and given my rulings on the other matters and at this earlier stage, I do think it would be premature and not appropriate for me to grant the motion given plaintiff's allegation.

And finally, there was a motion to treat the motion in the alternative as one for summary judgment. Plaintiff has responded to defendant's statements by representing that he isn't in a position to respond because he needs further discovery.

Although I did not see that the motion included a declaration to support that contention, I do agree that plaintiff would be entitled to some information to have a reasonable opportunity to present all the material that is pertinent to the motion. So I will decline to convert the motion to one for summary judgment at the time, and deny it certainly without prejudice.

So, again, thank you for your patience as I get this case unstuck, but that's my ruling. I think what we need to do next is set a date for a scheduling conference and a deadline for a Rule 26(f) report.

But I wanted to just take a step back and ask plaintiff's counsel, because this case has been filed as a putative class action, and I know that the defense has not moved, at least yet, to strike any class allegations, and I certainly haven't delved into that issue; but it seems to me that there's some question particularly concerning, I would say -- to the extent that the fraud counts require some showing about individual people who donated their individual understanding and reliance, that there may be some questions about commonality.

I mean, I don't know -- I don't want to put you on the spot, but I guess my question is do you think that we can set a schedule that would allow briefing on the class certification question early, because I imagine if this case is not certified as a class, then that changes a lot about the case. I don't know how much is at stake

if this were just an individual plaintiff case and not a class. So maybe you can speak to that, Mr. Woodard.

MR. WOODWARD: Sure. Thanks, Your Honor. I agree that it makes sense to proceed with class certification, or at least as soon as is reasonable. In connection what that, though, we will need some discovery, and we are ready to move forward just as soon as we can with the 26(f) conference and a 26(f) report.

We actually had already served a request for production of documents on the day that the defendant filed its answer. That was then followed, of course, with the motions that Your Honor just ruled on, and the request for production hasn't been responded to. But it will be useful, we think, in sort of outlining the types of discovery we're going to be seeking in connection with our class certification motion, and it's certainly the groundwork and foundation for what we think to be a productive discussion about how long it might take defendants to gather up and produce the materials that we're asking for that will help resolve the issues.

Then briefly, just to respond to Your Honor's point about the relationship of the fraud claims that we've alleged to class certification issues, there's plenty of case law that speaks to an inference of reliance if reliance is even to be a required element where you have, as we've alleged, a fraudulent scheme that's more or less uniform, we think that that is -- the discovery is going to bear that out. And if that in fact proves to be the case, that is likely to be one of the arguments that you'll hear when we move to certify that claim, if we choose to do so.

THE COURT: Okay. And that's fair. And again, I'm not suggesting that I'm ruling, but I just gathered that it seems like a case where, to the extent discovery can be bifurcated, to deal with class certification first. And it may be possible that there's no way to disentangle from the merits and that that's not possible.

So maybe instead of saying bifurcating discovery, if there's some way that discovery can be phased such that some of these issues can be addressed early, that would be beneficial. Again, it may be completely impossible to disentangle, and I'll let you all discuss that. I certainly don't want to have overlapping and confusing phases of discovery where parties don't know what box that they're in.

And then similarly, Mr. Woodward, just because I noted this in the briefing that there was some question about whether or not this is the proper defendant, obviously, that's a question as well that we would want to resolve early. And so I don't know if you've had any conversations with defense counsel about that issue, but I guess you can conduct discovery and then we can set a deadline for amending pleadings at the appropriate time.

Okay. So -- and then who's speaking for the defense?

MR. FLOOD: I am, Your Honor. Mr. Flood.

THE COURT: Okay. Mr. Flood, so that's my ruling, again, without prejudice, for any further motions that you may file, I just think it's premature at this stage given the allegations in the complaint. Do you have a sense of how much time it will take for the 26(f) report to be filed in the conference? How much time do you need? And I'll ask Mr. Flood the same thing.

MR. FLOOD: I don't have a clear sense, Your Honor. Next week is challenging --

THE COURT: Yes.

MR. FLOOD: -- to confer. And then December, of course, is holiday month, but I should think sometime in December even if it's closer to the holidays at the end, and I would propose talking to Mr. Woodward and Mr. Franzini and then figuring out what we can do. But I would think, with allowance for the holidays, several weeks ought to be enough time.

MR. WOODWARD: We agree. I think that's right.

THE COURT: Mr. Flood, do you have a proposed date, or do you want to confer and submit a proposal to me?

MR. WOODWARD: I think it makes sense, Your Honor, for us to confer and submit a proposal. I'm not sure what Mr. Flood feels about that. If it's easier to propose dates, just looking at my calendar, I could pick -- just the broad parameters what you laid out, I think maybe it would be most productive for us to confer and then come back to you with what works for both sides.

THE COURT: Okay. Why don't we do this: Why don't you all confer, and if you send a joint email to chambers letting us know the time frame that you want to have the scheduling conference in and the time frame or date that you've agreed to submit the discovery planning report, the Rule 26(f) report, then we'll just issue a minute order memorializing those dates.

MR. WOODWARD: That sounds good, Your Honor. Thank you.

THE COURT: All right. Is there anything else we should address today before concluding the hearing, and then I'll receive your information and set the minute order for the scheduling conference?

MR. FLOOD: Your Honor, I would like to mention just one thing by way of what might informally be thought of as a possible heads-up.

THE COURT: Okay.

MR. FLOOD: We'll want to confer, our legal team, with our client about Your Honor's ruling.

THE COURT: Okay.

MR. FLOOD: But as Your Honor pointed out at the beginning, the ecclesiastical abstention doctrine partakes of something jurisdictional, and so I think we have a live continuing question now of whether there is subject matter jurisdiction.

THE COURT: Okay.

MR. FLOOD: We are at least going to give consideration of whether that calls for an immediate appeal of one kind or another.

THE COURT: Sure.

MR. FLOOD: And related to that is the consideration of conducting discovery, you know, when that question is pending is also something covered or not by the same doctrine.

THE COURT: Sure.

MR. FLOOD: It doesn't mean of course we won't be meeting with Mr. Woodward per your directions we of course will but I just thought I'd signal that for you Your Honor and let's see how our conversations go and

we may be back with you with something in the manner of a motion there.

THE COURT: Sure. I appreciate that. Thank you for letting me know.

MR. FLOOD: Thank you, Your Honor.

THE COURT: Okay. If that's it, I will look forward to hearing from you, and I will issue a minute order. If you do file such a motion, I'll be on the lookout for it, and I promise I will resolve it promptly.

MR. FLOOD: Thank you. Actually, Your Honor, I do have one other question just obviously without purporting to do what I cannot do, namely, fix for you or have you tell us with any determination you may not have made, but does Your Honor intend to reduce your oral ruling today for an order for the docket? And the reason I ask of course is if we did think an appeal was necessary, I think the law is we've gotta have something on the docket to start the timeline. So that's just an open question, not necessarily looking for an answer today, just an expectation question.

THE COURT: Sure. I was just going to put an order that says for the reasons stated orally on the record that the motions are denied. My understanding was that was sufficient in terms of...

MR. FLOOD: And I'm not quarreling with Your Honor at all, so much as I think there are some technical features of the D.C. Circuit regime not shared with others that can affect the running of the time. I don't think it affects our ability actually to file something.

THE COURT: Right.

MR. FLOOD: That was the nature of my inquiry. And I suppose if we have a transcript from the court reporter, that will go a long way toward.

THE COURT: But to your question, yes. I'm going to put an order on the docket that formally denies the motion, but it will just simply say for the reasons stated orally on the record.

MR. FLOOD: I think that answers my question. Thank you, Your Honor.

THE COURT: Okay. Thank you so much. Have a good one.

(Proceedings adjourned at 2:56 p.m.)

* * * * * *

CERTIFICATE

I, BRYAN A. WAYNE, Official Court Reporter, certify that the foregoing pages are a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Bryan A. Wayne
Bryan A. Wayne

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23-7173

September Term, 2025
1:20-cv-01365-JMC
Filed On: November 4, 2025

David O'Connell,

Appellee

v.

United States Conference of Catholic Bishops,

Appellant

BEFORE: Srinivasan, Chief Judge; Henderson, Millett, Pillard, Wilkins, Katsas, Rao***, Walker*, Childs, Pan, and Garcia, Circuit Judges; and Edwards**, Senior Circuit Judge

O R D E R

Appellant's petition for rehearing en banc was circulated to the full court, and a response and a vote were requested. Thereafter, a majority of the judges eligible to participate did not vote in favor of the petition. Upon consideration of the foregoing, the motions for invitation to file briefs as amici curiae in support of appellant's petition for rehearing en banc, the lodged briefs, and the 28(j) letters, it is

ORDERED that the petition for rehearing en banc be denied. It is

FURTHER ORDERED that the motions for invitation to file briefs as amici curiae be granted. The Clerk is directed to file the lodged briefs.

Per Curiam

FOR THE COURT
Clifton B. Cislak, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

* A statement by Circuit Judge Walker, concurring in the denial of rehearing en banc, is attached.

** A statement by Senior Circuit Judge Edwards, concurring in the denial of rehearing en banc, is attached.

*** A statement by Circuit Judge Rao, dissenting from the denial of rehearing en banc, is attached.

WALKER, *Circuit Judge*, concurring in the denial of rehearing en banc:

David O'Connell attends Sacred Heart Catholic Church in East Providence, Rhode Island. One Sunday, in response to a call for alms from the pulpit, O'Connell made a cash donation to Peter's Pence. He understood the special collection to be exclusively for "emergency assistance to the neediest people around the world." JA 26.

Peter's Pence funds do not always go directly to those in need. Some money is invested or used for other administrative purposes. Believing himself defrauded, O'Connell sued the United States Conference of Catholic Bishops, the church body that administers the Peter's Pence collection in the United States.

Before the district court, the Conference of Catholic Bishops argued that a branch of government (the Judiciary) cannot wade into a dispute about church governance.[1] The district court disagreed, and in a brief oral ruling, it concluded that proceeding with discovery would not violate the church-autonomy doctrine. The Conference of Catholic Bishops appealed that interlocutory order, and a panel of this

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[1] *Cf.* T.S. Eliot, Murder in the Cathedral 25 (1935) ("We do not know very much of the future / Except that from generation to generation / The same things happen again and again.").

court dismissed the appeal for lack of appellate jurisdiction.[2]

In its opinion, the panel found "the unanimity of our sister circuits on this question to be notable and their reasoning persuasive."[3] But unanimity of holdings should not be mistaken for unanimity of opinion. The panel's decision conflicts with the conclusions of many sister-circuit colleagues.[4]

This "chorus of circuit-court dissenters" has persuasively explained why ecclesial defendants are entitled to appeal denials of motions to dismiss on

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[2] *See O'Connell v. United States Conference of Catholic Bishops*, 134 F.4th 1243, 1248-49 (D.C. Cir. 2025).

[3] *Id.* at 1255.

[4] *See, e.g.*, *Garrick v. Moody Bible Institute*, 95 F.4th 1104, 1117 (7th Cir. 2024) (Brennan, J., dissenting); *Belya v. Kapral*, 59 F.4th 570, 573 (2d Cir. 2023) (Park, J., joined by Livingston, C.J., Sullivan, Nardini, and Menashi, JJ., dissenting from denial of rehearing en banc); *Tucker v. Faith Bible Chapel International*, 53 F.4th 620, 625 (10th Cir. 2022) (Bacharach, J., joined by Tymkovich and Eid, JJ., dissenting from denial of rehearing en banc); *cf. McRaney v. North American Mission Board of Southern Baptist Convention, Inc.*, 980 F.3d 1066, 1067 (5th Cir. 2020) (Ho, J., joined by Jones, Smith, Elrod, Willett, and Duncan, JJ., dissenting from denial of rehearing en banc); *id.* at 1075 (Oldham, J., joined by Smith, Willett, Duncan, and Wilson, JJ., dissenting from denial of rehearing en banc).

church-autonomy grounds.[5] The church-autonomy doctrine protects religious bodies against "time-consuming and expensive litigation" when "the litigation itself" would "enmesh[] the courts in ecclesiastical disputes."[6] So when a district court erroneously denies a motion to dismiss based on the church-autonomy doctrine, the district court threatens the religious defendant with irreparable First Amendment harm by proceeding to

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[5] *Hanson v. District of Columbia*, 120 F.4th 223, 264 (D.C. Cir. 2024) (Walker, J., dissenting). Legal scholars too have joined the chorus. *See, e.g.*, Adam Reed Moore, *A Textualist Defense of a New Collateral Order Doctrine*, 99 Notre Dame L. Rev. Reflection 1, 44-45 (2023); *see also* Lael Weinberger, *Is Church Autonomy Jurisdictional?*, 54 Loy. U. Chi. L. J. 471, 503-05 (2023).

[6] *Tucker*, 53 F.4th at 627 (Bacharach, J., dissenting from denial of rehearing en banc).

discovery and possibly trial.[7] And that is an immediately appealable collateral order.[8]

This court's panel suggested that the district court could begin to adjudicate O'Connell's fraud claims by applying "neutral principles of law" that do not threaten "judicial interference in ecclesiastical matters."[9] I am not so sure. As Judge Bumatay wrote, a court cannot decide "whether the Church's statements about its tithing policy were fraudulent" without "necessarily settl[ing] a dispute between the Church and a disaffiliated member concerning the meaning of 'tithes.'"[10]

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[7] *See Garrick*, 95 F.4th at 1122 (Brennan, J., dissenting) ("it is not only the conclusions that may be reached by the government which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions" (quoting *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979)) (cleaned up)); *Belya*, 59 F.4th at 573 (Park, J., dissenting from denial of rehearing en banc) ("litigation, including discovery and possibly trial, on matters relating to church governance . . . imperils the First Amendment rights of religious institutions").

[8] *See Garrick*, 95 F.4th at 1117, 1121-24 (Brennan, J., dissenting); *Belya*, 59 F.4th at 573, 577-82 (Park, J., dissenting from denial of rehearing en banc); *Tucker*, 53 F.4th at 625, 625-30 (Bacharach, J., dissenting from denial of rehearing en banc).

[9] *O'Connell*, 134 F.4th at 1258.

[10] *Huntsman v. Corp. of the President of the Church of Jesus Christ of Latter-Day Saints*, 127 F.4th 784,

Nevertheless, this case does not meet our circuit's exceedingly high standard for en banc review — even if that review would be consistent with the traditions of other circuits that go en banc more often than we do.[11]

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813 (9th Cir. 2025) (en banc) (Bumatay, J., concurring in judgment).

[11] *See, e.g.*, *Air Line Pilots Association v. Eastern Air Lines, Inc.*, 863 F.2d 891, 925 (D.C. Cir. 1989) (Ginsburg, R.B., J., concurring in the denial of rehearing en banc) ("Only in the rarest of circumstances, . . . should we countenance the drain on judicial resources, the expense and delay for the litigants, and the high risk of a multiplicity of opinions offering no authoritative guidance, that full circuit rehearing of a freshly-decided case entails." (cleaned up)); *see also* D.C. Cir. R. 40(d) ("rehearing ordinarily will not be granted"); D.C. Circuit Handbook of Practice and Internal Procedures 58 (2024) (en banc petitions are "rarely granted" and "are not favored") (citing Fed. R. App. P. 40).

EDWARDS, *Senior Circuit Judge*, concurring in the denial of rehearing *en banc*: The narrow issue in this case is whether this court has jurisdiction to hear this appeal pursuant to the collateral order doctrine. The case law on this matter is quite clear, as the panel explained in its opinion. *See O'Connell v. U.S. Conf. of Cath. Bishops*, 134 F.4th 1243 (D.C. Cir. 2025). The panel faithfully adhered to the law of the circuit, which is consistent with the prevailing law in the federal courts. *Id.* at 1255-57. The United States Conference of Catholic Bishops (USCCB) seeks to expand the collateral order doctrine to suit its purposes. But USCCB's claim finds no support in the prevailing law as established by the Supreme Court and the federal circuit courts.

The panel decision does not involve a question of exceptional importance, nor does it conflict with any decision of the United States Supreme Court. Fed. R. App. P. 40(b)(2)(B), (D). Therefore, *en banc* review is not justified. The panel's decision that it lacks jurisdiction over this case is not only perfectly consistent with established law, but also reflects a just application of law.

Under the "final decision rule," the appellate jurisdiction of the federal courts of appeals is generally limited to "final decisions of the district courts of the United States." 28 U.S.C. § 1291. A final decision is typically one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945) (citation omitted). The "collateral order doctrine" provides a limited exception to the final decision rule for a "small class" of collateral rulings that, although they do not end the litigation,

are appropriately deemed "final." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). This "small category includes only decisions [1] that are conclusive, [2] that resolve important questions separate from the merits, and [3] that are effectively unreviewable on appeal from the final judgment in the underlying action." *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 42 (1995) (citing *Cohen*, 337 U.S. at 546). The Supreme Court has made it clear that these requirements are "stringent." *Will v. Hallock*, 546 U.S. 345, 349 (2006). The Court has also stressed the importance of the third *Cohen* factor, *i.e.*, a decision that can be effectively reviewed on appeal is not covered by the collateral order doctrine. *See, e.g.*, *Mohawk Indus. v. Carpenter*, 558 U.S. 100, 107-08 (2009).

The Supreme Court has openly acknowledged that many trial court rulings "may burden litigants in ways that are only imperfectly reparable by appellate reversal of a final district court judgment." *Digit. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 872 (1994) (citations omitted). Nevertheless, the Court has been resolute in saying that "the mere identification of some interest that would be 'irretrievably lost' has never sufficed to meet the third *Cohen* requirement." *Id.* (quoting *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 431 (1985)). It is important to remember that, in its current posture, this case does not involve a dispute over "church autonomy." Throughout this litigation, USCCB has appeared to assume that it has "immunity" from any action against it. It is mistaken. The church autonomy doctrine protects against judicial interference in ecclesiastical matters; it does not provide religious organizations

with a blanket immunity from suit, discovery, or trial. *See O'Connell*, 134 F.4th at 1257-58.

USCCB attempts to bring a collateral order appeal to challenge the District Court's order denying its motion to dismiss based on the church autonomy doctrine. Without in any way addressing the merits of the parties' claims, the District Court simply denied the motion to dismiss. The court found that, at this stage of the litigation, O'Connell's claims raised a purely secular dispute that could be resolved according to neutral principles of law. However, the District Court made it clear to the parties that it could not and would not address purely religious questions, should they arise during litigation. Thereafter, rather than proceeding with trial, USCCB filed an appeal with this court seeking interlocutory review.

The church autonomy doctrine protects against government interference in matters of faith, doctrine, and internal management. It may be raised as a defense in a civil suit, but it does not immunize religious organizations from civil actions. *See O'Connell*, 134 F.4th at 1258. Pleading-stage denials of a church autonomy defense, such as the contested motion to dismiss in this case, do not satisfy the strict requirements of the collateral order doctrine. This is especially true in a case of this sort in which nothing of significance has happened in the District Court. The contested denial of a motion to dismiss in this case is neither conclusive nor separate from the merits, and, most importantly, it can be reviewed upon post-judgment appeal.

Indeed, the idea that there could be collateral order review in a case of this sort would mean that there could be a constant stream of interlocutory review

petitions every time a litigant merely asserts a religious privilege during trial (which could happen every time the district court issued an evidentiary or discovery order). You could have interlocutory review after interlocutory review after interlocutory review, endlessly. This makes no sense in light of the final decision rule, especially given that a religious organization always retains the right to appeal any final judgment (or preliminary injunction) issued against it before it is required to take any contested action.

Neither the Supreme Court nor any circuit has ever expanded the collateral order doctrine to categorically cover alleged denials of a church autonomy defense. *See O'Connell*, 134 F.4th at 1257-58. This is hardly surprising. The limited scope of the collateral order doctrine reflects a healthy respect for the virtues of the final decision rule, which serves as an important safeguard against piecemeal and premature review. USCCB's claimed rights can be adequately addressed on appeal after the District Court issues a final decision and, therefore, are not eligible for interlocutory review.

RAO, *Circuit Judge*, dissenting from the denial of rehearing en banc: *Obolo di San Pietro*, or "Peter's Pence," is a thousand-year-old collection by which Catholic faithful annually give money to the Pope. In 2020, an individual congregant sued the United States Conference of Catholic Bishops (the "Bishops"), alleging fraud and other misconduct relating to the promotion and management of Peter's Pence. The Bishops raised a church autonomy defense in their motion to dismiss, which the district court rejected because the case could be decided using "neutral principles of law." A panel of this court then dismissed the Bishops' interlocutory appeal for lack of jurisdiction.

The First Amendment's Religion Clauses protect a "sphere" of autonomy for churches and other religious institutions and organizations. *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2060–61 (2020). Within that sphere, the church autonomy defense prohibits state interference "in matters of faith and doctrine and in closely linked matters of internal government." *Id.* at 2061. Because the donations at issue here implicate the faith, practice, and governance of the Catholic Church, the district court wrongly relied on "neutral principles of law" to overcome the Bishops' church autonomy defense. *See Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 189–90 (2012). Moreover, because state interference can include the process of judicial inquiry, the church autonomy defense is best understood as a constitutional immunity from suit. The rejection of a church autonomy defense therefore supports interlocutory review under the collateral order doctrine.

Given the important constitutional rights at stake, and the tension between the panel's decision and Supreme Court precedent, the full court should have heard this case.

I.

A.

Peter's Pence is a collection of monetary contributions the Catholic Church annually solicits to support the Pope's "work of evangelization" and "aid of the poor and needy." Pope Benedict XVI, *Address to the Members of the "Circolo San Pietro"* (Mar. 8, 2007), https://perma.cc/EDM7-32MB; *see Peter's Pence*, The Vatican, https://perma.cc/G53Z-QP7G. Its roots lie in a religious practice described in the New Testament, whereby material aid was given to Jesus Christ and his followers for their work spreading the gospel and aiding the poor. *See History of Peter's Pence*, The Vatican, https://perma.cc/72GK-GXYJ. Later, the apostle Paul instituted a collection of monetary support from Christian communities for the "Mother Church," then in Jerusalem. *Id.*

From this religious backdrop, Peter's Pence originated more than a thousand years ago as an annual gift of alms that Anglo-Saxon royalty pledged to the Pope. *See* W.E. Lunt, *The Financial System of the Medieval Papacy in the Light of Recent Literature*, 23 Q.J. of Econ. 251, 278 (1909). For centuries, the collection was treated not only as a gift, but also as a religious obligation that expressed devotion to the Pope. *See History of Peter's Pence*, The Vatican.

Peter's Pence continues today as a worldwide yearly collection of financial support from Catholics for the Pope, both as a "tangible sign of communion

with Him, as Peter's Successor," and as alms for the "most disadvantaged." *What is Peter's Pence*, The Vatican, https://perma.cc/AJ73-FNCN. Church law requires local bishops to assist in procuring financial means for the Pope, and the Church has accordingly adopted legislation governing Peter's Pence and other fundraising appeals. *See Code of Canon Law*, Book V, Title I, §§ 1262 & 1271 (1983).

B.

In 2018, David O'Connell, a congregant at Sacred Heart Church in East Providence, Rhode Island, made a donation to Peter's Pence during Sunday Mass. Two years later, he brought a class action suit against the Bishops for fraud, unjust enrichment, and breach of fiduciary duty related to the Bishops' promotion and management of Peter's Pence.[1] Among other things, O'Connell claimed the Bishops made affirmative misrepresentations about how donations to Peter's Pence would be used, received money that they "ought not to retain," and breached their duty to ensure that donations would be spent by the Pope in a particular way. J.A. 30–33.

O'Connell sought to represent a class made up of "[a]ll persons in the United States who donated money to the Peter's Pence collection," which could include

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[1] The Bishops deny that they play any role in the administration, collection, or distribution of funds given to Peter's Pence. But at the motion to dismiss stage, this court accepts the plaintiff's factual allegations as true and draws all reasonable inferences in his favor. *Attorney General v. Wynn*, 104 F.4th 348, 352 (D.C. Cir. 2024).

"millions" of believers. J.A. 26–27. O'Connell also requested substantial discovery from the Bishops, including a list of donors to Peter's Pence and records of amounts received, the ways in which such donations were ultimately used, and communications the Bishops had with the Pope and the Vatican. *O'Connell v. U.S. Conf. of Cath. Bishops*, 134 F.4th 1243, 1250 (D.C. Cir. 2025). As to remedies, O'Connell asked for an injunction modifying how the Bishops promote and manage Peter's Pence. He also requested damages, attorney's fees and costs, and disgorgement of all contributions made by class members to Peter's Pence.

The Bishops moved to dismiss, arguing that, because the lawsuit concerned the solicitation and expenditure of religious donations, it was barred by the First Amendment's protection of church autonomy. The district court denied the motion, holding it could resolve the case using "neutral principles of law" and without inquiring into "church operations, religious doctrine, religious hierarchy, or religious decisionmaking." *Id.* (cleaned up). Since the court could thereby avoid an "impermissible religious entanglement," the church autonomy doctrine did not bar its consideration of the suit. *Id.* (cleaned up).

The Bishops sought interlocutory review, arguing that O'Connell's claims were constitutionally barred because they interfered with matters of faith, doctrine, and internal church governance, and that immediate appeal was justified under the collateral order doctrine.

The panel dismissed the appeal for lack of jurisdiction, holding that "pleading-stage denials of a church autonomy defense do not satisfy the

requirements of the collateral order doctrine." *Id.* at 1261. Following the district court's substantive approach, the panel concluded that an exclusive reliance on "'objective, well-established [legal] concepts,' or neutral principles of law" enables a court to "steer[] clear of any violations of the church autonomy doctrine." *Id.* at 1254 (quoting *Jones v. Wolf*, 443 U.S. 595, 603 (1979)). The panel also rejected the categorization of the church autonomy doctrine as an immunity from suit. *Id.* at 1257–58. The Bishops seek rehearing en banc on these important questions.

II.

I begin by explaining the district court's fundamental error in rejecting the Bishops' church autonomy defense on the ground that "neutral principles of law" can decide the lawsuit. First, as the Supreme Court has repeatedly indicated, the church autonomy doctrine protects a sphere of vital First Amendment interests and is an affirmative defense that cannot be rejected simply because a lawsuit could be resolved using neutral principles of law. Second, this lawsuit implicates religious donations given to the leader of the Catholic Church, a matter squarely within the sphere of church autonomy protected by the First Amendment. The lawsuit accordingly should have been dismissed before intrusive discovery and judicial probing into matters of faith, doctrine, and internal church governance occurred. By allowing neutral principles of law to trump church autonomy, the district court failed to protect the First Amendment rights of the Catholic Church and its followers.

A.

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. Together, the two Religion Clauses undergird the church autonomy doctrine,[2] which recognizes that the Constitution "protect[s] the right of churches and other religious institutions to decide matters of faith and doctrine without government intrusion." *Our Lady of Guadalupe*, 140 S. Ct. at 2060 (cleaned up). The church autonomy doctrine secures the free exercise and associational rights of individual believers. For many individuals, religion includes "important communal elements"—"[t]hey exercise their religion through religious organizations." Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373, 1389 (1981). Indeed, it is "through religious communities that individuals jointly develop religious ideas and beliefs." Kathleen A. Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of* Smith, 2004 B.Y.U. L. Rev. 1633, 1676; *see*

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[2] While the doctrine of course covers more than churches, I adopt the prevailing terminology. *See, e.g.*, *Our Lady of Guadalupe*, 140 S. Ct. at 2061; *cf. Hosanna-Tabor*, 565 U.S. at 198 (Alito, J., concurring) (observing the need to look past labels in the ministerial exception context, given that "[t]he term 'minister' is commonly used by many Protestant denominations to refer to members of their clergy, but the term is rarely if ever used in this way by Catholics, Jews, Muslims, Hindus, or Buddhists").

Hosanna-Tabor, 565 U.S. at 188 ("The members of a religious group put their faith in the hands of their ministers."). Because individual believers often practice their faith through and within religious institutions and communities, protecting the autonomy of such groups "furthers individual religious freedom as well." *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring in the judgment).

These important religious liberty interests ground the blackletter law that religious institutions and organizations have a constitutionally protected "sphere" of "independent authority" over certain activities. *Our Lady of Guadalupe*, 140 S. Ct. at 2060–61. When evaluating the ministerial exception—one part of the "general principle of church autonomy"—the Supreme Court has explained that the First Amendment prevents judicial intrusion into areas essential to the independence of religious institutions, including matters of "faith," "doctrine," and "internal government." *Id.* at 2061; *see also Hosanna-Tabor*, 565 U.S. at 188; *Cath. Charities Bureau, Inc. v. Wisc. Lab. & Indus. Rev. Comm'n*, 145 S. Ct. 1583, 1595 (2025) (Thomas, J., concurring) ("The First Amendment guarantees to religious institutions broad autonomy to conduct their internal affairs and govern themselves."). These recent decisions built on older church autonomy cases that likewise recognized the power of religious organizations "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952); *see Serbian E. Orthodox Diocese for the*

United States of America & Canada v. Milivojevich, 426 U.S. 696, 720 (1976) (holding that the First Amendment commits the resolution of "quintessentially religious controversies" to church authorities).

In *Hosanna-Tabor*, the Supreme Court clarified that church autonomy operates as an affirmative defense. 565 U.S. at 195 n.4. Importantly, in the context of the ministerial exception, the Court also held that a church autonomy defense trumps neutral principles of law. In reaching this conclusion, the Court first distinguished *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), as inapposite. *See Hosanna-Tabor*, 565 U.S. at 189–90. Furthermore, it did not matter whether a minister was fired for a non-religious reason. The ministerial exception enables a religious organization to wield "control over the selection of those who will personify its beliefs." *Id.* at 188. Such control would be greatly reduced if the organization could fire its ministers only for religious reasons. Thus, the authority to "select and control who will minister to the faithful"—for whatever reason—was reserved to the "church[] alone." *Id.* at 195. Regardless of whether a suit presents neutral principles, the Court maintained that the First Amendment prohibits judicial interference with the decisions of religious organizations implicating matters of faith, doctrine, and internal governance. *See id.* at 188–90.

In *Our Lady of Guadalupe*, the Supreme Court again upheld the priority of substantive church autonomy over neutral principles of law. The plaintiffs in that case taught at religious schools. Both

were fired, not for religious reasons, but for poor classroom performance. *See Our Lady of Guadalupe*, 140 S. Ct. at 2056–59. The Court explained that the "quintessential" ministerial exception case was one in which "poor performance" was at issue, rather than a spiritual dispute. *Id.* at 2068. The Court had no trouble concluding that the ministerial exception barred the underlying employment lawsuits.

Hosanna-Tabor and *Our Lady of Guadalupe* express a self-evident principle: if the mere invocation of neutral principles permits a court to interfere with church autonomy, then the constitutional protection is a dead letter. *See* Lael Weinberger, *The Limits of Church Autonomy*, 98 Notre Dame L. Rev. 1253, 1277 (2023) ("If the court simply asks whether 'neutral principles' can resolve the case, the answer will (almost) always be yes.") (cleaned up). Thus, when judicial intervention would intrude on church autonomy, the First Amendment bars suit even if the challenged conduct can be evaluated on purely neutral or secular terms.

In concluding that the presence of "neutral principles of law" defeated the Bishops' church autonomy defense, the district court relied on *Jones v. Wolf*, which involved an intra-church dispute over ownership of church property. 443 U.S. at 597–99. In *Jones*, the Supreme Court embraced a "neutral principles of law" approach, by which it could decide the case using "objective, well-established concepts of trust and property law familiar to lawyers and judges." *Id.* at 602–03. Even when examining "certain religious documents, such as a church constitution," the Court maintained it could stay within its constitutional lane by "scrutiniz[ing] the document[s]

in *purely secular* terms." *Id.* at 604 (emphasis added). In dissent, Justice Powell argued that *Jones* broke with earlier precedents that prohibited judicial interference with the internal decisions of church authorities. *See id.* at 611–19 (Powell, J., dissenting).

While the Supreme Court's 5-4 decision in *Jones* remains on the books, its reasoning is at odds with the Court's recent decisions. In *Hosanna-Tabor* and *Our Lady of Guadalupe*, the Supreme Court made no mention of *Jones* or its neutral principles of law approach, which conflicts with the church autonomy doctrine's substantive protections for faith, doctrine, and internal governance.[3] *See Hosanna-Tabor*, 565 U.S. at 190; *Our Lady of Guadalupe*, 140 S. Ct. at 2061. Nor has the Court extended *Jones*'s neutral principles framework beyond church property to other areas of law.

Outside of the property context, the Supreme Court has safeguarded the sphere of church autonomy even when a lawsuit was framed under general legal principles. The district court therefore erred in concluding that the mere presence of "neutral

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[3] Notably, in opposing the ministerial exception, the plaintiffs in *Hosanna-Tabor* repeatedly cited *Jones*. *See, e.g.*, Brief for Respondent Cheryl Perich at 42–44, 56, *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012) (No. 10-553). The Court's implicit rejection of this approach confines *Jones* to its specific context and indicates that the availability of neutral principles does not normally overcome a church autonomy defense.

principles of law" overrode the Bishops' church autonomy defense.

B.

Following the Supreme Court's lead, the district court should have assessed the merits of the Bishops' church autonomy defense to O'Connell's lawsuit. Because religious donations and decisions about how to use such funds are connected to the faith, doctrine, and internal governance of the Catholic Church, they are protected by the First Amendment, and O'Connell's suit should have been dismissed.

Donations are of great importance to religious organizations, which cannot pursue their "central mission" without sufficient resources. *Our Lady of Guadalupe*, 140 S. Ct. at 2060. For example, a church may use donations to employ ministers to teach and spread its message; provide space for its members to gather in worship; and perform charitable works.

Decisions about how to raise and spend religious donations are inextricably tied up with a church's "right to shape its own faith and mission" and "internal governance," so the church autonomy defense must protect these activities. *Hosanna-Tabor*, 565 U.S. at 188; *see also* Stephanie H. Barclay et al., *Original Meaning and The Establishment Clause: A Corpus Linguistics Analysis*, 61 Ariz. L. Rev. 505, 548–49 (2019) (discussing how government regulation of "church tithes … involve[s] government interference in church affairs"). Other courts have already recognized that religious offerings and church spending are constitutionally protected from government interference. *See, e.g.*, *Bell v. Presbyterian Church (U.S.A.)*, 126 F.3d 328, 332–

33 (4th Cir. 1997) (holding that decisions about how to spend "religious outreach funds" fall within "the ecclesiastical sphere that the First Amendment protects from civil court intervention"); *Ambellu v. Re'ese Adbarat Debre Selam Kidist Mariam*, 387 F. Supp. 3d 71, 80 (D.D.C. 2019) ("How a church spends worshippers' contributions is, like the question of who may worship there, central to the exercise of religion.").

In this lawsuit, the relevant donation was made as part of a thousand-year-old church collection given directly to the head of the Catholic Church. O'Connell's challenge goes straight to the heart of how the Church raises and spends contributions made by its congregants—"internal church decision[s] that affect[ ] the faith and mission of the church." *Hosanna-Tabor*, 565 U.S. at 190. That subject is properly shielded from government interference by the Bishops' church autonomy defense.[4] Because a church's solicitation and use of religious donations are

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[4] Recognizing that the giving and spending of religious contributions falls within the church autonomy doctrine in no way suggests that religious institutions enjoy "a general immunity from secular laws." *Contra O'Connell*, 134 F.4th at 1254. The church autonomy doctrine does not apply to everything that a religious institution does. Rather, it is cabined to those substantive areas that implicate faith, doctrine, or internal governance. *Our Lady of Guadalupe*, 140 S. Ct. at 2061; *see Hosanna-Tabor*, 565 U.S. at 188; *cf. Watson v. Jones*, 80 U.S. (13 Wall.) 679, 732–33 (1872) (indicating the doctrine does not extend to matters of criminal law).

protected from government interference by the First Amendment, O'Connell's lawsuit should have been dismissed.

As a practical matter, it is worth highlighting how O'Connell's suit intrudes into the protected autonomy of the Catholic Church. O'Connell alleges fraudulent misrepresentation connected to his participation in Peter's Pence. District of Columbia law on fraudulent misrepresentation requires a defendant to have both "knowledge of [a representation's] falsity" and "intent to deceive." *Falconi-Sachs v. LPF Senate Square, LLC*, 142 A.3d 550, 555 (D.C. 2016) (cleaned up). In an effort to plausibly plead these elements, O'Connell's complaint details various sources of the Bishops' guidance related to Peter's Pence, including a church bulletin insert for use at Mass, a similar bulletin announcement, a script for announcements about Peter's Pence from the pulpit, and the Bishops' implementation of canon law to regulate their fundraising operations.

An examination of the knowledge and intent of the Catholic Church in raising money—including what it means when priests speak about religious giving from the pulpit and the Bishops implement canon law—risks the "entangle[ment]" of federal courts with "essentially religious controversies." *Milivojevich*, 426 U.S. at 709; *see Huntsman v. Corp. of the President of the Church of Jesus Christ of Latter-day Saints*, 127 F.4th 784, 798 (9th Cir. 2025) (en banc) (Bress, J., concurring in the judgment) ("Nothing says 'entanglement with religion' more than [plaintiff's] apparent position that the head of a religious faith should have spoken with greater precision about inherently religious topics, lest the Church be found

liable for fraud."). Moreover, allowing such lawsuits to proceed might create a chilling effect on how religious donations are raised and spent, impeding the free exercise of religion. *See Amos*, 483 U.S. at 336.

The remedies O'Connell seeks further demonstrate how this lawsuit intrudes on the Bishops' religious autonomy. In *Hosanna-Tabor*, the Supreme Court found that reinstatement or a combination of frontpay and backpay "would operate as a penalty on the Church for terminating an unwanted minister." 565 U.S. at 194. Even that relatively tailored and modest remedy was found unconstitutional. By contrast, O'Connell seeks sweeping injunctive relief and millions in disgorgement and damages. O'Connell first demands class-wide injunctive relief requiring the Bishops to administer Peter's Pence in a judicially prescribed manner. In attempting to change the way the Catholic Church speaks about, solicits, and deploys religious donations, O'Connell essentially seeks the structural reform of a religious institution. For a secular court to countenance such a request would plainly result in impermissible religious "entanglement." *See Our Lady of Guadalupe*, 140 S. Ct. at 2069.

O'Connell also asks for the disgorgement of "all monies contributed" to Peter's Pence. J.A. 32. Given that he hopes to represent a putative class of all American donors to Peter's Pence and requests the tolling of applicable limitations periods, O'Connell effectively asks for the return of all money *ever* donated by living American Catholics to Peter's Pence. Such sweeping injunctive relief and disgorgement of likely millions of dollars would result

in a massive incursion into the constitutionally protected sphere of church autonomy.

Finally, O'Connell's lawsuit, touching as it does on matters of faith, doctrine, and internal governance, undermines the associational rights of individual Catholic believers. The Supreme Court has long recognized a link between the church autonomy doctrine and expressive association. *See Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728–29 (1872) ("The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine … is unquestioned."); *see also Hosanna-Tabor*, 565 U.S. at 200 (Alito, J., concurring) ("Religious groups are the archetype of associations formed for expressive purposes."). As Justice Brennan explained, a religious community "represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals." *Amos*, 483 U.S. at 342 (Brennan, J., concurring in the judgment). Yet here, one individual seeks to interpose the coercive power of the courts between a religious institution and its members. As such, O'Connell's lawsuit constitutes an impermissible interference with the associational rights of the Catholic Church and individual believers.

* * *

The district court erred by invoking neutral principles of law to reject a church autonomy defense. Instead, the district court was required to assess whether the Catholic Church's administration of Peter's Pence, a major giving initiative, was within the constitutionally protected sphere of church autonomy. Because the solicitation and expenditure of religious donations clearly implicate matters of faith,

doctrine, and internal governance, O'Connell's lawsuit should have been dismissed.

III.

The panel did not resolve the Bishops' church autonomy defense, but instead concluded that we lack jurisdiction to review the district court's decision. On the panel's view, the rejection of a church autonomy defense is not a collateral order subject to interlocutory appeal, in part because the defense does not provide an immunity from suit. *O'Connell*, 134 F.4th at 1255–61. I respectfully disagree. Judges in other circuits have divided over the question of whether church autonomy provides an immunity from suit that fits within the collateral order doctrine, but no court has subjected the issue to en banc review.[5] Given the stakes of this case, which involves a challenge to the use of religious donations by the leader of the Catholic Church, we should have been the first.

This Part sets forth the argument for why church autonomy provides a constitutional immunity from suit that should be subject to interlocutory review. First, the historical backdrop at the time of ratification demonstrates that the First Amendment protects a sphere of religious autonomy from government intrusion. This history and original meaning have been repeatedly reaffirmed by the Supreme Court. Second, the First Amendment's protection for church autonomy is similar to other affirmative defenses that provide immunity from suit. While the Supreme Court

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[5] *See, e.g.*, *Belya v. Kapral*, 59 F.4th 570 (2d Cir. 2023) (mem.); *Tucker v. Faith Bible Chapel Int'l*, 53 F.4th 620 (10th Cir. 2022) (mem.).

has not specifically addressed the question, the reasoning of its decisions strongly supports an immunity characterization. Finally, because the church autonomy defense is an immunity from suit, decisions rejecting a church autonomy defense warrant interlocutory appeal.

A.

Historical materials from before and after ratification of the Bill of Rights demonstrate that the First Amendment safeguards a sphere of church autonomy and prohibits state interference with matters of faith, doctrine, and internal governance.

1.

To understand the nature and scope of the Constitution's protection for church autonomy, I begin by considering the "background against which the First Amendment was adopted." *Our Lady of Guadalupe*, 140 S. Ct. at 2061 (cleaned up); *see also Hosanna-Tabor*, 565 U.S. at 182–85 (grounding the ministerial exception in historical materials from 1215 to 1811); *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2087–89 (2019) (plurality op.) ("look[ing] to history for guidance" in interpreting the Establishment Clause). This history demonstrates that the First Amendment "was adopted against [the] background of distinct spheres for secular and religious authorities." *Cath. Charities Bureau*, 145 S. Ct. at 1597 (Thomas, J., concurring) (cleaned up).

Scholars and judges have extensively mapped the pre-Founding view that "church and state are 'two rightful authorities,' each supreme in its own sphere." *Id.* at 1596 (quoting Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise*

of Religion, 103 Harv. L. Rev. 1409, 1496–97 (1990)). Many of these authorities trace the separation to the early Christian church. In the Gospel of Matthew, Jesus Christ told the teachers of the law to "render to Caesar the things that are Caesar's, and to God the things that are God's." Matthew 22:21 (English Standard Version). "From antiquity onward," some Christians interpreted Jesus's statement to mean "that church and state are distinct, and that each has a legitimate claim to authority within its sphere." *Cath. Charities Bureau*, 145 S. Ct. at 1596 (Thomas, J., concurring). In the *City of God*, Augustine famously distinguished between the City of Man (the "earthly city") and the City of God (the "heavenly city"). *See* John D. Inazu, *The Freedom of the Church (New Revised Standard Version)*, 21 J. Contemp. Legal Issues 335, 348 (2013). Early popes similarly differentiated between "spiritual and temporal authority." Michael W. McConnell, *Why Is Religious Liberty the "First Freedom"?*, 21 Cardozo L. Rev. 1243, 1245 (2000).

This separation between religious and political spheres was recognized during the Middle Ages and up through the Reformation. Magna Carta proclaimed in 1215 that "the English church shall be free, and shall have its rights undiminished and its liberties unimpaired." James C. Holt, *Magna Carta* 317 (1965). The document codified the "Norman-Anglo-Saxon mind that … differentiated the two spheres of church and of state." Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 B.Y.U. L. Rev. 1385, 1408; *see also* Roscoe Pound, *A Comparison of Ideals of Law*, 47 Harv. L. Rev. 1, 6 (1933) ("In the politics and law of the Middle Ages the distinction between

the spiritual and the temporal, between the jurisdiction of religiously organized Christendom and the jurisdiction of the temporal sovereign … was fundamental."). Centuries later, Protestant reformers like John Calvin and Martin Luther would delineate the "two kingdoms" of "church and state." Robert J. Renaud & Lael D. Weinberger, *Spheres of Sovereignty: Church Autonomy Doctrine and the Theological Heritage of the Separation of Church and State*, 35 N. Ky. L. Rev. 67, 73–76 (2008). For instance, Calvin argued that the "spiritual kingdom … and civil government are things very different and remote from each other." 2 John Calvin, Institutes of the Christian Religion 633 (John Allen trans., 6th American rev. ed., 1928).

This very brief survey evidences a longstanding distinction between religious and governmental spheres. Yet at the same time, adherence to this separation was far from perfect. Beginning with the English Reformation, the English monarchy gained "control over the national religion" and proceeded to legislate "religious uniformity," collapsing the distinction between church and state. Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2112–14 (2003); *see Hosanna-Tabor*, 565 U.S. at 182 (discussing the English government's "grip on the exercise of religion" in the sixteenth and seventeenth centuries). As a result, many dissenters fled to America, where colonists implemented a variety of church and state arrangements. *See Hosanna-Tabor*, 565 U.S. at 182–83.

For example, some New England colonists endorsed the two kingdoms conception, in which church and state "were understood as two coordinate but separate covenantal associations for the discharge of godly authority." McConnell, *Establishment and Disestablishment*, 44 Wm. & Mary L. Rev. at 2123. In one writing, Rhode Island minister Roger Williams discussed the "hedge or wall of Separation between the Garden of the Church and the Wildernes of the world." Roger Williams, *Mr. Cotton's Letter, Examined and Answered* (1644), reprinted in 1 *The Complete Writings of Roger Williams* 392 (Russell & Russell 1963). Thomas Jefferson would later make similar reference to a "wall of separation between Church and State." *Letter from Thomas Jefferson to the Danbury Baptist Association* (Jan. 1, 1802), in 5 *The Founders' Constitution* 96 (Philip B. Kurland & Ralph Lerner eds., 1987). By contrast, the Virginia colony tended more toward the English tradition of significant state involvement with religious practice, although these efforts were sometimes resisted. *See* McConnell, *Establishment and Disestablishment*, 44 Wm. & Mary L. Rev. at 2116–17; *Hosanna-Tabor*, 565 U.S. at 183.

By the ratification of the Constitution and Bill of Rights, American thought had shifted toward the New England distinction between spheres. The late 1770s saw the beginning of a trend toward disestablishment at the state level, perhaps furthered by the increasing numbers of non-Anglican Protestant Americans who supported greater separation between church and state. *See* Esbeck, 2004 B.Y.U. L. Rev. at 1457–58 (marking pre-1791 disestablishments in North Carolina, New York, Virginia, Maryland, and South Carolina); Renaud & Weinberger, 35 N. Ky. L. Rev. at 81–82 (discussing the increasing prevalence of the two

kingdoms position). The same advocates of religious liberty "also supported adoption of constitutional protections at the federal level." McConnell, *Origins and Historical Understanding*, 103 Harv. L. Rev. at 1440. Among these was James Madison, who pronounced "that in matters of Religion, no mans right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance." James Madison, *Memorial and Remonstrance Against Religious Assessments* (June 20, 1785), in 5 *The Founders' Constitution* 82. A year before Madison's declaration, the Confederation Congress rejected an entreaty from the Vatican that it choose a new bishop for American Catholics because it was without "jurisdiction" over this "purely spiritual" matter. 3 Secret Journals of the Acts and Proceedings of Congress 493 (Thomas B. Wait. ed., 1821); *see* Thomas C. Berg et al., *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 Nw. U. L. Rev. Colloquy 175, 181 (2011).

This historical backdrop strongly supports the conclusion that the "two-kingdoms view of competing authorities is at the heart of our First Amendment." McConnell, *First Freedom*, 21 Cardozo L. Rev. at 1246; *see* Esbeck, 2004 B.Y.U. L. Rev. at 1579–81, 1589.

2.

Post-ratification decisions have relied on this constitutional backdrop when recognizing a sphere of church autonomy for religious institutions.

Many early state courts framed the issue in terms that tracked the pre-ratification conception and recognized "a sphere of ecclesiastical authority with which the civil courts ought not to interfere." Lael

Weinberger, *The Origins of Church Autonomy: Religious Liberty After Disestablishment* (Feb. 4, 2025), https://ssrn.com/abstract=4933864 (unpublished manuscript at 14). For instance, a South Carolina judge remarked that "[i]t belongs not to the civil power to enter into or review the proceedings of a Spiritual Court." *Harmon v Dreher*, 17 S.C. Eq. (Speers Eq.) 87, 120 (S.C. App. Eq. 1843). The Missouri Supreme Court "[h]appily" recognized a "total disconnection between the church and state," by which "neither will interfere with the other when acting within their appropriate spheres." *State ex rel. Watson v. Farris*, 45 Mo. 183, 198 (Mo. 1869). The Kentucky Court of Appeals held that the "judicial eye of the civil authority … cannot penetrate the veil of the Church, nor can the arm of this Court either rend or touch that veil." *Shannon v. Frost*, 42 Ky. (3 B. Mon.) 253, 259 (Ky. 1842). And in 1846, the Pennsylvania Supreme Court expressed its view that the "civil courts, if they should be so unwise as to attempt to supervise [the decisions of ecclesiastical courts] on matters which come within their jurisdiction, would only involve themselves in a sea of uncertainty and doubt." *German Reformed Church v. Com. ex rel. Seibert*, 3 Pa. (3 Barr.) 282, 291 (Pa. 1846). Because the First Amendment did not yet apply to the states, these decisions were not formally grounded in the Constitution. Nevertheless, state courts recognized that "according to the Constitution of the United States, politics and religion move in separate spheres, clearly defined." *Gartin v. Penick*, 68 Ky. (5 Bush) 110, 116 (Ky. 1869).

Citing this state law background, the Supreme Court affirmed in *Watson v. Jones* that "a subject-matter … strictly and purely ecclesiastical in its character"—such as which slate of elders and trustees

was rightfully in charge of a church—was "a matter over which the civil courts exercise no jurisdiction." 80 U.S. (13 Wall.) at 730–33. Where such a matter had already been resolved by church authorities, judicial inquiry "would lead to the total subversion of … religious bodies" by secular courts. *Id.* at 729. Moreover, such interference by the civil courts would be inconsistent with the "unquestioned" right of individuals "to organize voluntary religious associations." *Id.* at 728–29.

Arising out of a suit in diversity in 1872, *Watson* was based in general law—a "broad and sound view of the relations of church and state under our system of laws." *Id.* at 727; *see Hosanna-Tabor*, 565 U.S. at 185. But the decision was later pronounced to have a "clear constitutional ring." *Milivojevich*, 426 U.S. at 710 (cleaned up). Early state court decisions and *Watson* thus embraced a conception of church autonomy that protected certain religious matters from judicial interference.[6]

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[6] A few scholars have pointed to nineteenth-century state regulations on church property and governance as evidence that might defeat the narrative of a longstanding church autonomy doctrine. *See* Sarah Barringer Gordon, *The First Disestablishment: Limits on Church Power and Property Before the Civil War*, 162 U. Pa. L. Rev. 307, 321–24 (2014); *cf.* Kellen Funk, *Church Corporations and the Conflict of Laws in Antebellum America*, 32 J.L. & Relig. 263, 269–70 (2017). But there are reasons to question the significance of those restrictions. Prior to 1868, states were not bound by the First Amendment, so to the extent church autonomy was only a common or general

Since *Watson*, the Supreme Court has repeatedly recognized the importance of a sphere of church autonomy protected by the First Amendment and beyond the control of the state. For instance, in *Kedroff*, the Supreme Court invalidated a state law that specified which church authority—Russian or American—controlled certain Orthodox churches in New York. 344 U.S. at 95–99, 106–07. Emphasizing that "the power … to appoint the ruling hierarch of" these churches had historically vested in "the Supreme Church Authority of the Russian Orthodox Church," the Court concluded that the "Church's choice of its hierarchy" was "an ecclesiastical right." *Id.* at 115, 119. The Court largely adopted *Watson*'s emphasis on church authority to hold that ecclesiastical rights were protected by the Constitution against state interference. *Id.* at 119.

Two decades later in *Milivojevich*, the Court rejected a lawsuit brought by a former Orthodox bishop challenging his removal. 426 U.S. at 702–08, 724–25. The bishop had been removed by church officials for religious reasons, and the Court dismissed his attempt to relitigate a "quintessentially religious" controversy in civil court. *Id.* at 720. As it was "the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith," "secular notions" of civil law like "due process" could not resolve the case. *Id.* at 714–15.

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law doctrine in state courts, it could be validly overridden by state legislation. *See* Weinberger, *The Origins of Church Autonomy*, unpublished manuscript at 38–39.

As already discussed, the Supreme Court's recent decisions in *Hosanna-Tabor* and *Our Lady of Guadalupe* more explicitly recognize that the First Amendment protects a sphere of church autonomy into which secular courts cannot intrude. In *Hosanna-Tabor*, the Court unanimously held there was a ministerial exception to generally applicable employment discrimination laws. 565 U.S. at 188. That proposition followed from both the Free Exercise Clause, "which protects a religious group's right to shape its own faith and mission through its appointments," and the Establishment Clause, which "prohibits government involvement" in decisions about "which individuals will minister to the faithful." *Id.* at 188–89. In a concurrence joined by Justice Kagan, Justice Alito likewise connected the "private sphere" of church autonomy to the "free dissemination of religious doctrine," explaining that a "religious body's control over [its ministers] is an essential component of its freedom to speak in its own voice, both to its own members and to the outside world." *Id.* at 199, 201 (Alito, J., concurring). Justice Alito also justified the church autonomy doctrine on freedom of association grounds, characterizing religious groups as "the archetype of associations formed for expressive purposes." *Id.* at 200.

In *Our Lady of Guadalupe*, the Supreme Court reinforced the church autonomy doctrine and the Constitution's protection for the "independence of religious institutions in matters of faith and doctrine," which is "closely linked to independence in what we have termed matters of church government." 140 S. Ct. at 2060 (cleaned up). The Court again grounded the church autonomy doctrine in both of the Religion Clauses. *Id.* While religious institutions are not

generally immune from secular laws, the Constitution "protect[s] their autonomy with respect to internal management decisions that are essential to the institution's central mission." *Id.* The Court concluded that "judicial intervention into disputes between the [religious] school and the teacher threatens the school's independence in a way that the First Amendment does not allow." *Id.* at 2069.

In sum, American courts recognize that the First Amendment protects a sphere of church autonomy free from government regulation and judicial interference. Safeguarding this autonomy with respect to matters of faith, doctrine, and internal governance ensures "a spirit of freedom for religious organizations, an independence from secular control or manipulation." *Kedroff*, 344 U.S. at 116.

B.

The foregoing history and precedent demonstrate that the Religion Clauses protect a sphere of church autonomy from state interference. Because such interference can include the very process of judicial inquiry, the church autonomy defense is best understood as a constitutional immunity from suit.

Although the Supreme Court has not addressed this precise question, its precedents strongly support treating the church autonomy defense as a constitutional immunity from suit. As discussed, a chorus of decisions stretching back to *Watson* emphasizes how churches and other religious organizations occupy a separate sphere into which the state may not intrude. In addition, the Court has recognized that the rights protected by the Religion Clauses are burdened not merely by final decisions,

but also by the "very process of inquiry leading to findings and conclusions."[7] *NLRB v. Cath. Bishop of Chicago*, 440 U.S. 490, 502 (1979). For instance, the Court in *Catholic Bishop* rejected the National Labor Relations Board's efforts to assert jurisdiction over Catholic school teachers, explaining that the resolution of labor charges would impermissibly and "necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission." *Id.* at 502. Although decided on constitutional avoidance grounds, the Court reasoned that allowing the Board to resolve labor disputes within religious schools "would implicate the guarantees of the Religion Clauses." *Id.* at 507.

Similarly, the Court has stressed the "well established" rule that "courts should refrain from trolling through a person's or institution's religious beliefs." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality op.). It is categorically "not within the judicial ken" to assess religious questions like "the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." *Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 699 (1989); *see also Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div.*, 450 U.S. 707, 715 (1981) (concluding "the judicial process is singularly

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[7] Our court has long reaffirmed these principles. *See, e.g.*, *EEOC v. Cath. Univ. of Am.*, 83 F.3d 455, 466–67 (D.C. Cir. 1996); *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341–42 (D.C. Cir. 2002); *Carroll Coll., Inc. v. NLRB*, 558 F.3d 568, 571–72 (D.C. Cir. 2009).

ill equipped to resolve [intrafaith] differences in relation to the Religion Clauses"). Judicial inquiry into such matters may lead courts into a "religious thicket," where they could become embroiled in "essentially religious controversies." *Milivojevich*, 426 U.S. at 709, 719.

Practically speaking, without an immunity from suit, religious institutions would face substantial transgressions into their constitutionally protected sphere of independence. Litigation may involve depositions of church leaders, probing inquiries into ecclesiastical doctrine and church structure, and discovery of sensitive church communications. As Justice Alito explained, civil courts cannot engage in a "pretext inquiry" as to the motivations of religious employers because such inquiry would "dangerously undermine … religious autonomy." *Hosanna-Tabor*, 565 U.S. at 205 (Alito, J., concurring). The "*mere adjudication* of such questions would pose grave [constitutional] problems for religious autonomy," because it would place a civil factfinder in "ultimate judgment" over the "importance and priority of the religious doctrine in question." *Id.* at 205–06 (emphasis added). Similarly, in *Our Lady of Guadalupe*, the Court declined to second guess how church schools characterized the essentially religious mission of their teachers, in part because courts lack "a complete understanding and appreciation of the role played by every person who performs a particular role in every religious tradition." 140 S. Ct. at 2066; *cf. id.* at 2070 (Thomas, J., concurring) ("What qualifies as 'ministerial' is an inherently theological question, and thus one that cannot be resolved by civil courts through legal analysis.").

These cases recognize that the First Amendment protects from judicial inquiry matters that implicate faith, doctrine, and internal governance. When a lawsuit impinges on this autonomous sphere and requires a court to question and probe doctrine or governance, the Religion Clauses provide religious organizations with an immunity from suit.

While not explicitly addressing the immunity question, the Supreme Court has characterized the First Amendment's protection for church autonomy as a non-jurisdictional affirmative defense. *Hosanna-Tabor*, 565 U.S. at 195 n.4. We know from other contexts that some immunities, like absolute and qualified immunity for public officials, are non-jurisdictional affirmative defenses.[8] *See Nevada v. Hicks*, 533 U.S. 353, 373 (2001).

Absolute and qualified immunity protect interests similar to those safeguarded by the church autonomy doctrine. Absolute immunity enables officials to carry out the "proper and effective administration of public affairs" without the "apprehension" and "fear of

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[8] Longstanding Supreme Court and circuit precedent is therefore at odds with the panel's suggestion that a non-jurisdictional affirmative defense cannot provide an immunity from suit. *Cf. O'Connell*, 134 F.4th at 1258. Of course, some immunities from suit, like legislative immunity under the Speech and Debate Clause, are jurisdictional bars. *See Fields v. Off. of Eddie Bernice Johnson*, 459 F.3d 1, 13 (D.C. Cir. 2006) (en banc). But as explained above, other immunities are not.

consequences" that emanate from the possibility of subsequent litigation. *Nixon v. Fitzgerald*, 457 U.S. 731, 745–46 (1982) (cleaned up). For instance, the President enjoys absolute immunity from both civil and criminal prosecution, because "once it is determined that the President acted within the scope of his exclusive authority, his discretion in exercising such authority cannot be subject to further judicial examination." *Trump v. United States*, 144 S. Ct. 2312, 2327 (2024). Even the threat of prosecution could render him "unduly cautious in the discharge of his official duties" and thus pose "unique risks to the effective functioning of government." *See Fitzgerald*, 457 U.S. at 751–52 & n.32. For many other officials, qualified immunity shields the performance of official duties from liability. *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982). Because these immunities encompass "an entitlement not to stand trial or face the other burdens of litigation," they are effectively lost if a case wrongly goes to trial. *Mitchell v. Forsyth*, 472 U.S. 511, 526–27 (1985). Absolute and qualified immunity recognize a sphere of independence free from intrusions by the judicial process.

Similarly, the Religion Clauses protect a sphere of "independence" in which religious organizations may structure their faith and practice without "[s]tate interference." *Our Lady of Guadalupe*, 140 S. Ct. at 2060. Within this sphere of autonomy, religious organizations must have freedom from judicial intrusion. The vitality of this constitutional freedom requires that, in matters implicating church autonomy, religious organizations enjoy a constitutional immunity from suit.

The en banc court should recognize that the church autonomy defense is an immunity from suit. The reasoning of Supreme Court decisions comports with treating church autonomy as an immunity.[9] Lower courts have an obligation to uphold the Constitution, and we may be required at times to recognize the full scope of a constitutional right before the Supreme Court. *See, e.g.*, *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007), *aff'd sub nom. District of Columbia v. Heller*, 554 U.S. 570 (2008). For instance, the ministerial exception was first recognized by the Fifth Circuit in 1972. *See McClure v. Salvation Army*, 460 F.2d 553, 558–61 (5th Cir. 1972). Only 40 years later did the Supreme Court squarely hold that this exception was required under the First Amendment's church autonomy doctrine. *Hosanna-Tabor*, 565 U.S. at 188.

As new cases arise, we must of course follow the direction of the Supreme Court. With respect to First Amendment protections for religious institutions, that direction strongly points to recognizing the

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[9] The Fifth Circuit recently concluded that church autonomy provides an immunity from suit, splitting from the Second, Seventh, and Tenth Circuits. *See McRaney v. N. Am. Mission Bd. of the S. Baptist Convention, Inc.*, 2025 WL 2602899, at *12–13 (5th Cir. Sept. 9, 2025). Under an immunity rationale, the appellate courts of multiple states and the District of Columbia also allow interlocutory review of church autonomy denials. *See, e.g.*, *United Methodist Church, Baltimore Ann. Conf. v. White*, 571 A.2d 790, 792–93 (D.C. 1990) (Rogers, C.J.); *Harris v. Matthews*, 643 S.E.2d 566, 569–70 (N.C. 2007).

church autonomy doctrine as conferring an immunity from suit.

C.

Because the church autonomy defense is best understood as an immunity from suit, the district court's rejection of the Bishops' defense was an immediately appealable collateral order.

The collateral order doctrine allows interlocutory appeals from orders "[1] that are conclusive, [2] that resolve important questions separate from the merits, and [3] that are effectively unreviewable on appeal from the final judgment in the underlying action." *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 42 (1995) (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)). In deciding whether an interlocutory appeal qualifies under the collateral order doctrine, our analysis focuses on a "class of claims" and eschews an "individualized jurisdictional inquiry." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 107 (2009) (cleaned up). The Supreme Court has kept the "'small class' of collaterally appealable orders … narrow and selective in its membership." *Will v. Hallock*, 546 U.S. 345, 350 (2006). Even applying this stringent standard, the requirements for a collateral order are met for a church autonomy defense.

First, the rejection of a church autonomy defense is conclusive in that it necessarily subjects a religious organization to the burdens of further litigation. "[A]lmost every order the Court has deemed to be collateral involves a claimed right not to stand trial." Adam Reed Moore, *A Textualist Defense of a New Collateral Order Doctrine*, 99 Notre Dame L. Rev. Reflection 1, 9 (2023). The First Amendment protects

a sphere of church autonomy with respect to faith, doctrine, and internal governance and immunizes religious organizations from lawsuits that implicate such matters. As an immunity, church autonomy serves as "an entitlement not to stand trial or face the other burdens of litigation." *Mitchell*, 472 U.S. at 526. When a case is "erroneously permitted to go to trial," the immunity is "effectively lost." *Id.* If a church autonomy defense is denied at the motion to dismiss stage, the matter is not "open, unfinished or inconclusive." *Abney v. United States*, 431 U.S. 651, 658 (1977) (cleaned up). Rather, the defendant's obligation to proceed to discovery and endure further burdens of litigation has been conclusively determined.

Second, the rejection of a church autonomy defense is "separate" or "conceptually distinct" from the resolution of the underlying case. *Mitchell*, 472 U.S. at 527–29. The immunity protects important First Amendment rights, namely the "independence" of religious organizations "in matters of faith and doctrine and in closely linked matters of internal government." *Our Lady of Guadalupe*, 140 S. Ct. at 2061. Whether a lawsuit touches on this sphere raises a legal question distinct from a plaintiff's underlying substantive claims. In this case O'Connell alleges common law claims for fraud, unjust enrichment, and breach of fiduciary duty. The merits of those claims are wholly separate from the validity of the Bishops' church autonomy defense. That defense depends on whether the Catholic Church's administration of a millennium-old religious offering from congregants to the Pope is a matter of faith, doctrine, or internal governance protected by the Religion Clauses. Analyzing that issue does not require consideration of

whether, for example, the Bishops made material misrepresentations on which Catholic parishioners detrimentally relied.

Third and finally, the rejection of a church autonomy defense is effectively unreviewable on final appeal because, like other immunities, it is best understood as "an *immunity from suit* rather than a mere defense to liability." *Mitchell*, 472 U.S. at 526. It cannot be "effectively reviewed on appeal from a final judgment because by that time the immunity from standing trial will have been irretrievably lost." *Plumhoff v. Rickard*, 572 U.S. 765, 772 (2014); *see Loma Linda-Inland Consortium for Healthcare Educ. v. NLRB*, 2023 WL 7294839, at *17 (D.C. Cir. May 25, 2023) (Rao, J., dissenting from the denial of an injunction pending appeal) ("The harm caused by the NLRB trolling through the beliefs of the Consortium and making determinations about its religious mission … cannot be undone through a later appeal.") (cleaned up); *cf. McRaney v. N. Am. Mission Bd. of the S. Baptist Convention, Inc.*, 2025 WL 2602899, at *13 (5th Cir. Sept. 9, 2025) ("An immediate appeal … protects ecclesiastical organizations from unconstitutional deprivations of the First Amendment's" protections.). As with other immunities, the protections of the church autonomy defense will be destroyed if not vindicated before trial.

To satisfy the stringent requirements of the collateral order doctrine, "the decisive consideration is whether delaying review until the entry of final judgment would imperil a substantial public interest or some particular value of a high order." *Mohawk Indus.*, 558 U.S. at 107 (cleaned up). "When a policy is embodied in a constitutional or statutory provision

entitling a party to immunity from suit (a rare form of protection), there is little room for the judiciary to gainsay its 'importance.'" *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 879 (1994). The First Amendment protects a sphere of church autonomy, a paramount freedom for both religious institutions and individuals. The Supreme Court's decisions in *Hosanna-Tabor* and *Our Lady of Guadalupe* reinforce the importance of the church autonomy defense and its suitability for interlocutory review.[10]

* * *

The facts of this case typify the stakes for religious liberty when a church autonomy defense is denied. O'Connell, an individual congregant, challenges the Catholic Church's use of his donation and asks the Bishops to disclose lengthy donor lists, records of amounts received, and the ways in which contributions made under Peter's Pence were deployed. Describing the litigation demonstrates how it plainly encroaches on the heartland of matters committed to the Church's exclusive sphere, including

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[10] In *Hosanna-Tabor* and *Our Lady of Guadalupe*, the Supreme Court reviewed the appellate courts' denial of a church autonomy defense before the dispute went back to the district court and a full trial was held. *See Hosanna-Tabor*, 565 U.S. at 181; *Our Lady of Guadalupe*, 140 S. Ct. at 2058–60. Although the collateral order doctrine does not apply to the Court's review, in a sense the Court reviewed interlocutory appeals similar to the one before us now.

ecclesiastical decisions about how to solicit, manage, and use religious donations. Without immediate interlocutory review, the Bishops have no meaningful route to protect their independence from judicial intrusion into matters of faith, doctrine, and internal governance. Requiring the Bishops to go forward with this litigation comports with neither the Constitution nor the Supreme Court's precedents. I respectfully dissent.

28 U.S.C. 1291 provides:

§ 1291. Final decisions of district court

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

General Docket
United States Court of Appeals for
District of Columbia Circuit

Court of Appeals Docket #: 23-7173 **Docketed:** 12/22/2023 **Nature of Suit:** 3370 Other Fraud **Termed:** 04/25/2025 David O'Connell v. United States Conference of Catholic Bishops **Appeal From:** United States District Court for the District of Columbia **Fee Status:** Fee Paid
Case Type Information: 1) Civil Private 2) Private 3)
Originating Court Information: **District:** 0090-1: 1:20-cv-01365-JMC **Lead:** 1:20-cv-01365-JMC **Court Reporter:** Lisa Bankins, Court Reporter **Court Reporter:** Stacy Heavenridge Johns, Court Reporter **Court Reporter:** Nancy Meyer, Court Reporter **Court Reporter:** Bryan Wayne **Motions Judge:** Jia M. Cobb, U.S. District Judge **Date Filed:** 05/21/2020 **Date Order/Judgement:** 11/17/2023 **Date NOA Filed:** 12/18/2023
Prior Cases: None **Current Cases:** None

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David O'Connell,

Plaintiff - Appellee

v.

United States Conference of Catholic Bishops,

Defendant – Appellant

Lael Weinberger,

Amicus Curiae for Appellant

Americans United for Separation of Church and State,

Amicus Curiae for Appellee

Derek T. Muller; Lutheran Church-Missouri Synod; Thomas C. Berg; Elizabeth Clark; Richard W. Garnett; Douglas Laycock; Christopher C. Lund; Michael W. McConnell, Attorney; Michael P. Moreland; Robert J. Pushaw; Eugene Volokh; Assembly of Canonical Orthodox Bishops of the United States of America; Church of Jesus Christ of Latter-Day Saints; General Conference of Seventh Day Adventists; Jewish Coalition for Religious Liberty; Muslim Public Affairs Council; National Association of Evangelicals; Arizona Legislature; Belmont Abbey College; J. Reuben Clark Law Society; State of Indiana,

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12/22/2023		PRIVATE CIVIL CASE docketed. [23-7173] [Entered: 12/22/2023 09:34 AM]
12/22/2023	11 pg, 237.03 KB	NOTICE OF APPEAL [2032971] seeking review of a decision by the U.S. District Court in 1:20-cv-01365-JMC filed by United States Conference of Catholic Bishops. Appeal assigned USCA Case Number: 23-7173. [23-7173] [Entered: 12/22/2023 09:35 AM]
12/22/2023	1 pg, 45 KB	LETTER [2032974] sent regarding attorney membership to Marc R Stanley for David O'Connell. Application for Admission due 01/22/2024. [23-7173] [Entered: 12/22/2023 09:36 AM]
12/22/2023	1 pg, 40.65 KB	CLERK'S ORDER [2032977] filed to show cause regarding dismissing case for lack of jurisdiction. Response to Order due 01/22/2024. The response may not exceed the length limitations established in the order., Failure to respond shall result in dismissal of the case for lack of prosecution; The Clerk is directed to send this

		order to appellant by certified mail, return receipt requested and by 1st class mail. [23-7173] [Entered: 12/22/2023 09:45 AM]
12/22/2023		CERTIFIED AND FIRST CLASS MAIL SENT [2033076] with return receipt requested [Receipt No.7021 0350 0001 9948 2377] of order [2032977-5]. Certified Mail Receipt due 01/22/2024 from United States Conference of Catholic Bishops. [23-7173] [Entered: 12/22/2023 12:55 PM]
01/04/2024	1 pg, 45.83 KB	LETTER [2034436] sent regarding attorney membership to Martin Woodward for David O'Connell. Application for Admission due 02/05/2024. [23-7173] [Entered: 01/04/2024 02:35 PM]
01/12/2024	4 pg, 3.22 MB	FIRST CLASS MAIL RETURN [2036415] marked "UNCLAIMED - UNABLE TO FORWARD". Mail [2033076-2], [2032974-2] had been sent to Attorney Marc R. Stanley for Appellee David O'Connell. [23-7173] [Entered: 01/19/2024 11:56 AM]

01/22/2024	1 pg, 73.38 KB	ENTRY OF APPEARANCE [2036880] filed by Emmet T. Flood and co-counsel Kevin T. Baine; Mark S. Storslee on behalf of Appellant United States Conference of Catholic Bishops. [23-7173] (Flood, Emmet) [Entered: 01/22/2024 10:16 PM]
01/22/2024	69 pg, 983.8 KB	RESPONSE [2036883] to order [2032977-2], [2032977-3], [2032977-4], [2032977-5] combined with a MOTION for this Court to note jurisdiction, as the district court's decision qualifies as a collateral order over which appellate jurisdiction is proper filed by United States Conference of Catholic Bishops [Service Date: 01/22/2024 by CM/ECF NDA] Length Certification: 5,123 Words. [23-7173] (Flood, Emmet) [Entered: 01/22/2024 11:12 PM]
01/31/2024	1 pg, 774.47 KB	ENTRY OF APPEARANCE [2038191] filed by Martin Woodward on behalf of Appellee David O'Connell. [23-7173] (Woodward, Martin) [Entered: 01/31/2024 11:11 AM]

02/15/2024	1 pg, 302.9 KB	DUPLICATE FILING-DISREGARD--ENTRY OF APPEARANCE [2040689] filed by Simon Franzini on behalf of Appellee David O'Connell. [23-7173]--[Edited 02/16/2024 by HNG] (Doble, Gabriel) [Entered: 02/15/2024 09:41 PM]
02/15/2024	1 pg, 302.9 KB	ENTRY OF APPEARANCE [2040690] filed by Gabriel Doble on behalf of Appellee David O'Connell. [23-7173] (Doble, Gabriel) [Entered: 02/15/2024 09:43 PM]
02/15/2024	4 pg, 17.09 KB	MOTION [2040691] for leave to file response filed by David O'Connell (Service Date: 02/15/2024 by CM/ECF NDA) Length Certification: 101 words. [23-7173] (Doble, Gabriel) [Entered: 02/15/2024 09:48 PM]
02/28/2024	1 pg, 38.35 KB	CLERK'S ORDER [2042788] filed granting motion for leave to file [2040691-2]; directing response to jurisdictional statement [2036883-3] due 03/20/2024 [23-7173] [Entered: 02/28/2024 05:19 PM]

03/20/2024	156 pg, 3.78 MB	RESPONSE IN OPPOSITION [2045896] to motion [2036883-2] filed by David O'Connell [Service Date: 03/20/2024 by CM/ECF NDA] Length Certification: 5177. [23-7173] (Doble, Gabriel) [Entered: 03/20/2024 03:36 PM]
03/28/2024	6 pg, 128.56 KB	MOTION [2047335] for leave to file reply filed by United States Conference of Catholic Bishops (Service Date: 03/28/2024 by CM/ECF NDA) Length Certification: 555 words. [23-7173] (Flood, Emmet) [Entered: 03/28/2024 02:39 PM]
04/03/2024	8 pg, 30.65 KB	RESPONSE IN OPPOSITION [2048194] to motion for leave to file [2047335-2] filed by David O'Connell [Service Date: 04/03/2024 by CM/ECF NDA] Length Certification: 904 Words. [23-7173] (Doble, Gabriel) [Entered: 04/03/2024 07:54 PM]
06/20/2024	1 pg, 38.6 KB	PER CURIAM ORDER [2060696] filed discharging order to show cause [2032977-5]; referring motion for this court to note jurisdiction and the question of this court's

		jurisdiction [2036883-2] to the merits panel to which this case is assigned; dismissing as moot motion for leave to file a reply [2047335-2]. The Clerk is directed to enter a briefing schedule. Before Judges: Katsas, Rao and Childs. [23-7173] [Entered: 06/20/2024 10:34 AM]
06/27/2024	2 pg, 80.13 KB	CLERK'S ORDER [2062062] filed setting briefing schedule: APPELLANT Brief due 08/06/2024. APPENDIX due 08/06/2024. APPELLEE Brief due on 09/05/2024. APPELLANT Reply Brief due 09/26/2024 [23-7173] [Entered: 06/27/2024 04:03 PM]
07/08/2024	7 pg, 163.33 KB	*CONSENT* MOTION [2063401] to modify briefing schedule filed by United States Conference of Catholic Bishops (Service Date: 07/08/2024 by CM/ECF NDA) Length Certification: 357 words. [23-7173] (Flood, Emmet) [Entered: 07/08/2024 01:31 PM]
07/09/2024	1 pg, 39.41 KB	CLERK'S ORDER [2063847] filed granting appellant's consent motion to modify briefing schedule [2063401-2],

		The following revised brefing schedule will now apply: APPELLANT Brief due 09/06/2024. APPENDIX due 09/06/2024. APPELLEE Brief due on 11/06/2024. APPELLANT Reply Brief due 11/27/2024 [23-7173] [Entered: 07/09/2024 05:01 PM]
09/06/2024	1 pg, 67.39 KB	ENTRY OF APPEARANCE [2073639] filed by Daniel H. Blomberg and co-counsel Laura Wolk Slavis on behalf of Appellant United States Conference of Catholic Bishops. [23-7173] (Blomberg, Daniel) [Entered: 09/06/2024 06:55 PM]
09/06/2024	1 pg, 68.4 KB	ENTRY OF APPEARANCE [2073641] filed by Daniel H. Blomberg and co-counsel Colten L. Stanberry and Kelly R. Oeltjenbruns on behalf of Appellant United States Conference of Catholic Bishops. [23-7173] (Blomberg, Daniel) [Entered: 09/06/2024 07:03 PM]
09/06/2024	74 pg, 477.46 KB	APPELLANT BRIEF [2073646] filed by United States Conference of Catholic Bishops [Service Date: 09/06/2024] Length of Brief: 12,962. [23-7173] (Blomberg, Daniel)

		[Entered: 09/06/2024 07:37 PM]
09/06/2024	185 pg, 4.59 MB	*JOINT* APPENDIX [2073647] filed by United States Conference of Catholic Bishops [Volumes: 1] [Service Date: 09/06/2024] [23-7173] (Blomberg, Daniel) [Entered: 09/06/2024 07:42 PM]
09/10/2024	78 pg, 603.87 KB	ERRATA [2074092] filed by United States Conference of Catholic Bishops to Appellant/Petitioner brief [2073646-2] . Reason for errata: correcting three typographical formatting errors. [Service Date: 09/10/2024] [23-7173] (Blomberg, Daniel) [Entered: 09/10/2024 01:52 PM]
09/10/2024	74 pg, 478.52 KB	CORRECTED APPELLANT BRIEF [2074354] filed by United States Conference of Catholic Bishops [Service Date: 09/10/2024] Length of Brief: 12,962. [23-7173] [Entered: 09/12/2024 10:02 AM]
09/13/2024	3 pg, 218.51 KB	NOTICE [2074581] of intention to participate as amicus curiae [Disclosure Listing: Not Applicable to this Party] filed by Dr. Lael Weinberger [Service Date: 09/13/2024] [23-

		7173]--[Edited 09/16/2024 by LMM] (Streett, Aaron) [Entered: 09/13/2024 11:12 AM]
09/13/2024	3 pg, 128.33 KB	*CONSENT* NOTICE [2074582] of intention to participate as amicus curiae [Disclosure Listing: Not Applicable to this Party] filed by Professor Derek T. Muller [Service Date: 09/13/2024] [23-7173]--[Edited 09/16/2024 by LMM] (Michel, Christopher) [Entered: 09/13/2024 11:12 AM]
09/13/2024	37 pg, 803.68 KB	*CONSENT* AMICUS FOR APPELLANT BRIEF [2074585] filed by Professor Derek T. Muller [Service Date: 09/13/2024] Length of Brief: 5,908 Words. [23-7173] (Michel, Christopher) [Entered: 09/13/2024 11:16 AM]
09/13/2024	27 pg, 494.61 KB	AMICUS FOR APPELLANT BRIEF [2074588] filed by Dr. Lael Weinberger [Service Date: 09/13/2024] Length of Brief: 4,401. [23-7173] (Streett, Aaron) [Entered: 09/13/2024 11:21 AM]
09/13/2024	5 pg, 89.52	NOTICE [2074643] of intention to participate as amicus curiae

	KB	[Disclosure Listing: Attached] filed by Seven Religious Organizations [Service Date: 09/13/2024] [23-7173]--[Edited 09/16/2024 by LMM] (Showalter, Michael) [Entered: 09/13/2024 01:12 PM]
09/13/2024	34 pg, 416.99 KB	AMICUS FOR APPELLANT BRIEF [2074645] filed by Seven Religious Organizations [Service Date: 09/13/2024] Length of Brief: 4,836. [23-7173] (Showalter, Michael) [Entered: 09/13/2024 01:14 PM]
09/13/2024	7 pg, 138.71 KB	NOTICE [2074742] of intention to participate as amicus curiae [Disclosure Listing: Not Applicable to this Party] filed by Law & Religion Scholars Thomas C. Berg, Elizabeth Clark, Richard W. Garnett, Douglas Laycock, Christopher Lund, Michael W. McConnell, Michael P. Moreland, Robert J. Pushaw, Eugene Volokh [Service Date: 09/13/2024] [23-7173]--[Edited 09/16/2024 by LMM] (Hungar, Thomas) [Entered: 09/13/2024 06:25 PM]
09/13/2024	51 pg, 289.17	AMICUS FOR APPELLANT BRIEF [2074743] filed by Law & Religion Scholars Thomas

	KB	C. Berg, Elizabeth Clark, Richard W. Garnett, Douglas Laycock, Christopher Lund, Michael W. McConnell, Michael P. Moreland, Robert J. Pushaw, Eugene Volokh [Service Date: 09/13/2024] Length of Brief: 6,482 words. [23-7173] (Hungar, Thomas) [Entered: 09/13/2024 06:28 PM]
11/06/2024	86 pg, 533.59 KB	APPELLEE BRIEF [2083814] filed by David O'Connell [Service Date: 11/06/2024] Length of Brief: 12,997. [23-7173] (Doble, Gabriel) [Entered: 11/06/2024 02:13 PM]
11/06/2024	114 pg, 342.86 KB	SEPARATE STATUTORY ADDENDUM [2083815] to Appellee/Respondent brief [2083814-2] filed by David O'Connell [Service Date:11/06/2024] [23-7173] (Doble, Gabriel) [Entered: 11/06/2024 02:14 PM]
11/08/2024	1 pg, 67.4 KB	ENTRY OF APPEARANCE [2084227] filed by Kelsey Baer Flores on behalf of Appellant United States Conference of Catholic Bishops. [23-7173] (Flores, Kelsey) [Entered: 11/08/2024 02:37 PM]

11/12/2024	3 pg, 102.18 KB	NOTICE [2084450] of intention to participate as amicus curiae [Disclosure Listing: Attached] filed by Americans United for Separation of Church and State [Service Date: 11/12/2024] [23-7173] (Samuels, Jenny) [Entered: 11/12/2024 12:06 PM]
11/13/2024	26 pg, 231.73 KB	AMICUS FOR APPELLEE BRIEF [2084720] filed by Americans United for Separation of Church and State [Service Date: 11/13/2024] Length of Brief: 3,283 Words. [23-7173] (Samuels, Jenny) [Entered: 11/13/2024 02:05 PM]
11/22/2024	4 pg, 118.08 KB	NOTICE [2086292] to withdraw attorney Kelly R. Oeltjenbruns who represented United States Conference of Catholic Bishops in 23-7173 filed by United States Conference of Catholic Bishops [Service Date: 11/22/2024] [23-7173] (Oeltjenbruns, Kelly) [Entered: 11/22/2024 02:26 PM]
11/27/2024	41 pg, 298.76 KB	APPELLANT REPLY BRIEF [2087098] filed by United States Conference of Catholic Bishops [Service Date: 11/27/2024] Length of Brief:

		6,493 Words. [23-7173] (Blomberg, Daniel) [Entered: 11/27/2024 12:48 PM]
11/27/2024	1 pg, 40.9 KB	CLERK'S ORDER [2087196] filed scheduling oral argument on Friday, 01/10/2025. [23-7173] [Entered: 11/27/2024 04:04 PM]
12/27/2024	2 pg, 87.28 KB	[AMENDED BY ORDER OF 01/06/2025]--PER CURIAM ORDER [2091664] filed allocating oral argument time as follows: Appellant - 10 Minutes, Appellee - 10 Minutes. One counsel per side to argue; directing party to file Form 72 notice of arguing attorney by 12/31/2024 [23-7173]--[Edited 01/06/2025 by SHA] [Entered: 12/27/2024 01:14 PM]
12/27/2024		FORM 72 submitted by arguing attorney, Gabriel Z. Doble, on behalf of Appellee David O'Connell *(For Internal Use Only: Form is restricted to protect counsel's personal contact information).* [23-7173] (Doble, Gabriel) [Entered: 12/27/2024 02:09 PM]

12/30/2024		FORM 72 submitted by arguing attorney, Daniel H. Blomberg, on behalf of Appellant United States Conference of Catholic Bishops *(For Internal Use Only: Form is restricted to protect counsel's personal contact information).* [23-7173] (Blomberg, Daniel) [Entered: 12/30/2024 11:39 AM]
01/06/2025	1 pg, 45.89 KB	PER CURIAM ORDER [2092686] filed amending order to allocate oral argument time [2091664-2], allocating oral argument time as follows: Appellant - 15 Minutes, Appellee - 15 Minutes. One counsel per side to argue. [23-7173] [Entered: 01/06/2025 10:54 AM]
01/10/2025	1 pg, 40.54 KB	ORAL ARGUMENT HELD before Judges Srinivasan, Childs and Edwards. [23-7173] [Entered: 01/10/2025 11:07 AM]
02/05/2025	66 pg, 586.96 KB	LETTER [2099058] pursuant to FRAP 28j advising of additional authorities filed by David O'Connell [Service Date: 02/05/2025] [23-7173] (Blomberg, Daniel) [Entered:

		02/05/2025 05:45 PM]
02/07/2025	3 pg, 97.1 KB	RESPONSE [2099629] to letter Rule 28j authorities [2099058-2], letter [2099058-3] filed by David O'Connell [Service Date: 02/07/2025 by CM/ECF NDA] Length Certification: 346. [23-7173] (Doble, Gabriel) [Entered: 02/07/2025 05:14 PM]
04/25/2025	1 pg, 55.64 KB	PER CURIAM JUDGMENT [2112842] filed that this appeal be dismissed for lack of jurisdiction without reaching the merits of United States Conference of Catholic Bishops's ("USCCB") church autonomy defense or USCCB's argument that O'Connell failed to state a claim, for the reasons in the accompanying opinion. Before Judges: Srinivasan, Childs and Edwards. [23-7173] [Entered: 04/25/2025 10:39 AM]
04/25/2025	27 pg, 275.93 KB	OPINION [2112847] filed (Pages: 27) for the Court by Judge Edwards. [23-7173] [Entered: 04/25/2025 10:41 AM]
04/25/2025	1 pg, 38.63	CLERK'S ORDER [2112848] filed withholding issuance of the mandate. [23-7173]

	KB	[Entered: 04/25/2025 10:42 AM]
05/27/2025	56 pg, 712.94 KB	PETITION [2117614] for rehearing en banc filed by Appellant United States Conference of Catholic Bishops [Service Date: 05/27/2025 by CM/ECF NDA] Length Certification: 3,898. [23-7173] (Blomberg, Daniel) [Entered: 05/27/2025 04:05 PM]
06/02/2025	7 pg, 110.1 KB	MOTION [2118563] to participate as amicus curiae [Disclosure Listing: Attached] filed by J. Reuben Clark Law Society [Service Date: 06/02/2025] [23-7173] (Sidhu, Jasjaap) [Entered: 06/02/2025 02:57 PM]
06/02/2025	23 pg, 218.52 KB	AMICUS FOR APPELLANT BRIEF [2118572] lodged by J. Reuben Clark Law Society [Service Date: 06/02/2025] Length of Brief: 2,585 Words. [23-7173] --[MODIFIED EVENT FROM FILED TO LODGED-- Edited 06/03/2025 by DJR] (Sidhu, Jasjaap) [Entered: 06/02/2025 03:03 PM]
06/03/2025	7 pg,	*CONSENT* MOTION

	136.31 KB	[2118777] to participate as amicus curiae [Disclosure Listing: Attached] filed by Seven Religious Organizations [Service Date: 06/03/2025] [23-7173] (Nolette, Joel) [Entered: 06/03/2025 01:04 PM]
06/03/2025	23 pg, 291.92 KB	AMICUS FOR APPELLANT BRIEF [2118778] lodged by Seven Religious Organizations [Service Date: 06/03/2025] Length of Brief: 2,596. [23-7173]--[Edited 06/05/2025 by EBL--MODIFIED EVENT FROM FILED TO LODGED] (Nolette, Joel) [Entered: 06/03/2025 01:06 PM]
06/03/2025	6 pg, 120.77 KB	MOTION [2118910] to participate as amicus curiae [Disclosure Listing: Not Applicable to this Party] filed by State of Indiana and 22 Other States and the Arizona Legislature [Service Date: 06/03/2025] [23-7173] (Barta, James) [Entered: 06/03/2025 05:55 PM]
06/03/2025	24 pg, 217.94 KB	AMICUS FOR APPELLANT BRIEF [2118912] lodged by State of Indiana and 22 Other

		States and the Arizona Legislature [Service Date: 06/03/2025] Length of Brief: 2514. [23-7173]--[Edited 06/05/2025 by EBL--MODIFIED EVENT FROM FILED TO LODGED] (Barta, James) [Entered: 06/03/2025 06:01 PM]
06/03/2025	7 pg, 136.94 KB	MOTION [2118931] to participate as amicus curiae [Disclosure Listing: Attached] filed by Belmont Abbey College [Service Date: 06/03/2025] [23-7173] (Knight, Parker) [Entered: 06/03/2025 11:06 PM]
06/03/2025	24 pg, 168.98 KB	AMICUS FOR APPELLANT BRIEF [2118933] lodged by Belmont Abbey College [Service Date: 06/03/2025] Length of Brief: 2,472. [23-7173]-[Edited 06/05/2025 by EBL--MODIFIED EVENT FROM FILED TO LODGED] (Knight, Parker) [Entered: 06/03/2025 11:18 PM]
06/09/2025	1 pg, 38.35 KB	CLERK'S ORDER [2119723] filed, on the court's own motion, that within 15 days of the date of this order, appellee

		file a response to the petition for rehearing en banc [2117614-2]. The response may not exceed 3,900 words. Absent an order of the en banc court, a reply to the response will not be accepted for filing. [23-7173] [Entered: 06/09/2025 10:11 AM]
06/11/2025	5 pg, 20.48 KB	UNOPPOSED MOTION [2120265] to extend time to file response to 07/01/2025 filed by David O'Connell [Service Date: 06/11/2025] Length Certification: 217 Words. [23-7173] (Doble, Gabriel) [Entered: 06/11/2025 01:48 PM]
06/24/2025	1 pg, 39.56 KB	PER CURIAM ORDER, En Banc, [2122094] filed granting appellee's unopposed motion for a one week extension of time [2120265-2] within which to file a response to appellant's petition for rehearing en banc [2117614-2]. Any response is now due by July 1, 2025. Before Judges: Srinivasan, Henderson, Millett, Pillard, Wilkins, Katsas, Rao, Walker, Childs, Pan, Garcia and Edwards. [23-7173] [Entered: 06/24/2025 12:57 PM]

07/01/2025	29 pg, 277.86 KB	RESPONSE [2123332] to petition for rehearing en banc [2117614-2] filed by David O'Connell [Service Date: 07/01/2025 by CM/ECF NDA] Length Certification: 3,892 Words.. [23-7173] (Doble, Gabriel) [Entered: 07/01/2025 04:38 PM]
09/05/2025	39 pg, 387.52 KB	LETTER [2133694] pursuant to FRAP 28j advising of additional authorities filed by United States Conference of Catholic Bishops [Service Date: 09/05/2025] [23-7173] (Blomberg, Daniel) [Entered: 09/05/2025 02:15 PM]
09/08/2025	3 pg, 95.1 KB	RESPONSE [2133979] to letter Rule 28j authorities [2133694-2], letter [2133694-3] filed by David O'Connell [Service Date: 09/08/2025 by CM/ECF NDA] Length Certification: 346 Words. [23-7173] (Doble, Gabriel) [Entered: 09/08/2025 05:24 PM]
09/11/2025	61 pg, 613.1 KB	LETTER [2134517] pursuant to FRAP 28j advising of additional authorities filed by United States Conference of Catholic Bishops [Service Date:

		09/11/2025] [23-7173] (Blomberg, Daniel) [Entered: 09/11/2025 05:27 PM]
09/15/2025	3 pg, 94.88 KB	RESPONSE [2134897] to letter [2134517-2], letter [2134517-3] filed by David O'Connell [Service Date: 09/15/2025 by CM/ECF NDA] Length Certification: 342 Words. [23-7173] (Doble, Gabriel) [Entered: 09/15/2025 02:55 PM]
09/17/2025	4 pg, 119.25 KB	NOTICE [2135408] to withdraw attorney Kelsey Flores who represented United States Conference of Catholic Bishops in 23-7173 filed by United States Conference of Catholic Bishops [Service Date: 09/17/2025] [23-7173] (Flores, Kelsey) [Entered: 09/17/2025 04:34 PM]
11/04/2025	41 pg, 556.5 KB	PER CURIAM ORDER, En Banc, [2143753] filed denying petition for rehearing en banc [2117614-2]; granting motions to participate as amicus curiae [2118931-2], [2118910-2], [2118777-2], [2118563-2]; The Clerk is directed to file Amicus briefs [2118933-2],[2118912-2], [2118778-2], [2118572-2] Before Judges: Srinivasan,

		Henderson, Millett, Pillard, Wilkins, Katsas, Rao***, Walker*, Childs, Pan, Garcia and Edwards**. [23-7173 (* A statement by Circuit Judge Walker, concurring in the denial of rehearing en banc, is attached.) (** A statement by Senior Circuit Judge Edwards, concurring in the denial of rehearing en banc, is attached.) (*** A statement by Circuit Judge Rao, dissenting from the denial of rehearing en banc, is attached.) [Entered: 11/04/2025 12:39 PM]
11/04/2025		PER ABOVE ORDER lodged Amicus brief [2118933-2], Amicus brief [2118912-2], Amicus brief [2118778-2], Amicus brief [2118572-2] is filed [23-7173] [Entered: 11/04/2025 12:41 PM]
11/06/2025	19 pg, 217.93 KB	MOTION [2144243] to stay mandate filed by United States Conference of Catholic Bishops (Service Date: 11/06/2025 by CM/ECF NDA) Length Certification: 2,814 words.. [23-7173] (Blomberg, Daniel) [Entered: 11/06/2025 06:03 PM]

11/17/2025	6 pg, 138.86 KB	RESPONSE IN OPPOSITION [2145754] to motion to stay mandate [2144243-2] filed by David O'Connell [Service Date: 11/17/2025 by CM/ECF NDA] Length Certification: 541 Words. [23-7173] (Doble, Gabriel) [Entered: 11/17/2025 03:02 PM]
11/20/2025	6 pg, 145.58 KB	REPLY [2146333] filed by United States Conference of Catholic Bishops to response [2145754-2] [Service Date: 11/20/2025 by CM/ECF NDA] Length Certification: 604 words. [23-7173] (Blomberg, Daniel) [Entered: 11/20/2025 11:47 AM]
11/21/2025	1 pg, 38.37 KB	PER CURIAM ORDER [2146674] filed denying appellant's motion to stay the mandate pending the filing and disposition of a petition for writ of certiorari [2144243-2]. Before Judges: Srinivasan, Childs and Edwards. [23-7173] [Entered: 11/21/2025 03:39 PM]

U.S. District Court
District of Columbia (Washington, DC)
CIVIL DOCKET FOR CASE #:
1:20-cv-01365-JMC

O'Connell v. United States Conference of Catholic Bishops Assigned to: Judge Jia M. Cobb Demand: $5,000,000 Case in other court: Rhode Island, 1:20-cv-00031 USCA, 23-07173 Cause: 28:1332 Diversity-Fraud Date Filed: 05/21/2020 Jury Demand: Plaintiff Nature of Suit: 370 Other Fraud Jurisdiction: Diversity

Plaintiff **DAVID O'CONNELL**	represented by **Jonas Bram Jacobson** DOVEL & LUNAR LLP 201 Santa Monica Boulevard Suite 600 Santa Monica, CA 90401 310-656-7066 Email: jonas@dovel.com *LEAD ATTORNEY* *PRO HAC VICE* *ATTORNEY TO BE NOTICED* **Marc R Stanley** STANLEY LAW GROUP 6116 North Central Expressway Ste 1500 Dallas, TX 75206

	214-443-4300 Fax: 214-443-0358 Email: marcstanley@mac.com *LEAD ATTORNEY* *ATTORNEY TO BE NOTICED* **Simon Carlo Franzini** DOVEL & LUNER LLP 201 Santa Monica Boulevard Suite 600 Santa Monica, CA 90401 310-656-7066 Email: simon@dovel.com *LEAD ATTORNEY* *PRO HAC VICE* *ATTORNEY TO BE NOTICED* **Martin Woodward** KITNER WOODWARD PLLC 13101 Preston Road Suite 110 Dallas, TX 75240 214-443-4300 Fax: 214-443-4304 Email: martin@kitnerwoodward.com *PRO HAC VICE* *ATTORNEY TO BE NOTICED* **Yvette Golan** THE GOLAN FIRM PLLC 650 Massachusetts Ave. NW Suite 600 Washington, DC 20001

	713-206-8250 Email: ygolan@tgfirm.com *ATTORNEY TO BE NOTICED*
v.	
Defendant **UNITED STATES CONFERENCE OF CATHOLIC BISHOPS**	represented by **Kevin Taylor Baine** WILLIAMS & CONNOLLY LLP 680 Maine Avenue, S.W. Washington, DC 20024 202-434-5010 Email: kbaine@wc.com LEAD ATTORNEY ATTORNEY TO BE NOTICED **Emmet T. Flood** WILLIAMS & CONNOLLY 680 Maine Avenue SW Washington, DC 20005 202-434-5300 Email: eflood@wc.com ATTORNEY TO BE NOTICED **Richard Simon Cleary, Jr** WILLIAMS & CONNOLLY 680 Maine Avenue, S.W. Washington, DC 20024 202-434-5240 Email: rcleary@wc.com ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
01/22/2020	1	COMPLAINT (filing fee paid $ 400.00, receipt number 0103-1466938), filed by David O'Connell. (Attachments: # 1 Criminal Cover Sheet, # 2 Summons)(Wasylyk, Peter) [Transferred from Rhode Island on 5/21/2020.] (Entered: 01/22/2020)
01/22/2020		Case assigned to District Judge William E. Smith and Magistrate Judge Patricia A. Sullivan. (Hicks, Alyson) [Transferred from Rhode Island on 5/21/2020.] (Entered: 01/22/2020)
01/22/2020	2	CASE OPENING NOTICE ISSUED (Hicks, Alyson) [Transferred from Rhode Island on 5/21/2020.] (Entered: 01/22/2020)
01/22/2020	3	Summons Issued as to United States Conference of Catholic Bishops. (Hicks, Alyson) [Transferred from Rhode Island on 5/21/2020.] (Entered: 01/22/2020)
01/29/2020	4	SUMMONS Returned Executed

		by David O'Connell. United States Conference of Catholic Bishops served on 1/24/2020, answer due 2/14/2020. (Wasylyk, Peter) [Transferred from Rhode Island on 5/21/2020.] (Entered: 01/29/2020)
02/13/2020	5	NOTICE of Appearance by Robert K. Taylor on behalf of United States Conference of Catholic Bishops (Taylor, Robert) [Transferred from Rhode Island on 5/21/2020.] (Entered: 02/13/2020)
02/13/2020	6	NOTICE of Appearance by Eugene G. Bernardo, II on behalf of United States Conference of Catholic Bishops (Bernardo, Eugene) [Transferred from Rhode Island on 5/21/2020.] (Entered: 02/13/2020)
02/13/2020	7	MOTION to Dismiss for Lack of Jurisdiction *and Improper Venue* filed by United States Conference of Catholic Bishops. **Responses due by 2/27/2020.** (Attachments: # 1 Supporting Memorandum, # 2 Exhibit A (Ridderhoff Affidavit))(Taylor, Robert) [Transferred from Rhode Island on 5/21/2020.] (Entered: 02/13/2020)

02/26/2020	8	Cross MOTION to Transfer Case *and response to Motion to Dismiss* filed by All Plaintiffs. **Responses due by 3/11/2020.** (Attachments: # 1 Supporting Memorandum)(Wasylyk, Peter) [Transferred from Rhode Island on 5/21/2020.] (Entered: 02/26/2020)
03/09/2020	9	RESPONSE In Opposition to 8 Cross MOTION to Transfer Case *and response to Motion to Dismiss ; and REPLY in Support of 7 Motion to Dismiss* filed by United States Conference of Catholic Bishops. **Replies due by 3/16/2020.** (Taylor, Robert) [Transferred from Rhode Island on 5/21/2020.] (Entered: 03/09/2020)
03/16/2020	10	REPLY to Response re 9 Response to Motion, *transfer venue* filed by David O'Connell. (Wasylyk, Peter) [Transferred from Rhode Island on 5/21/2020.] (Entered: 03/16/2020)
05/21/2020		TEXT ORDER denying as moot 7 Motion to Dismiss for Lack of Jurisdiction; granting 8 Motion to Transfer Case: The Court GRANTS 8 Plaintiff's Cross-Motion to Transfer Venue,

		transferring the case to the United States District Court for the District of Columbia. Defendant's 7 Motion to Dismiss is hereby DENIED AS MOOT. So Ordered by District Judge William E. Smith on 5/21/2020. (Jackson, Ryan) [Transferred from Rhode Island on 5/21/2020.] (Entered: 05/21/2020)
05/21/2020	11	Case transferred in from District of Rhode Island; Case Number 1:20-cv-00031. Original file certified copy of transfer order and docket sheet received. (Entered: 05/21/2020)
06/02/2020	12	NOTICE of Appearance by Kevin Taylor Baine on behalf of UNITED STATES CONFERENCE OF CATHOLIC BISHOPS (Baine, Kevin) (Entered: 06/02/2020)
06/02/2020	13	LCvR 26.1 CERTIFICATE OF DISCLOSURE of Corporate Affiliations and Financial Interests by UNITED STATES CONFERENCE OF CATHOLIC BISHOPS (Baine, Kevin) (Entered: 06/02/2020)
06/02/2020	14	Consent MOTION for Extension of Time to File Answer by

		UNITED STATES CONFERENCE OF CATHOLIC BISHOPS (Attachments: # 1 Proposed Order)(Baine, Kevin) Modified docket text at the request of counsel on 6/3/2020 (eg). (Entered: 06/02/2020)
06/10/2020		MINUTE ORDER granting 14 Motion for Extension of Time to Answer. It is hereby ORDERED that Defendant shall answer or otherwise respond to the complaint on or before 7/6/2020. Signed by Judge Ketanji Brown Jackson on 6/10/2020. (jag) (Entered: 06/10/2020)
06/15/2020	15	NOTICE of Appearance by Marc R Stanley on behalf of All Plaintiffs (Stanley, Marc) (Entered: 06/15/2020)
06/15/2020	16	MOTION for Leave to Appear Pro Hac Vice :Attorney Name- Martin Woodward, Filing fee $ 100, receipt number ADCDC-7229825. Fee Status: Fee Paid. by DAVID O'CONNELL (Attachments: # 1 Declaration Declaration of Martin Woodward in support of motion for admission pro hac vice, # 2 Text of Proposed Order proposed Order granting motion for

		admission of attorney pro hac vice)(Stanley, Marc) (Entered: 06/15/2020)
06/29/2020		MINUTE ORDER granting 16 Motion for Leave to Appear Pro Hac Vice. It is hereby ORDERED that Martin Woodward is admitted pro hac vice in the matter as counsel for Plaintiff. **Counsel should register for e-filing via PACER and file a notice of appearance pursuant to LCvR 83.6(a). Click for instructions.** Signed by Judge Ketanji Brown Jackson on 6/29/2020. (jag) Modified event title on 7/1/2020 (znmw). (Entered: 06/29/2020)
06/30/2020	17	NOTICE of Appearance by Martin Woodward on behalf of DAVID O'CONNELL (Woodward, Martin) (Entered: 06/30/2020)
07/02/2020	18	Consent MOTION for Extension of Time to *to File Motion for Class Certification* by DAVID O'CONNELL (Attachments: # 1 Text of Proposed Order)(Stanley, Marc) (Entered: 07/02/2020)
07/06/2020	19	GENERAL ORDER AND

		GUIDELINES FOR CIVIL CASES BEFORE JUDGE KETANJI BROWN JACKSON. The Court will hold the parties and counsel responsible for following these directives, and parties and counsel should pay particular attention to the Court's instructions for briefing motions and filing exhibits. Failure to adhere to this Order may, when appropriate, result the imposition of sanctions and/or sua sponte denial of non-conforming motions. Signed by Judge Ketanji Brown Jackson on 7/6/2020. (jag) (Entered: 07/06/2020)
07/06/2020	20	ANSWER to 1 Complaint by UNITED STATES CONFERENCE OF CATHOLIC BISHOPS.(Baine, Kevin) (Entered: 07/06/2020)
07/09/2020	21	ORDER setting Initial Scheduling Conference for 9/17/2020 at 10:00 AM in Courtroom 17 before Judge Ketanji Brown Jackson. Signed by Judge Ketanji Brown Jackson on 7/9/2020. (jag) (Entered: 07/09/2020)
07/09/2020		MINUTE ORDER granting 18

		Motion for Extension of Time to File Motion for Class Certification. It is hereby ORDERED that Plaintiff's deadline to file a motion for class certification is STAYED until further Order of this Court. The Court will address the issue of briefing class certification at the upcoming Initial Scheduling Conference. Signed by Judge Ketanji Brown Jackson on 7/9/2020. (jag) (Entered: 07/09/2020)
07/10/2020	22	MOTION to Dismiss for Lack of Jurisdiction , MOTION for Judgment on the Pleadings *or, in the alternative*, MOTION for Summary Judgment by UNITED STATES CONFERENCE OF CATHOLIC BISHOPS (Attachments: # 1 Memorandum in Support of Defendant's Motion, # 2 Statement of Facts, # 3 Declaration of Mary Mencarini Campbell, # 4 Text of Proposed Order)(Baine, Kevin) (Entered: 07/10/2020)
07/10/2020		MINUTE ORDER. In light of the filing of Defendant's 22 Motion to Dismiss for Lack of Subject Matter Jurisdiction, for Judgment on the Pleadings or, in

		the Alternative, for Summary Judgment, it is hereby ORDERED that the Initial Scheduling Conference currently set for 9/17/2020 is VACATED. It is FURTHER ORDERED that Plaintiff shall file his response to the 22 Motion on or before 7/24/2020, and Defendant shall file any reply on or before 7/31/2020. Signed by Judge Ketanji Brown Jackson on 7/10/2020. (jag) (Entered: 07/10/2020)
07/21/2020	23	Consent MOTION for Extension of Time to File Response/Reply as to 22 MOTION to Dismiss for Lack of Jurisdiction MOTION for Judgment on the Pleadings *or, in the alternative* MOTION for Summary Judgment by DAVID O'CONNELL (Attachments: # 1 Text of Proposed Order)(Woodward, Martin) (Entered: 07/21/2020)
07/23/2020		MINUTE ORDER granting, for good cause shown, 23 Consent Motion for Extension of Time to File Response and Reply re 22 Motion to Dismiss for Lack of Jurisdiction, Motion for Judgment on the Pleadings or, in the Motion for Summary

		Judgment. It is hereby ORDERED that Plaintiff's response re 22 is due on or before 8/7/2020, and Defendant's reply is due on or before 8/21/2020. Signed by Judge Ketanji Brown Jackson on 7/23/2020. (jag) (Entered: 07/23/2020)
08/07/2020	24	Memorandum in opposition to re 22 MOTION to Dismiss for Lack of Jurisdiction MOTION for Judgment on the Pleadings *or, in the alternative* MOTION for Summary Judgment filed by DAVID O'CONNELL. (Attachments: # 1 Statement of Facts, # 2 Text of Proposed Order)(Woodward, Martin) (Entered: 08/07/2020)
08/21/2020	25	REPLY to opposition to motion re 22 MOTION to Dismiss for Lack of Jurisdiction MOTION for Judgment on the Pleadings *or, in the alternative* MOTION for Summary Judgment filed by UNITED STATES CONFERENCE OF CATHOLIC BISHOPS. (Baine, Kevin) (Entered: 08/21/2020)
10/09/2020		MINUTE ORDER. It is hereby ORDERED that a motion

		hearing on Defendant's 22 Motion to Dismiss for Lack of Jurisdiction, for Judgment on the Pleadings or, in the alternative, for Summary Judgment is set for 1/28/2021 at 02:30 PM before Judge Ketanji Brown Jackson. Signed by Judge Ketanji Brown Jackson on 10/09/2020. (lckbj2) (Entered: 10/09/2020)
12/30/2020	26	NOTICE of Appearance by Emmet T. Flood on behalf of UNITED STATES CONFERENCE OF CATHOLIC BISHOPS (Flood, Emmet) (Entered: 12/30/2020)
01/25/2021	27	NOTICE of Appearance by Richard Simon Cleary, Jr on behalf of UNITED STATES CONFERENCE OF CATHOLIC BISHOPS (Cleary, Richard) (Entered: 01/25/2021)
01/27/2021		MINUTE ORDER. It is hereby ORDERED that the VTC Motion Hearing currently set for 1/28/2021 at 2:30 PM is VACATED and RESET for 1/28/2021 at 01:30 PM before Judge Ketanji Brown Jackson. Signed by Judge Ketanji Brown Jackson on 1/27/2021. (jag)

		(Entered: 01/27/2021)
01/28/2021		Minute Entry for video proceedings held before Judge Ketanji Brown Jackson: Motion Hearing held on 1/28/2021 re 22 MOTION to Dismiss for Lack of Jurisdiction MOTION for Judgment on the Pleadings or, *in the alternative* MOTION for Summary Judgment. Oral argument heard and motion taken under advisement. (Court Reporter Nancy Meyer) (zgdf) (Entered: 02/01/2021)
02/03/2021	28	TRANSCRIPT OF PROCEEDINGS before Judge Ketanji Brown Jackson held on 01/28/2021. Page Numbers: 1-82. Date of Issuance: 02/01/2021. Court Reporter: Nancy J. Meyer. Telephone Number: 202-354-3118. Tape Number: N/A. Transcripts may be ordered by submitting the Transcript Order Form For the first 90 days after this filing date, the transcript may be viewed at the courthouse at a public terminal or purchased from the court reporter referenced above. After 90 days, the transcript may be accessed via PACER. Other transcript formats, (multi-page,

		condensed, CD or ASCII) may be purchased from the court reporter. **NOTICE RE REDACTION OF TRANSCRIPTS:** The parties have 21days to file with the court and the court reporter any request to redact personal identifiers from this transcript. If no such requests are filed, the transcript will be made available to the public via PACER without redaction after 90 days. The policy, which includes the five personal identifiers specifically covered, is located on our website at www.dcd.uscourts.gov. Redaction Request due 2/24/2021. Redacted Transcript Deadline set for 3/6/2021. Release of Transcript Restriction set for 5/4/2021.(Meyer, Nancy) (Entered: 02/03/2021)
06/22/2021		Judge Ketanji Brown Jackson has been elevated to serve on the U.S. Court of Appeals for the D.C. Circuit. She is therefore no longer assigned to this case, and this matter has been reassigned

		to the Calendar Committee, which will oversee it until it is assigned to another district judge. Any questions should be directed to Judge Jackson's former deputy clerk, Gwendolyn Franklin, at 202-354-3145 or gwen_franklin@dcd.uscourts.gov. (rj) (Entered: 06/22/2021)
11/15/2021		Case directly reassigned to Judge Jia M. Cobb. Judge Ketanji Brown Jackson has been appointed to the D.C. Circuit and is no longer assigned to the case. (rj) (Entered: 11/15/2021)
05/06/2022	29	NOTICE of Change of Address by Richard Simon Cleary, Jr (Cleary, Richard) (Entered: 05/06/2022)
07/14/2022	30	NOTICE of Appearance by Yvette Golan on behalf of All Plaintiffs (Golan, Yvette) (Main Document 30 replaced on 7/14/2022) (zjf). (Main Document 30 replaced on 7/14/2022) (zjf). (Entered: 07/14/2022)
07/14/2022	31	MOTION for Leave to Appear Pro Hac Vice :Attorney Name- Jonas Jacobson, Filing fee $ 100, receipt number ADCDC-9369484. Fee Status: Fee Paid.

		by DAVID O'CONNELL. (Attachments: # 1 Declaration Jacobson, # 2 Exhibit Certificate Good Standing, # 3 Text of Proposed Order)(Golan, Yvette) (Entered: 07/14/2022)
07/14/2022	32	MOTION for Leave to Appear Pro Hac Vice :Attorney Name- Simon Franzini, Filing fee $ 100, receipt number ADCDC-9369520. Fee Status: Fee Paid. by DAVID O'CONNELL. (Attachments: # 1 Declaration Franzini, # 2 Exhibit Certificate, # 3 Text of Proposed Order)(Golan, Yvette) (Entered: 07/14/2022)
07/14/2022	33	NOTICE of Change of Address by Martin Woodward (Woodward, Martin) (Entered: 07/14/2022)
07/18/2022		MINUTE ORDER granting 31 Motion for Admission Pro Hac Vice of Jonas Jacobson: Attorney Jonas Jacobson is hereby admitted pro hac vice to appear in this matter. **Counsel should register for e-filing via PACER and file a notice of appearance pursuant to LCvR 83.6(a)** Click for instructions. Signed by Judge

		Jia M. Cobb on July 18, 2022. (lcjmc1) (Entered: 07/18/2022)
07/18/2022		MINUTE ORDER granting 32 Motion for Admission Pro Hac Vice of Simon Franzini: Attorney Simon Franzini is hereby admitted pro hac vice to appear in this matter. **Counsel should register for e-filing via PACER and file a notice of appearance pursuant to LCvR 83.6(a)** Click for instructions. Signed by Judge Jia M. Cobb on July 18, 2022. (lcjmc1) (Entered: 07/18/2022)
07/18/2022	34	NOTICE of Appearance by Simon Carlo Franzini on behalf of DAVID O'CONNELL (Franzini, Simon) (Entered: 07/18/2022)
07/18/2022	35	NOTICE of Appearance by Jonas Bram Jacobson on behalf of DAVID O'CONNELL (Jacobson, Jonas) (Entered: 07/18/2022)
07/28/2022	36	Unopposed MOTION for Telephone Conference *Status Conference* by DAVID O'CONNELL. (Attachments: # 1 Text of Proposed Order)(Franzini, Simon) (Entered: 07/28/2022)

07/28/2022		MINUTE ORDER granting 36 Plaintiff's Unopposed Motion for Status Conference: This unopposed motion for a status conference is granted. The Court directs the Parties to appear for a status conference on August 9, 2022, at 1130AM. The status conference will be on the record and conducted via telephone. The Court's Deputy Clerk will provide the information necessary to access the call. Signed by Judge Jia M. Cobb on July 28, 2022. (lcjmc1) (Entered: 07/28/2022)
08/09/2022		Minute Entry for telephonic proceeding held before Judge Jia M. Cobb: Status Conference held on 8/9/2022, to update the parties on the status of the case. (Court Reporter Lisa Bankins) (zgdf) (Entered: 08/17/2022)
03/21/2023	37	Unopposed MOTION for Telephone Conference *Status Conference* by DAVID O'CONNELL. (Attachments: # 1 Text of Proposed Order)(Franzini, Simon) (Entered: 03/21/2023)
06/09/2023		MINUTE ORDER granting 37 Plaintiff's Unopposed Motion for

		Telephone Conference: Upon consideration of the Motion, it is hereby ORDERED that the Motion is GRANTED. The Court directs the Parties to appear for a status conference on July 18, 2023, at 11:00 AM. The status conference will be on the record and conducted via telephone. The Court's Deputy Clerk will provide the information necessary to access the conference. Signed by Judge Jia M. Cobb on June 9, 2023. (lcjmc2) (Entered: 06/09/2023)
07/18/2023		Minute Entry for Status Conference proceeding held on 7/18/2023 before Judge Jia M. Cobb. Parties were informed a ruling on the pending motion is forthcoming via Chambers. (Court Reporter Stacy Johns) (zed) (Entered: 07/18/2023)
10/16/2023	38	NOTICE *(Letter from counsel)* by DAVID O'CONNELL (Woodward, Martin) (Entered: 10/16/2023)
11/06/2023		MINUTE ORDER: The Court hereby ORDERS the Parties to appear for a video status conference, during which the Court shall issue its ruling on

		the pending 22 motion to dismiss, on November 17, 2023 at 2:30 PM. This hearing shall be on the record before Judge Jia M. Cobb and conducted via Zoom. The Court's Deputy Clerk will provide the information necessary to access the call. Signed by Judge Jia M. Cobb on November 6, 2023. (lcjmc2) (Entered: 11/06/2023)
11/17/2023		Minute Entry for proceedings held before Judge Jia M. Cobb: Motion Hearing held on 11/17/2023. For the reasons stated on record, Oral ruling denying 22 MOTION to Dismiss for Lack of Jurisdiction and MOTION for Judgment on the Pleadings, and denying without prejudice the MOTION for Summary Judgment. Parties are to confer and file a joint scheduling report. Order forthcoming via Chambers. (Court Reporter Bryan Wayne) (zgf) (Entered: 11/17/2023)
11/17/2023		MINUTE ORDER denying 22 Motion to Dismiss: For the reasons stated on the record in the hearing held today, the Court DENIES Defendants' 22 Motion to Dismiss for Lack of

		Jurisdiction and Motion for Judgment on the Pleadings, and DENIES without prejudice Defendants' Motion for Summary Judgment. Signed by Judge Jia M. Cobb on November 17, 2023. (lcjmc2) (Entered: 11/17/2023)
11/19/2023	39	TRANSCRIPT OF 11/17/23 STATUS HEARING before Judge Jia M. Cobb held on November 17, 2023; Page Numbers: 1-20. Date of Issuance: 11/19/2023. Court Reporter: Bryan A. Wayne. Transcripts may be ordered by submitting the Transcript Order Form For the first 90 days after this filing date, the transcript may be viewed at the courthouse at a public terminal or purchased from the court reporter referenced above. After 90 days, the transcript may be accessed via PACER. Other transcript formats, (multi-page, condensed, CD or ASCII) may be purchased from the court reporter. **NOTICE RE REDACTION OF TRANSCRIPTS:** The parties have twenty-one days to file with the court and the court reporter any request to redact personal

		identifiers from this transcript. If no such requests are filed, the transcript will be made available to the public via PACER without redaction after 90 days. The policy, which includes the five personal identifiers specifically covered, is located on our website at www.dcd.uscourts.gov. Redaction Request due 12/10/2023. Redacted Transcript Deadline set for 12/20/2023. Release of Transcript Restriction set for 2/17/2024.(Wayne, Bryan) (Entered: 11/19/2023)
11/28/2023		MINUTE ORDER setting Initial Scheduling Conference: The Court hereby ORDERS the Parties to appear for a scheduling conference on January 10, 2024 at 10:00 AM. This conference will be on the record before Judge Jia M. Cobb and conducted via video. The Court's Deputy Clerk will provide the information necessary to access the conference. It is further ORDERED that the Parties shall file a joint report pursuant to Local Civil Rule 16.3(d) and Federal Rule of Civil Procedure 26(f) by January 3, 2024. Signed

		by Judge Jia M. Cobb on November 28, 2023. (lcjmc2) (Entered: 11/28/2023)
12/18/2023	40	NOTICE OF APPEAL TO DC CIRCUIT COURT as to Order on Motion to Dismiss/Lack of Jurisdiction,, Order on Motion for Judgment on the Pleadings,, Order on Motion for Summary Judgment, by UNITED STATES CONFERENCE OF CATHOLIC BISHOPS. Filing fee $ 605, receipt number ADCDC-10567032. Fee Status: Fee Paid. Parties have been notified. (Flood, Emmet) (Entered: 12/18/2023)
12/19/2023	41	Transmission of the Notice of Appeal, Order Appealed (Memorandum Opinion), and Docket Sheet to US Court of Appeals. The Court of Appeals fee was paid re 40 Notice of Appeal to DC Circuit Court,. (zdp) (Entered: 12/19/2023)
12/22/2023		USCA Case Number 23-7173 for 40 Notice of Appeal to DC Circuit Court, filed by UNITED STATES CONFERENCE OF CATHOLIC BISHOPS. (zjm) (Entered: 12/27/2023)

01/03/2024	42	MEET AND CONFER STATEMENT. (Franzini, Simon) (Entered: 01/03/2024)
01/10/2024		Minute Entry for proceedings held before Judge Jia M. Cobb: Scheduling Conference held on 1/10/2024. Status Report due by 2/8/2024. (Court Reporter Stacy Johns) (zgf) (Entered: 01/11/2024)
02/08/2024	43	Joint STATUS REPORT by DAVID O'CONNELL. (Woodward, Martin) (Entered: 02/08/2024)
02/12/2024		MINUTE ORDER: The Court has reviewed the Parties' recent 43 joint status report. Given the current stage of proceedings before the D.C. Circuit, the Court hereby ORDERS the Parties to file an additional joint status report by March 13, 2024. The status report shall apprise the Court of the status of the appeal, the Parties' respective positions on this Court's jurisdiction pending appeal, and the Parties' respective positions on whether a stay is appropriate pending appeal. Signed by Judge Jia M. Cobb on February 12, 2024. (lcjmc2) (Entered:

		02/12/2024)
03/13/2024	44	Joint STATUS REPORT by DAVID O'CONNELL. (Woodward, Martin) (Entered: 03/13/2024)
03/15/2024		MINUTE ORDER: The Court has reviewed the parties' recent 44 joint status report. Given the current stage of proceedings before the D.C. Circuit, the Court hereby ORDERS the Parties to file a joint status report by May 1, 2024. Signed by Judge Jia M. Cobb on March 15, 2024. (lcjmc2) (Entered: 03/15/2024)
05/01/2024	45	Joint STATUS REPORT by DAVID O'CONNELL. (Woodward, Martin) (Entered: 05/01/2024)
05/02/2024		MINUTE ORDER: The Court has reviewed the Parties 45 joint status report. At this stage, the Court does not understand either Party to request any specific action from this Court during the pendency of the appeal, in which Defendant challenges this Court's jurisdiction. The Court therefore ORDERS the Parties to file a

		joint status report by July 1, 2024, and every 60 days thereafter, which shall apprise the Court of the status of the appeal and if either Party wishes this Court to take any specific action before the appeal is resolved. Signed by Judge Jia M. Cobb on May 2, 2024. (lcjmc2) (Entered: 05/02/2024)
07/01/2024	46	Joint STATUS REPORT by DAVID O'CONNELL. (Woodward, Martin) (Entered: 07/01/2024)
08/30/2024	47	Joint STATUS REPORT by UNITED STATES CONFERENCE OF CATHOLIC BISHOPS. (Flood, Emmet) (Entered: 08/30/2024)
10/29/2024	48	Joint STATUS REPORT by UNITED STATES CONFERENCE OF CATHOLIC BISHOPS. (Flood, Emmet) (Entered: 10/29/2024)
10/31/2024		MINUTE ORDER: The Court ORDERS that this case is STAYED pending resolution of Defendant's appeal to the D.C. Circuit, Case No. 23-7173. The parties are no longer required to file joint status reports every 60

		days. The parties shall file a joint status report within 14 days of the Circuit's decision, advising the Court how the parties would like to proceed. Signed by Judge Jia M. Cobb on October 31, 2024. (lcjmc2) (Entered: 10/31/2024)
05/13/2025		MINUTE ORDER: More than 14 days have passed since the D.C. Circuit issued its opinion dismissing Defendant's appeal for lack of jurisdiction, but the parties have not filed a joint status report. See Oct. 31, 2024 Min. Order. It is therefore ORDERED that the parties shall file a joint status report by May 16, 2025, advising the Court how they would like to proceed. Signed by Judge Jia M. Cobb on May 13, 2025. (lcjmc2) (Entered: 05/13/2025)
05/13/2025	49	Joint STATUS REPORT by UNITED STATES CONFERENCE OF CATHOLIC BISHOPS. (Flood, Emmet) (Entered: 05/13/2025)
05/14/2025		MINUTE ORDER: In light of the parties' joint status report, the Court ORDERS that the parties shall file a further joint status

		report within 14 days after the issuance of the D.C. Circuit's mandate. Signed by Judge Jia M. Cobb on May 14, 2025. (lcjmc2) (Entered: 05/14/2025)
12/01/2025	50	MANDATE of USCA as to 40 Notice of Appeal to DC Circuit Court, filed by UNITED STATES CONFERENCE OF CATHOLIC BISHOPS ; USCA Case Number 23-7173. (Attachments: # 1 USCA Judgment 4/25/2025)(znmw) (Entered: 12/01/2025)
12/15/2025	51	MEET AND CONFER STATEMENT. (Franzini, Simon) (Entered: 12/15/2025)
01/06/2026		NOTICE of Hearing: Initial Scheduling Conference set for 1/27/2026 at 1:30 PM via Zoom before Judge Jia M. Cobb. (zed) (Entered: 01/06/2026)

U.S. District Court
District of Rhode Island (Providence)
CIVIL DOCKET FOR CASE #:
1:20-cv-00031-WES-PAS

O'Connell v. United States Conference of Catholic Bishops
Assigned to: District Judge William E. Smith
Referred to: Magistrate Judge Patricia A. Sullivan
Demand: $5,000,000
Cause: 28:1332 Diversity-Fraud

Date Filed: 01/22/2020
Date Terminated: 05/21/2020
Jury Demand: Plaintiff
Nature of Suit: 370 Other Fraud
Jurisdiction: Diversity

Plaintiff **David O'Connell**	represented by **Peter N. Wasylyk** Law Offices of Peter N. Wasylyk 1307 Chalkstone Avenue Providence, RI 02908 401-831-7730 Fax: 401-861-6064 Email: pnwlaw@aol.com *ATTORNEY TO BE NOTICED*
v.	
Defendant **United States Conference of Catholic Bishops**	represented by **Eugene G. Bernardo , II** Partridge, Snow & Hahn LLP 40 Westminster Street Suite 1100

	Providence, RI 02903 401-861-8200 Fax: 401-861-8210 Email: egb@psh.com *LEAD ATTORNEY* *ATTORNEY TO BE NOTICED* **Robert K. Taylor** Partridge, Snow & Hahn LLP 40 Westminster Street Suite 1100 Providence, RI 02903 401-861-8200 Fax: 401-861-8210 Email: rkt@psh.com *LEAD ATTORNEY* *ATTORNEY TO BE NOTICED*

Date Filed	**#**	**Docket Text**
01/22/2020	1	COMPLAINT (filing fee paid $400.00, receipt number 0103-1466938), filed by David O'Connell. (Attachments: # 1 Criminal Cover Sheet, # 2 Summons)(Wasylyk, Peter) (Entered: 01/22/2020)
01/22/2020		Case assigned to District Judge William E. Smith and Magistrate Judge Patricia A. Sullivan. (Hicks, Alyson)

		(Entered: 01/22/2020)
01/22/2020	2	CASE OPENING NOTICE ISSUED (Hicks, Alyson) (Entered: 01/22/2020)
01/22/2020	3	Summons Issued as to United States Conference of Catholic Bishops. (Hicks, Alyson) (Entered: 01/22/2020)
01/29/2020	4	SUMMONS Returned Executed by David O'Connell. United States Conference of Catholic Bishops served on 1/24/2020, answer due 2/14/2020. (Wasylyk, Peter) (Entered: 01/29/2020)
02/13/2020	5	NOTICE of Appearance by Robert K. Taylor on behalf of United States Conference of Catholic Bishops (Taylor, Robert) (Entered: 02/13/2020)
02/13/2020	6	NOTICE of Appearance by Eugene G. Bernardo, II on behalf of United States Conference of Catholic Bishops (Bernardo, Eugene) (Entered: 02/13/2020)
02/13/2020	7	MOTION to Dismiss for Lack of Jurisdiction *and Improper Venue* filed by United States Conference of Catholic Bishops.

		Responses due by 2/27/2020. (Attachments: # 1 Supporting Memorandum, # 2 Exhibit A (Ridderhoff Affidavit))(Taylor, Robert) (Entered: 02/13/2020)
02/26/2020	8	Cross MOTION to Transfer Case *and response to Motion to Dismiss* filed by All Plaintiffs. **Responses due by 3/11/2020.** (Attachments: # 1 Supporting Memorandum)(Wasylyk, Peter) (Entered: 02/26/2020)
03/09/2020	9	RESPONSE In Opposition to 8 Cross MOTION to Transfer Case *and response to Motion to Dismiss ; and REPLY in Support of 7 Motion to Dismiss* filed by United States Conference of Catholic Bishops. **Replies due by 3/16/2020.** (Taylor, Robert) (Entered: 03/09/2020)
03/16/2020	10	REPLY to Response re 9 Response to Motion, *transfer venue* filed by David O'Connell. (Wasylyk, Peter) (Entered: 03/16/2020)
05/21/2020		TEXT ORDER denying as moot 7 Motion to Dismiss for Lack of Jurisdiction; granting 8 Motion to Transfer Case: The Court

		GRANTS 8 Plaintiff's Cross-Motion to Transfer Venue, transferring the case to the United States District Court for the District of Columbia. Defendant's 7 Motion to Dismiss is hereby DENIED AS MOOT. So Ordered by District Judge William E. Smith on 5/21/2020. (Jackson, Ryan) (Entered: 05/21/2020)

United States District Court
District of Rhode Island

David O'Connell, individually and on behalf of all others similarly situated, Plaintiff, v. United States Conference of Catholic Bishops, Defendant.	Case no. Class Action

Plaintiff's Original Class Action Complaint

* * *

1. Plaintiff David O'Connell brings this action on behalf of himself and all others similarly situated, against Defendant United States Conference of Catholic Bishops ("USCCB"). Plaintiff alleges the following based upon information and belief, the investigation of counsel, and his personal knowledge of the factual allegations.

Preliminary statement

2. Requests for charitable contributions must be scrupulously accurate. This is especially true when a powerful religious organization, already trusted by its members, asks them to donate money for specific charitable purposes-why would anyone ever suspect that the money would not be spent as promised?

3. For years, USCCB has solicited and collected hundreds of millions of dollars in donations from parishioners of Catholic churches throughout Rhode Island and the United States as part of its "Peter's Pence" collection. USCCB consistently promotes this specific collection as necessary for helping those suffering the effects of war, oppression, natural disaster, or disease throughout the world, and who are thus in need of immediate relief.

4. Regrettably and tragically, only a very small portion of this money—as little as 10%—has found its way to the needy for whom it was given. The rest of the money—hundreds of millions of dollars over the last several years—has been diverted into various suspicious investment funds, which in turn have tunneled the money into such diverse ventures as luxury condominium developments and Hollywood movies while paying fund managers hefty, multi-million dollar commissions.

5. At the urging of USCCB, David O'Connell gave to Peter's Pence at Sacred Heart Church in East Providence, Rhode Island, in order to help those in disaster-stricken parts of the world in immediate need of assistance. On behalf of himself and everyone else in Rhode Island and the United States, he now asks USCCB to come clean. Having collected hundreds of millions of dollars from faithful and well-meaning donors for the poor in immediate need of assistance, USCCB must now account for itself and the money with which it was entrusted, and, in the interests of justice, it must disgorge the funds that were not spent as it promised.

Jurisdiction and venue

6. This Court has jurisdiction pursuant to 28 U.S.C. § 1332(d) because the Class consists of more than 100 members, the amount in controversy exceeds the sum or value of five million dollars exclusive of recoverable interest and costs, and minimal diversity exists. This Court also has supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367.

7. Venue is proper in this District pursuant to 28 U.S.C. § 1391 because a substantial part of the events and omissions giving rise to the claims of Plaintiff and the Class occurred in this District. Furthermore, venue is proper in this District because Plaintiff made a donation to Peter's Pence in this District at Sacred Heart Church in East Providence, Rhode Island.

Parties

8. Defendant United States Conference of Catholic Bishops ("USCCB") is a District of Columbia non-profit corporation with its principal place of business at 3211 4th Street NE, Washington, DC 20017. It may be served with process through its noncommercial registered agent, Monsignor J. Brian Bransfield, at 32114th Street NE, Washington, DC 20017.

9. Defendant USCCB is the episcopal conference of the Catholic Church in the United States. It is composed of all active and retired members of the Catholic hierarchy in the United States. USCCB is served by a staff of approximately 315 lay people, priests, deacons, and others located at its headquarters in Washington, DC.

10. USCCB describes its purpose as "to promote the greater good which the Church offers humankind, especially through forms and programs of the apostolate

fittingly adapted to the circumstances of time and place. This purpose is drawn from the universal law of the Church and applies to the episcopal conferences which are established all over the world for the same purpose."[1] In the United States, that includes the promotion, oversight, administration, and collection of coordinated charitable donation efforts throughout the country called "collections," including the Peter's Pence collection. USCCB regularly and routinely conducts business throughout the United States and Rhode Island, specifically including the promotion, oversight, administration and intake of donations through the Peter's Pence collection.

11. USCCB, including its members, employees, subsidiaries, affiliates, volunteers, and agents, promoted, advertised, provided instructions for, administered, oversaw, and collected funds from donors throughout Rhode Island and the United States in connection with the Peter's Pence collection, and specifically within the Diocese of Providence and the Parish of Sacred Heart in East Providence.

12. Plaintiff David O'Connell resides in East Providence, Rhode Island. He made a donation to Peter's Pence at Sacred Heart Church in East Providence, Rhode Island.

13. Plaintiff specifically reserves the right to amend this Complaint to name additional party defendants revealed by discovery or further investigation to have been involved with the diversion of donor funds from the Peter's Pence collection to purposes other than those promised.

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[1] http://www.usccb.org/about/index.cfm (accessed December 23, 2019).

Any applicable statutes of limitation are tolled

14. Plaintiff and Class members did not discover and could not discover through the exercise of reasonable diligence that USCCB has been promoting and collecting donations to Peter's Pence for purposes other than those to which the funds were applied. Any statutes of limitation otherwise applicable to any claims asserted in this Complaint have thus been tolled by the discovery rule.

15. Any applicable statutes of limitation have also been tolled by USCCB's knowing, active, and ongoing fraudulent concealment of the facts alleged herein. USCCB has known or should have known of the non-charitable applications of donations to Peter's Pence while it has been soliciting and collecting them. Thus, USCCB has effectively concealed from, and failed to notify, Plaintiff, Class members, and the public of the critical material fact that the vast majority of donations to Peter's Pence are not spent for the purpose promised to donors. Although it knew or should have known that donations to Peter's Pence are diverted to non-charitable purposes, USCCB did not acknowledge the problem, and in fact actively concealed it.

16. USCCB was, and is, under a continuous duty to disclose to Plaintiff and Class members the true character and nature of the Peter's Pence collection, including the critical material facts that donations to Peter's Pence are not used as promised to help those in need of immediate relief from war, natural disaster, and oppression, but rather are diverted to other purposes. Instead, USCCB actively concealed the true character and nature of the Peter's Pence collection and made misrepresentations about the specified purposes of the collection. Plaintiff and Class members reasonably relied upon USCCB's

concealment of these facts that rendered their statements misleading.

17. Based on the foregoing, USCCB is estopped from relying on any statutes of limitation in defense of this action.

Factual allegations

A. USCCB specifically promotes Peter's Pence as a collection for emergency assistance to the neediest around the world

18. Peter's Pence is a special collection taken from Catholics around the world every June. USCCB explains Peter's Pence as follows:

> The Peter's Pence Collection derives its name from an ancient custom. In ninth-century England[,] King Alfred the Great collected money, a "pence," from landowners as financial support for the Pope. Today, the Peter's Pence Collection supports the Pope's philanthropy by giving the Holy Father the means to provide emergency assistance to those in need because of natural disaster, war, oppression, and disease.[2]

19. In the United States, it is USCCB that promotes and administers the Peter's Pence collection in coordination with dioceses, parishes, and churches across the country. As USCCB states: "The USCCB National Collections Committee oversees the promotion of the Peter's Pence Collection."[3]

20. To do this, USCCB creates and distributes uniform

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[2] http://www.usccb.org/catholic-giving/opportunities-for-giving/peters-pence/index.cfm (accessed December 23, 2019).

[3] http://www.usccb.org/catholic-giving/opportunities-for-giving/peters-pence/index.cfm (accessed December 23, 2019).

promotional materials for specific use in parishes and dioceses. These include a social media tool kit, church bulletin inserts, letters from bishops, web ads, posters, and print ads, all freely downloadable from USCCB's website.[4]

21. All of the Peter's Pence solicitation materials contain the same essential message, as stated in USCCB's sample church bulletin insert: "Donations to this collection support the charitable works of Pope Francis for the relief of those most in need."[5]

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[4] See generally http://www.usccb.org/catholic-giving/opportunities-for-giving/peters-pence/collection/ (accessed December 21, 2019).

[5] http://www.usccb.org/catholic-giving/opportunities -for-giving/peters-pence/collection/2019/upload/pp-2019-bulletin-insert-bilingual.pdf (accessed December 21, 2019).

22. This screenshot of USCCB's bulletin insert solicitation shows exactly how USCCB illustrates the purpose of Peter's Pence to prospective donors:[6]

> ***How We Can Join Pope Francis and Be a Witness of Charity***
>
> By supporting the Peter's Pence Collection, you assist the charitable works of Pope Francis. Your generosity witnesses to charity and helps the Holy See reach out compassionately to those who are marginalized.
>
> For example, in the Dioceses of Embeder, Harar, and Mek in Ethiopia, people rely exclusively on subsistence farming and nomadic herding. The El Niño weather phenomenon worsened drought conditions in these regions, and the people fear a new famine that could be far worse than the 1984 famine that led to more than a million deaths in Ethiopia. But your support of the collection is helping the Holy Father to bring aid to the affected villages. Your donations have funded food and medicines that give the Ethiopian people a measure of relief and hope. Learn more by visiting *www.peterspence.va/opere*.

23. USCCB's exemplar "bulletin announcements" have a similar, more abbreviated approach, accompanied by instructions for use before, during, and after the collection:[7]

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[6] http://www.usccb.org/catholic-giving/opportunities-for-giving/peters-pence/collection/2O19/upload/pp-2019-bulletin-insert-bilingual.pdf. (accessed December 21, 2019).

[7] http://www.usccb.org/catholic-giving/opportunities-for-giving/peters-pence/collection/2019/upload/pp-2019-bulletin-announcements.doc (accessed December 21, 2019).

Bulletin Announcements – English

Week Before the Collection

Next week, we will take up the Peter's Pence Collection, which provides Pope Francis with the funds he needs to carry out his charitable works around the world. The proceeds benefit our brothers and sisters on the margins of society, including victims of war, oppression, and natural disasters. Please be generous. For more information, visit *www.usccb.org/peters-pence.*

Week of the Collection

Today is the Peter's Pence Collection, a worldwide collection that supports the charitable works of Pope Francis. Funds from this collection help victims of war, oppression, and natural disasters. Take this opportunity to join with Pope Francis and be a witness of charity to our suffering brothers and sisters. Please be generous today. For more information, visit *www.usccb.org/peters-pence.*

Week After the Collection

Thank you for your generous support in last week's Peter's Pence Collection! Our parish collected $[amount]. Our contributions, combined with those from our brothers and sisters around the world, will help Pope Francis provide essential relief to people in need. If you missed the collection, it is not too late to give! Visit *www.usccb.org/nationalcollections,* and click on the "How to Give" link.

24. USCCB also furnishes specific instructions for Peter's Pence appeals to be read from the pulpit at church services:[8]

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[8] http://www.usccb.org/catholic-giving/opportunities-for-giving/peters-pence/collection/2019/upload/pp-2019-parish-

Parish Appeal

(Please read this text from the pulpit, or include it as part of your weekly announcements.)

Today we take up the Peter's Pence Collection, which supports the charitable works of Pope Francis. Catholics around the globe support this collection to help the Holy Father reach out to people suffering in our world, especially those enduring the effects of war and violence, natural disasters, and religious persecution. Please be generous today.

25. For those American Catholics inspired to research Peter's Pence directly from the Vatican website, the messages all reinforce that of the USCCB materials. The Vatican catalogues "works realized" by Peter's Pence, replete with images and elaborate descriptions of disaster relief undertaken in various countries (for example, Ecuador):[9]

ECUADOR

Thanks to Peter's Pence has begun a new reconstruction project after the earthquake that struck the coastal regions

In April 2016, an earthquake of 7.8 on the Richter scale hit the coastal area of Ecuador, located less than 200 kilometers from the capital Quito, causing - according to the UN Office for Humanitarian Affairs (OCHA) - 700 deaths, 12,000 injured, 50 thousand homeless.

After aid for the first emergencies, the Holy See started **a project for the reconstruction of houses, schools and public buildings** in the province of Manabi, the epicenter of the earthquake.

In fact, governments' data shows that the destroyed or damaged buildings exceed 2,000 units, over 600 of these are schools, while in many cities water, sewage and electricity networks have to be rebuilt.

The material damages amount to over 3 billion dollars.

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appeal.doc (accessed December 23, 2019).

[9] http://www.peterspence.va/en/opere-realizzate/ecuador.html (accessed December 21, 2019).

B. USCCB is keenly aware of the importance of accurate solicitations and honoring donor intent

26. USCCB is well aware of the importance of transparency, accountability, accuracy, and honoring donor intent in connection with national collections like Peter's Pence. It has adopted specific guidelines for administering USCCB national collections in dioceses.[10] The guidelines discuss the importance of the proper use of promotional materials; they additionally have an extensive discussion about honoring donor intent. Citing both Canon law and "civil laws observed within the United States," the guidelines "call for procedures that ensure donor funds are used for precise purposes intended in the donation appeal." In particular, USCCB guidelines state:[11]

> The national collections are required to adhere to the fundamental principle of "donor intent." For this reason, the following principles should be closely followed:[16]
>
> - Donors should be informed about the intended uses of donated resources.
> - Donors must be assured that gifts will be used for the purposes for which they were given.
>
> The principles and requirements of donor intent must be preserved throughout the entire collection process, from the announcement of the intention of the collection,

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[10] http://www.usccb.org/_cs_upload/about/national-collections/collection-administration/43214_1.pdf. (accessed December 21, 2019).

[11] http://www.usccb.org/ cs upload/about/national-collections/collection--administration/43214_l.pdf (at p. 5) (accessed December 21, 2019) (footnotes from original document omitted in screenshot).

through the safeguarding and delivering of funds, to the final use by the various collection Subcommittees of the USCCB, including the use and reporting by eventual recipient grantees. Diocesan bishops and parish pastors have a special obligation to be vigilant that the norms of both canon and civil law are followed in these instances.[17]

C. Contrary to USCCB's representations, Peter's Pence donations are used for investments in real estate and Hollywood films rather than emergency assistance for the needy

27. Despite USCCB's assurances that it honors donor intent, and that donations to Peter's Pence are for the suffering in immediate need, it has recently become apparent that these donor funds are not being used for the purpose USCCB promises. On October 17, 2019, the Italian news magazine *L'Espresso* published a story sourced from secret internal Vatican investigative reports, as pictured in this screenshot:[12]

[12] http://espresso.repubblica.it/plus/articoli/2019/10/17/news/vaticano-obolo-san-pietro-1.340060 (accessed December 23, 2019).

STATO DELLA CITTÀ DEL VATICANO

TRIBUNALE

UFFICIO DEL PROMOTORE DI GIUSTIZIA

prot.n.39-2017 RGP

Oggetto: decreto di perquisizione e sequestro

Sommario

1- Premessa

Il presente provvedimento prende avvio e ragion d'essere da un'articolata denuncia [illegible] dello IOR, dott. Gian Franco

28. The *L'Espresso* story revealed that most of the Peter's Pence funds are diverted into "reckless speculative operations," with 77% of the collections—roughly $560 million—given to Credit Suisse, a Swiss-based investment company.[13] The story also detailed how an Italian financier named Raffaele Mincione was approached by a high-ranking Vatican official to make a $200 million investment, which Mincione used to purchase real estate in London for a luxury apartment development through a fund he managed. Eventually, when returns were less than projected, the Vatican pulled out of the fund and

[13] https://cruxnow.com/vatican/2019/10/leaked-documents-detail-200-million-vatican-deal-for-swanky-london-property/ (accessed December 22, 2019).

bought the entirety of the property, resulting in Mincione realizing almost $170 million in income.[14]

29. On December 4, 2019, the Italian newspaper *Corriere della Sera* published additional details on the diversion of Peter's Pence funds.[15] This revealed that more than $1 million was invested in the Elton John biopic *Rocketman*, and more than $3.6 million in the film *Men in Black: International*.[16] Additionally, millions of dollars were invested in a Malta-based investment company called Centurion Global Fund run by an Italian financier named Enrico Crasso, who received "millions of euros in commissions" while losing 4.61% of the fund (approximately two million euros) by the end of 2018.[17]

30. On December 11, 2019, the Wall Street Journal reported that only 10% of donations to the Peter's Pence collection actually go to charitable works.[18] Most of the money is used to plug holes in the Vatican's administrative budget, "[b]ut for at least the past five years, only about 10% of the money collected—more than €50 million was

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[14] https://cruxnow.com/vatican/2019/10/leaked-dcouments-detail-200-million-vatican-deal-for-swanky-london-property/ (accessed December 22,2019).

[15] https://www.corriere.it/english/19_dicembre_04/vatican-invested-lapo-elkann-and-elton-john-film-72eo7obo-16co-11ea-b17e-o2f19725a806.shtml?refresh_ce-cp (accessed December 22, 2019).

[16] http://www.ncregister.com/site/print/62807 (accessed December 22, 2019).

[17] http://www.ncregister,com/site/print/62807 (accessed December 22, 2019).

[18] https://www.wsj.com/articles/vatican-uses-donations-for-the-poor-to-plug-its-budget-deficit-11576075764 (accessed December 22, 2019).

raised in 2018—has gone to the sort of charitable causes featured in advertising for the collection, according to people familiar with the matter."[19]

31. Asked in November about the reports of Peter's Pence being used for purposes other than charity, Pope Francis, according to the Catholic News Service, "said no one should be bothered by the fact that the Vatican invests the money it collects from Catholics around the world. 'The sum of Peter's Pence arrives and what do I do? Put it in a drawer? No, that's bad administration. I try to make an investment.'"[20]

32. But many reactions to news of the actual use of Peter's Pence were not accepting. Some commentators asked whether there was "a bait and switch at Peter's Pence," noting "the great disparity between how it is marketed and what the vast majority of the collection is actually used for."[21]

33. Another commentator, writing in the *Catholic Herald*, noted this exchange between Francis X. Rocca, author of the *Wall Street Journal* article, and one Cardinal of the Catholic Church, shown in the following screenshot:[22]

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[19] https://www.wsj.com/articles/vatican-uses-donations-for-the-poor-to-plug-its-budget-deficit-11576075764 (accessed December 22, 2019).

[20] https://www.catholicnews.com/services/englishnews/2019/financial-scandal-shows-vatican-reforms-are-working-pope-tells-media.cfm (accessed December 22, 2019).

[21] https://acton.org/publications/transatlantic/2019/12/13/bait-and-switch-peters-pence-bait-and-switch (accessed December 23,2019).

[22] https://catholicherald.co.uk/commentandblogs/2019/12/15/what-the-peters-pence-furore-tells-us-about-vatican-financial-reform/ (accessed December 23, 2019).

On Twitter, Cardinal Wilfrid Napier of Durban noted, "According to information given to the Council for the Economy," of which he is a member, "the Pope's Petrine ministry extends beyond care of the poor". Napier went on to say, "Therefore, if the Peter's Pence Collection is taken up to support the Pope in his Petrine ministry, it is for a much wider purpose than simply care of the Poor."

Rocca replied: "Your Eminence, that is of course correct under the law. The problem is that the promotional material from the Vatican and local churches gives an entirely different impression, so people are giving under the misapprehension that the money goes mainly to the poor."

Cardinal Napier responded, "Then I think we have to say the promotional material is not accurate, misleading or even wrong, because it does not reflect the truth."

D. David O'Connell donated to Peter's Pence after USCCB told him his donation would be applied for emergency assistance

34. David O'Connell regularly attends Sunday mass at Sacred Heart Church in East Providence, Rhode Island. In the summer of 2018, during a Sunday mass in which he was solicited from the pulpit as directed by USCCB to help those in need of emergency relief, he made a cash donation to the Peter's Pence collection. Nothing he saw or heard, on that day or beforehand, told him or made him understand that his donations to Peter's Pence would be used for anything other than emergency assistance to the neediest people around the world.

35. Even if David O'Connell had slowly and carefully researched external sources such as the USCCB or Vatican websites, he would still reasonably be unaware

that his donations to Peter's Pence would not be used entirely and exclusive for emergency assistance to the poor. He had no reason to suspect that the Peter's Pence collection was actually used for investments and other purposes rather than for emergency assistance, and USCCB's failure to inform them about this was material; if USCCB had disclosed this fact, David O'Connell would not have donated to the Peter's Pence collection.

36. USCCB has always known the difference between a donation for emergency assistance and a donation to defray Vatican administrative expenses. But USCCB hid this distinction in its promotion, oversight, and administration of the Peters Pence collection in the United States, and, as a result, it has effectively profited at the expense of David O'Connell and the members of the public. David O'Connell donated money for specific charitable purposes, which USCCB directed into other, non-charitable purposes. All along, USCCB knew or should have known this was the likely result, but it promoted the Peter's Pence collection as a charitable effort meant only for the poorest of the poor regardless; accordingly, millions of donors across the country ended up in the exact same position as David O'Connell.

Class allegations

37. Plaintiff David O'Connell seeks to represent the following Class:

> All persons in the United States who donated money to the Peter's Pence collection. Excluded from the Class are USCCB and its subsidiaries and affiliates; all persons who make a timely election to be excluded from the Class; governmental entities; and the Judge to whom this case is assigned and his/her immediate family.

38. Plaintiff reserves the right to revise the Class definition based upon information learned through discovery.

39. Certification of Plaintiff's claims for class-wide treatment is appropriate because Plaintiff can prove the elements of his claims on a class-wide basis using the same evidence as would be used to prove those elements in individual actions alleging the same claim.

40. This action has been brought and may be properly maintained on behalf of the Class proposed herein under Federal Rule of Civil Procedure 23.

A. Numerosity

41. Pursuant to Federal Rule of Civil Procedure 23(a)(1), the members of the Class are so numerous and geographically dispersed that individual joinder of all Class members is impracticable. While Plaintiff is informed and believes that there are millions of members of the Class, the precise number is unknown to him. Class members may be notified of the pendency of this action by recognized, Court-approved notice dissemination methods, which may include U.S. mail, electronic mail, internet postings, and/or published notice.

B. Commonality and Predominance

42. Pursuant to Federal Rules of Civil Procedure 23(a)(2) and 23(b)(3), this action involves common questions of law and fact, which predominate over any questions affecting individual Class members, including, without limitation:

a) Whether USCCB engaged in the conduct alleged herein;

b) Whether USCCB's conduct violates common law as asserted herein;

c) Whether Plaintiff and the other Class members are entitled to equitable relief, including, but not limited to, restitution or injunctive relief; and

d) Whether Plaintiff and the other Class members are entitled to damages and other monetary relief and, if so, in what amount.

C. Typicality

43. Pursuant to Federal Rule of Civil Procedure 23(a)(3), Plaintiffs claims are typical of the other Class members' claims because, among other things, all Class members were comparably injured through USCCB's wrongful conduct as described above.

D. Adequacy

44. Pursuant to Federal Rule of Civil Procedure 23(a)(4), Plaintiff is an adequate Class representative because his interests do not conflict with the interests of the other members of the Class he seeks to represent; Plaintiff has retained counsel competent and experienced in complex class action litigation; and Plaintiff intends to prosecute this action vigorously. The interests of the Class will be fairly and adequately protected by Plaintiff and his counsel.

E. Declaratory and Injunctive Relief

45. Pursuant to Federal Rule of Civil Procedure 23(b)(2), Defendants have acted or refused to act on grounds generally applicable to Plaintiff and the other members of the Class, thereby making appropriate final injunctive relief and declaratory relief, as described below, with respect to the Class as a whole.

F. Superiority

46. Pursuant to Federal Rule of Civil Procedure 23(b)(3), a class action is superior to any other available means for the fair and efficient adjudication of this controversy, and no unusual difficulties are likely to be encountered in the management of this class action. The damages or other financial detriment suffered by Plaintiff and the other Class members are relatively small compared to the burden and expense that would be required to individually litigate their claims against USCCB, so it would be impracticable for Class members to individually seek redress for USCCB's wrongful conduct. Even if Class members could afford individual litigation, the court system could not. Individualized litigation creates a potential for inconsistent or contradictory judgments and increases the delay and expense to all parties and the court system. By contrast, the class action device presents far fewer management difficulties, and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court.

Claims for relief

Count I. Fraud

47. Plaintiff realleges and incorporates by reference all paragraphs as though fully set forth herein.

A. USCCB made affirmative misrepresentations

48. USCCB consistently, routinely, and uniformly solicited donations for the Peter's Pence collection as emergency assistance needed for victims of war, oppression, natural disaster, or disease throughout the world. By doing this, USCCB communicated to Plaintiff

and to each Class member that any money they donated to Peter's Pence would be used exclusively for these purposes.

49. This was a material representation, as USCCB knew that prospective donors would be inclined to donate to Peter's Pence if they believed their donations were urgently needed by people in dire circumstances. And this was a false representation, because the donations were never going to be routed immediately to the needy, but rather were going to be diverted into investment funds and subsequently into purposes such as real estate, Hollywood films, and hefty commissions for fund managers.

50. USCCB knew or should have known the representations were false and intended Plaintiff and Class members to rely on them. Plaintiff and Class members decided to donate to Peter's Pence based in part on the representations communicated to them by USCCB.

51. But for USCCB's fraud, Plaintiff and the members of the Class would not have donated to the Peter's Pence collection. Plaintiff and the members of the Class have sustained damage because they contributed money for specific charitable purposes which USCCB did not spend in accordance with its promises. Accordingly, USCCB is liable to Plaintiff and the members of the Class for damages in an amount to be proven at trial.

B. USCCB fraudulently concealed material facts

52. USCCB consistently, routinely, and uniformly solicited donations for the Peter's Pence collection as emergency assistance needed for victims of war, oppression, natural disaster, or disease throughout the world. By doing this, USCCB communicated to Plaintiff and to each Class member that any money they donated to Peter's Pence would be used exclusively for these purposes.

53. USCCB concealed and suppressed the fact that the donations were never going to be routed immediately to the needy, but rather were going to be diverted into investment funds and subsequently into purposes such as real estate, Hollywood films, and hefty commissions for fund managers. This was a material fact about which USCCB had or should have had knowledge, and that it concealed from Plaintiff and the members of the Class to mislead them.

54. Plaintiff and the members of the Class did not know this fact and could not have discovered it through a reasonably diligent investigation.

55. USCCB had a duty to disclose that donations to Peter's Pence would not be immediately spent on emergency assistance for the needy around the world because (1) USCCB had or should have had exclusive knowledge of the material, suppressed facts; (2) USCCB took affirmative actions to conceal the material facts, including by devising and implementing a promotional program for Peter's Pence that emphasized the need for emergency assistance for the poor; (3) USCCB made partial representations by suggesting in promotional and solicitation materials that donations to the Peter's Pence collection are exclusively to aid the needy in dire circumstances around the world. Plaintiff and Class members decided to donate to Peter's Pence based in part on the representations communicated to them by USCCB's promotions and solicitations.

56. But for USCCB's fraud, Plaintiff and the members of the Class would not have made donations to the Peter's Pence collection. Plaintiff and the members of the Class have sustained damage because they contributed money for specific charitable purposes which USCCB did not spend in accordance with its promises. Accordingly,

USCCB is liable to Plaintiff and the members of the Class for damages in an amount to be proven at trial.

Count II. Unjust enrichment

57. Plaintiff realleges and incorporates by reference all paragraphs as though fully set forth herein.

58. As described in detail in the factual allegations above, USCCB made false representations to Plaintiff and the members of the Class that resulted in their contributions of money for charitable purposes to their detriment.

59. Under these circumstances as described above, USCCB has received money from Plaintiff and the members of the Class that USCCB, in equity and good conscience, ought not to retain.

60. As a result, USCCB is liable in restitution to Plaintiff and the members of the Class to disgorge and remit to Plaintiff and the Class all monies contributed, in an amount to be proved at trial.

Count III. Breach of fiduciary duty

61. Plaintiff realleges and incorporates by reference all paragraphs as though fully set forth herein.

62. As described in detail in the factual allegations above, USCCB promoted, advertised, provided instructions for, administered, oversaw, and collected funds from donors throughout Rhode Island and the United States in connection with the Peter's Pence collection. USCCB owed Plaintiff and the members of the Class fiduciary duties in connection with its promotion, solicitation, and handling of all charitable contributions to the Peter's Pence collection.

63. Under the circumstances described in detail above, USCCB breached its fiduciary duties to Plaintiff and the members of the Class by failing to ensure that the charitable contributions to the Peter's Pence collection were spent in accordance with USCCB's promises.

64. As a result of USCCB's breaches of its fiduciary duties, Plaintiff and the members of the Class have sustained damages, and USCCB is liable to Plaintiff and the members of the Class for damages in an amount to be proved at trial.

Request for relief

65. David O'Connell, individually and on behalf of the members of the Class, respectfully request that the Court enter judgment in their favor and against USCCB, as follows:

A. Certification of the proposed Class, including appointment of Plaintiff's counsel as Class Counsel;

B. An order temporarily and permanently enjoining Defendants from continuing the unlawful, deceptive, and fraudulent practices alleged in this Complaint;

C. Injunctive relief;

D. Costs, restitution, damages, and disgorgement in an amount to be determined at trial;

E. An order requiring USCCB to pay both pre- and post-judgment interest on any amounts awarded;

F. An award of costs and attorneys' fees; and

G. Such other or further relief as may be appropriate.

Demand for jury trial

66. Plaintiff hereby demands a jury trial for all claims so triable.

Dated: January 22, 2020

Respectfully submitted,

/s/ *Peter N. Wasylyk*
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Counsel for Plaintiff and the Class

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAVID O'CONNELL, individually and on behalf of all others similarly situated, Plaintiff, v. UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, Defendant.	Case No. 1:20-CV-01365-KBJ Class Action

ANSWER OF DEFENDANT UNITED STATES CONFERENCE OF CATHOLIC BISHOPS

Defendant, the United States Conference of Catholic Bishops (USCCB), submits this Answer to the Plaintiff's Complaint.

This Answer is based upon the USCCB's investigation to date, and Defendant USCCB reserves the right to supplement or amend this Answer during the course of litigation as new information is discovered. Except as otherwise expressly admitted in the paragraphs below, Defendant denies each and every allegation in the Complaint, and specifically denies any and all wrongdoing and/or liability. To the extent any allegation in the Complaint is not specifically and expressly admitted, it is denied. No statement herein constitutes a comment on the legal theories upon

which Plaintiff purports to proceed. To the extent the Complaint asserts legal contentions, such legal contentions require no response in this Answer, and this Answer contains no response to legal contentions other than their general denial.

In response to the numbered paragraphs of the Complaint, Defendant admits, denies or otherwise avers as follows:

1. *Plaintiff David O'Connell brings this action on behalf of himself and all others similarly situated, against Defendant United States Conference of Catholic Bishops ("USCCB"). Plaintiff alleges the following based upon information and belief, the investigation of counsel, and his personal knowledge of the factual allegations.*

Paragraph 1 states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies the allegations.

2. *Requests for charitable contributions must be scrupulously accurate. This is especially true when a powerful religious organization, already trusted by its members, asks them to donate money for specific charitable purposes—why would anyone ever suspect that the money would not be spent as promised?*

Paragraph 2 states a legal conclusion to which no response is required. To the extent that a response is required, Defendant denies the allegations.

3. *For years, USCCB has solicited and collected hundreds of millions of dollars in donations from parishioners of Catholic churches throughout Rhode Island and the United States as part of its "Peter's Pence" collection. USCCB consistently promotes this*

specific collection as necessary for helping those suffering the effects of war, oppression, natural disaster, or disease throughout the world, and who are thus in need of immediate relief.

Defendant denies the allegations of paragraph 3.

4. *Regrettably and tragically, only a very small portion of this money—as little as 10%—has found its way to the needy for whom it was given. The rest of the money—hundreds of millions of dollars over the last several years—has been diverted into various suspicious investment funds, which in turn have funneled the money into such diverse ventures as luxury condominium developments and Hollywood movies while paying fund managers hefty, multi-million dollar commissions.*

Defendant denies the allegations of paragraph 4.

5. *At the urging of USCCB, David O'Connell gave to Peter's Pence at Sacred Heart Church in East Providence, Rhode Island, in order to help those in disaster-stricken parts of the world in immediate need of assistance. On behalf of himself and everyone else in Rhode Island and the United States, he now asks USCCB to come clean. Having collected hundreds of millions of dollars from faithful and well-meaning donors for the poor in immediate need of assistance, USCCB must now account for itself and the money with which it was entrusted, and, in the interests of justice, it must disgorge the funds that were not spent as it promised.*

Defendant denies the allegations of paragraph 5, to the extent that it purports to contain allegations of fact to which a response is required.

6. *This Court has jurisdiction pursuant to 28 U.S.C. § 1332(d) because the Class consists of more than 100 members, the amount in controversy exceeds the sum or value of five million dollars exclusive of recoverable interest and costs, and minimal diversity exists. This Court also has supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367.*

Defendant denies that this Court has subject matter jurisdiction over Plaintiff's claim pursuant to 28 U.S.C. § 1332 (d) or any other provision of law.

7. *Venue is proper in this District pursuant to 28 U.S.C. § 1391 because a substantial part of the events and omissions giving rise to the claims of Plaintiff and the Class occurred in this District. Furthermore, venue is proper in this District because Plaintiff made a donation to Peter's Pence in this District at Sacred Heart Church in East Providence, Rhode Island.*

Defendant denies that Plaintiff made a donation to Peter's Pence in this District but does not otherwise contest venue, assuming that the Court has subject matter jurisdiction.

8. *Defendant United States Conference of Catholic Bishops ("USCCB") is a District of Columbia non-profit corporation with its principal place of business at 3211 4th Street NE, Washington, DC 20017. It may be served with process through its non-commercial registered agent, Monsignor J. Brian Bransfield, at 3211 4th Street NE, Washington, DC 20017.*

Defendant denies the allegations of paragraph 8.

9. *Defendant USCCB is the episcopal conference of the Catholic Church in the United States. It is*

composed of all active and retired members of the Catholic hierarchy in the United States. USCCB is served by a staff of approximately 315 lay people, priests, deacons, and others located at its headquarters in Washington, DC.

Defendant admits the allegations of paragraph 9.

10. *USCCB describes its purpose as "to promote the greater good which the Church offers humankind, especially through forms and programs of the apostolate fittingly adapted to the circumstances of time and place. This purpose is drawn from the universal law of the Church and applies to the episcopal conferences which are established all over the world for the same purpose."*[1] *In the United States, that includes the promotion, oversight, administration, and collection of coordinated charitable donation efforts throughout the country called "collections," including the Peter's Pence collection. USCCB regularly and routinely conducts business throughout the United States and Rhode Island, specifically including the promotion, oversight, administration and intake of donations through the Peter's Pence collection.*

Defendant denies the allegations of paragraph 10, except to admit that it describes its purpose in the language quoted from its website, and that it promotes, administers and collects funds for a number of national collections; and to aver that it assists the Holy See in the promotion of the Peter's Pence Collection but does not administer, oversee,

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[1] http://www.usccb.org/about/index.cfm (accessed December 23, 2019).

collect or receive funds for the Peter's Pence Collection.

11. *USCCB, including its members, employees, subsidiaries, affiliates, volunteers, and agents, promoted, advertised, provided instructions for, administered, oversaw, and collected funds from donors throughout Rhode Island and the United States in connection with the Peter's Pence collection, and specifically within the Diocese of Providence and the Parish of Sacred Heart in East Providence.*

Defendant denies the allegations of paragraph 11, except to admit that it provided materials to assist in the promotion of the Peter's Pence Collection.

12. *Plaintiff David O'Connell resides in East Providence, Rhode Island. He made a donation to Peter's Pence at Sacred Heart Church in East Providence, Rhode Island.*

Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 12 and, on that basis, denies those allegations.

13. *Plaintiff specifically reserves the right to amend this Complaint to name additional party defendants revealed by discovery or further investigation to have been involved with the diversion of donor funds from the Peter's Pence collection to purposes other than those promised.*

Paragraph 13 is a statement of Plaintiff's legal position to which no response is required. To the extent that a response is required, Defendant denies the allegations of paragraph 13.

14. *Plaintiff and Class members did not discover and could not discover through the exercise of reasonable diligence that USCCB has been promoting and collecting donations to Peter's Pence for purposes other than those to which the funds were applied. Any statutes of limitation otherwise applicable to any claims asserted in this Complaint have thus been tolled by the discovery rule.*

Defendant denies the allegations of paragraph 14.

15. *Any applicable statutes of limitation have also been tolled by USCCB's knowing, active, and ongoing fraudulent concealment of the facts alleged herein. USCCB has known or should have known of the non-charitable applications of donations to Peter's Pence while it has been soliciting and collecting them. Thus, USCCB has effectively concealed from, and failed to notify, Plaintiff, Class members, and the public of the critical material fact that the vast majority of donations to Peter's Pence are not spent for the purpose promised to donors. Although it knew or should have known that donations to Peter's Pence are diverted to non-charitable purposes, USCCB did not acknowledge the problem, and in fact actively concealed it.*

Defendant denies the allegations of paragraph 15.

16. *USCCB was, and is, under a continuous duty to disclose to Plaintiff and Class members the true character and nature of the Peter's Pence collection, including the critical material facts that donations to Peter's Pence are not used as promised to help those in need of immediate relief from war, natural disaster, and oppression, but rather are diverted to other purposes. Instead, USCCB actively concealed the true*

character and nature of the Peter's Pence collection and made misrepresentations about the specified purposes of the collection. Plaintiff and Class members reasonably relied upon USCCB's concealment of these facts that rendered their statements misleading.

Defendant denies the allegations of paragraph 16.

17. *Based on the foregoing, USCCB is estopped from relying on any statutes of limitation in defense of this action.*

Defendant denies the allegations of paragraph 17.

18. *Peter's Pence is a special collection taken from Catholics around the world every June. USCCB explains Peter's Pence as follows:*

> *The Peter's Pence Collection derives its name from an ancient custom. In ninth-century England[,] King Alfred the Great collected money, a "pence," from landowners as financial support for the Pope. Today, the Peter's Pence Collection supports the Pope's philanthropy by giving the Holy Father the means to provide emergency assistance to those in need because of natural disaster, war, oppression, and disease.*[2]

Defendant admits the allegations of paragraph 18, except for the allegation that the collection is taken up every June.

19. *In the United States, it is USCCB that promotes and administers the Peter's Pence collection in coordination with dioceses, parishes, and churches*

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[2] http//www.usccb.org/catholic-giving/opportunities-for-giving/peters-pence/index.cfm (accessed December 23, 2019).

across the country. As USCCB states: "The USCCB National Collections Committee oversees the promotion of the Peter's Pence Collection."[3]

Defendant denies the allegations of paragraph 19, except to admit that the USCCB oversees the promotion of the Peter's Pence Collection in the United States.

20. *To do this, USCCB creates and distributes uniform promotional materials for specific use in parishes and dioceses. These include a social media tool kit, church bulletin inserts, letters from bishops, web ads, posters, and print ads, all freely downloadable from USCCB's website.*[4]

Defendant denies the allegations of paragraph 20, except to admit that it creates and distributes or makes available on its website promotional materials for use in parishes and dioceses, including a social media tool kit, church bulletin inserts, a sample Bishop's letter, web ads, a poster, and print ads.

21. *All of the Peter's Pence solicitation materials contain the same essential message, as stated in USCCB's sample church bulletin insert: "Donations to this collection support the charitable works of Pope Francis for the relief of those most in need."*[5]

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[3] http/www.usccb.org/catholic-giving/opportunities-for-giving/peters-pence/index.cfm (accessed December 23, 2019).

[4] See generally http://www.usccb.org/catholic-giving/opportunities-for-giving/peterspense/collection/ (accessed December 21, 2019).

[5] http://www.usccb.org/catholic-giving/opportunities-for-giving/peters-pence/collection/2019/upload/pp-2019-bulletin-insert-bilingual.pdf (accessed December 21, 2019).

Defendant denies the allegations of paragraph 21.

22. *This screenshot of USCCB's bulletin insert solicitation shows exactly how USCCB illustrates the purpose of Peter's Pence to prospective donors.*[6]

> ***How We Can Join Pope Francis and Be a Witness of Charity***
>
> By supporting the Peter's Pence Collection, you assist the charitable works of Pope Francis. Your generosity witnesses to charity and helps the Holy See reach out compassionately to those who are marginalized.
>
> For example, in the Dioceses of Embeder, Harar, and Mek in Ethiopia, people rely exclusively on subsistence farming and nomadic herding. The El Niño weather phenomenon worsened drought conditions in these regions, and the people fear a new famine that could be far worse than the 1984 famine that led to more than a million deaths in Ethiopia. But your support of the collection is helping the Holy Father to bring aid to the affected villages. Your donations have funded food and medicines that give the Ethiopian people a measure of relief and hope. Learn more by visiting *www.peterspence.va/opere*.

Defendant denies the allegations of paragraph 22, except to admit that it reproduces a portion of an exemplar church bulletin on the USCCB's website.

23. *USCCB's exemplar "bulletin announcements" have a similar, more abbreviated approach, accompanied by instructions for use before, during, and after the collection:*[7]

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[6] http://www.usccb.org/catholic-giving/opportunities-for-giving/peters-pence/collection/2019/upload/pp-2019-bulletin-insert-bilingual.pdf (accessed December 21, 2019).

[7] http://www.usccb.org/catholic-giving/opportunities-

Bulletin Announcements – English

Week Before the Collection

Next week, we will take up the Peter's Pence Collection, which provides Pope Francis with the funds he needs to carry out his charitable works around the world. The proceeds benefit our brothers and sisters on the margins of society, including victims of war, oppression, and natural disasters. Please be generous. For more information, visit *www.usccb.org/peters-pence.*

Week of the Collection

Today is the Peter's Pence Collection, a worldwide collection that supports the charitable works of Pope Francis. Funds from this collection help victims of war, oppression, and natural disasters. Take this opportunity to join with Pope Francis and be a witness of charity to our suffering brothers and sisters. Please be generous today. For more information, visit *www.usccb.org/peters-pence.*

Week After the Collection

Thank you for your generous support in last week's Peter's Pence Collection! Our parish collected $[amount]. Our contributions, combined with those from our brothers and sisters around the world, will help Pope Francis provide essential relief to people in need. If you missed the collection, it is not too late to give! Visit *www.usccb.org/nationalcollections,* and click on the "How to Give" link.

Defendant denies the allegations of paragraph 23, except to admit that the USCCB makes available

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forgiving/peters-pence/collection/2019/upload/pp-2019-bulletin-announcements.doc (accessed December 21, 2019).

exemplar bulletin announcements that parishes may use if they wish to do so.

24. *USCCB also furnishes specific instructions for Peter's Pence appeals to be read from the pulpit at church services:*[8]

Parish Appeal

(Please read this text from the pulpit, or include it as part of your weekly announcements.)

Today we take up the Peter's Pence Collection, which supports the charitable works of Pope Francis. Catholics around the globe support this collection to help the Holy Father reach out to people suffering in our world, especially those enduring the effects of war and violence, natural disasters, and religious persecution. Please be generous today.

Defendant denies the allegations of paragraph 24, except to admit that the USCCB makes available text that may be read from the pulpit or included as part of a parish's weekly announcements if the parish so chooses.

25. *For those American Catholics inspired to research Peter's Pence directly from the Vatican website, the messages all reinforce that of the USCCB materials. The Vatican catalogues "works realized" by Peter's Pence, replete with images and elaborate descriptions of disaster relief undertaken in various countries (for example, Ecuador):*[9]

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[8] http://www.usccb.org/catholic-giving/opportunities-for-giving/peters-pence/collection/2019/upload/pp-2019-parish-appeal.doc (accessed December 23, 2019).

[9] http://www.peterspence.va/en/opere-realizzate/eduador.html (accessed December 21, 2019).

ECUADOR

Thanks to Peter's Pence has begun a new reconstruction project after the earthquake that struck the coastal regions

In April 2016, an earthquake of 7.8 on the Richter scale hit the coastal area of Ecuador, located less than 200 kilometers from the capital Quito, causing - according to the UN Office for Humanitarian Affairs (OCHA) - 700 deaths, 12,000 injured, 50 thousand homeless.

After aid for the first emergencies, the Holy See started **a project for the reconstruction of houses, schools and public buildings** in the province of Manabi, the epicenter of the earthquake.

In fact, governments' data shows that the destroyed or damaged buildings exceed 2,000 units, over 600 of these are schools, while in many cities water, sewage and electricity networks have to be rebuilt.

The material damages amount to over 3 billion dollars.

Defendant denies the allegations of paragraph 25, except to admit that the Holy See maintains a website that describes the Peter's Pence Collection and to aver that the website speaks for itself and is the best evidence of its content.

26. *USCCB is well aware of the importance of transparency, accountability, accuracy, and honoring donor intent in connection with national collections like Peter's Pence. It has adopted specific guidelines for administering USCCB national collections in dioceses.*[10] *The guidelines discuss the importance of the proper use of promotional materials; they additionally have an extensive discussion about honoring donor intent.*

> *Citing both Canon law and "civil laws observed within the United States," the guidelines "call for procedures that ensure donor funds are used for precise purposes intended in the donation appeal."*

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[10] http://www.usccb.org/_cs_upload/about/national-collections/collection-administration/43214_1.pdf (accessed December 21, 2019).

In particular, USCCB guidelines state:[11]

> The national collections are required to adhere to the fundamental principle of "donor intent." For this reason, the following principles should be closely followed:[16]
>
> - Donors should be informed about the intended uses of donated resources.
> - Donors must be assured that gifts will be used for the purposes for which they were given.
>
> The principles and requirements of donor intent must be preserved throughout the entire collection process, from the announcement of the intention of the collection, through the safeguarding and delivering of funds, to the final use by the various collection Subcommittees of the USCCB, including the use and reporting by eventual recipient grantees. Diocesan bishops and parish pastors have a special obligation to be vigilant that the norms of both canon and civil law are followed in these instances.[17]

Defendant denies the allegations of paragraph 26, except to admit that the USCCB publishes on its website Guidelines for Administering USCCB National Collections in Dioceses, which speak for themselves and are the best evidence of their content, and to aver that those Guidelines distinguish between "universal collections [that] have been established by the Holy See itself," including Peter's Pence "for the needs of the Holy Father," and national collections established by the USCCB.

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[11] http://www.usccb.org/_cs_upload/about/national-collections/collection-administration/43214_1.pdf (at p.5) (accessed December 21, 2019) (footnotes from original document omitted in screenshot).

27. *Despite USCCB's assurances that it honors donor intent, and that donations to Peter's Pence are for the suffering in immediate need, it has recently become apparent that these donor funds are not being used for the purpose USCCB promises. On October 17, 2019, the Italian news magazine L'Espresso published a story sourced from secret internal Vatican investigative reports, as pictured in this screenshot:*[12]

STATO DELLA CITTÀ DEL VATICANO

TRIBUNALE

UFFICIO DEL PROMOTORE DI GIUSTIZIA

prot.n.39-2017 RGP

Oggetto: decreto di perquisizione e sequestro

Sommario

1- Premessa

Il presente provvedimento prende avvio e ragion d'essere da un'articolata denuncia dello IOR, dott. Gian Franco

Defendant denies the allegations of paragraph 27, except to admit that *L'Espresso* published an article on October 19, 2019, which speaks for itself and is the best evidence of its content.

28. *The* L'Espresso *story revealed that most of the Peter's Pence funds are diverted into "reckless speculative operations," with 77% of the collections—roughly $560 million—given to Credit Suisse, a*

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[12] http://espresso.repubblica.it/plus/articoli/2019/10/17/news/vaticano-obolo-san-pietro-1.340060 (accessed December 23, 2019).

Swiss-based investment company.[13] *The story also detailed how an Italian financier named Raffaele Mincione was approached by a high-ranking Vatican official to make a $200 million investment, which Mincione used to purchase real estate in London for a luxury apartment development through a fund he managed. Eventually, when returns were less than projected, the Vatican pulled out of the fund and bought the entirety of the property, resulting in Mincione realizing almost $170 million in income.*[14]

Defendant denies the allegations of paragraph 28, except to admit that *L'Espresso* published an article on October 19, 2019, which speaks for itself and is the best evidence of its content.

29. *On December 4, 2019, the Italian newspaper* Corriere della Sera *published additional details on the diversion of Peter's Pence funds.*[15] *This revealed that more than $1 million was invested in the Elton John biopic* Rocketman*, and more than $3.6 million in the film* Men in Black: International.[16] *Additionally, millions of dollars were invested in a Malta-based investment company called Centurion*

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13 https//cruxnow.com/Vatican/2019/10/leaked-documents-detail-200-million-vatican-deal-for-swanky-londonproperty/ (accessed December 22, 1029).

14 https://cruxnow.com/vatican/2019/10/leaked-documents-detail-200-million-vatican-deal-for-swanky-londonproperty/ (accessed December 22, 2019).

15 https://www.corriere.it/english/19_dicembre_04/vatican-invested-lapo-elkann-and- elton-john-film-72e070b0-16c0-11ea-b17e-02f19725a806.shtml?refresh_ce-cp (accessed December 22, 2019).

16 http://www.ncregister.com/site/print/62807 (accessed December 22, 2019).

Global Fund run by an Italian financier named Enrico Crasso, who received "millions of euros in commissions" while losing 4.61% of the fund (approximately two million euros) by the end of 2018.[17]

Defendant denies the allegations of paragraph 29, except to admit that *Corriere della Sera* published an article on December 4, 2019, which speaks for itself and is the best evidence of its content.

30. *On December 11, 2019, the* Wall Street Journal *reported that only 10% of donations to the Peter's Pence collection actually go to charitable works.*[18] *Most of the money is used to plug holes in the Vatican's administrative budget, "[b]ut for at least the past five years, only about 10% of the money collected—more than €50 million was raised in 2018—has gone to the sort of charitable causes featured in advertising for the collection, according to people familiar with the matter."*[19]

Defendant denies the allegations of paragraph 30, except to admit that the *Wall Street Journal* published an article on December 11, 2019, which speaks for itself and is the best evidence of its content.

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17 http://www.ncregister.com/site/print/62807 (accessed December 22, 2019).

18 https://www.wsj.com/articles/vatican-uses-donations-for-the-poor-to-plug-its- budget-deficit-11576075764 (accessed December 22, 2019).

19 https://www.wsj.com/articles/vatican-uses-donations-for-the-poor-to-plug-its-budget-deficit-11576075764 (accessed December 22, 2019).

31. *Asked in November about the reports of Peter's Pence being used for purposes other than charity, Pope Francis, according to the* Catholic News Service*, "said no one should be bothered by the fact that the Vatican invests the money it collects from Catholics around the world. 'The sum of Peter's Pence arrives and what do I do? Put it in a drawer? No, that's bad administration. I try to make an investment.'"*[20]

Defendant denies the allegations of paragraph 31, except to admit that the *Catholic News Service* published an article on November 26, 2019, which speaks for itself and is the best evidence of its content.

32. *But many reactions to news of the actual use of Peter's Pence were not accepting. Some commentators asked whether there was "a bait and switch at Peter's Pence," noting "the great disparity between how it is marketed and what the vast majority of the collection is actually used for."*[21]

Defendant denies the allegations of paragraph 32, except to admit that it refers to two published commentaries that speak for themselves and are the best evidence of their content.

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[20] https://www.catholicnews.com/services/englishnews/2019/financial-scandal-shows-vatican-reforms-are-workingpope-tells-media.cfm (accessed December 22, 2019).

[21] https://acton.org/publications/transatlantic/2019/12/13/bait-and-switch-peters- pence (accessed December 22, 2019); *see also* https://www.lifesitenews.com/opinion/catholics-should-be-outraged-at-vaticans- peters-pencebait-and-switch (accessed December 23, 2019).

33. *Another commentator, writing in the Catholic Herald, noted this exchange between Francis X. Rocca, author of the Wall Street Journal article, and one Cardinal of the Catholic Church, shown in the following screenshot:*[22]

> On Twitter, Cardinal Wilfrid Napier of Durban noted, "According to information given to the Council for the Economy," of which he is a member, "the Pope's Petrine ministry extends beyond care of the poor". Napier went on to say, "Therefore, if the Peter's Pence Collection is taken up to support the Pope in his Petrine ministry, it is for a much wider purpose than simply care of the Poor."
>
> Rocca replied: "Your Eminence, that is of course correct under the law. The problem is that the promotional material from the Vatican and local churches gives an entirely different impression, so people are giving under the misapprehension that the money goes mainly to the poor."
>
> Cardinal Napier responded, "Then I think we have to say the promotional material is not accurate, misleading or even wrong, because it does not reflect the truth."

Defendant denies the allegations of paragraph 33, except to admit that the *Catholic Herald* published a Comment on December 15, 2019, which speaks for itself and is the best evidence of its content.

34. *David O'Connell regularly attends Sunday [M]ass at Sacred Heart Church in East Providence, Rhode Island. In the summer of 2018, during a Sunday [M]ass in which he was solicited from the*

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[22] https://catholicherald.co.uk/commentandblogs/2019/12/15/what-the-peters-pence-furore-tells-us-about-vaticanfinancial-reform/ (accessed December 23, 2019).

pulpit as directed by USCCB to help those in need of emergency relief, he made a cash donation to the Peter's Pence collection. Nothing he saw or heard, on that day or beforehand, told him or made him understand that his donations to Peter's Pence would be used for anything other than emergency assistance to the neediest people around the world.

Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 34 and, on that basis, denies those allegations.

35. *Even if David O'Connell had slowly and carefully researched external sources such as the USCCB or Vatican websites, he would still reasonably be unaware that his donations to Peter's Pence would not be used entirely and exclusive for emergency assistance to the poor. He had no reason to suspect that the Peter's Pence collection was actually used for investments and other purposes rather than for emergency assistance, and USCCB's failure to inform them about this was material; if USCCB had disclosed this fact, David O'Connell would not have donated to the Peter's Pence collection.*

Defendant denies the allegations of paragraph 35.

36. *USCCB has always known the difference between a donation for emergency assistance and a donation to defray Vatican administrative expenses. But USCCB hid this distinction in its promotion, oversight, and administration of the Peters Pence collection in the United States, and, as a result, it has effectively profited at the expense of David O'Connell and the members of the public. David O'Connell donated money for specific charitable purposes, which*

USCCB directed into other, non-charitable purposes. All along, USCCB knew or should have known this was the likely result, but it promoted the Peter's Pence collection as a charitable effort meant only for the poorest of the poor regardless; accordingly, millions of donors across the country ended up in the exact same position as David O'Connell.

Defendant denies the allegations of paragraph 36.

37. *Plaintiff David O'Connell seeks to represent the following Class: All persons in the United States who donated money to the Peter's Pence collection. Excluded from the Class are USCCB and its subsidiaries and affiliates; all persons who make a timely election to be excluded from the Class; governmental entities; and the Judge to whom this case is assigned and his/her immediate family.*

38. *Plaintiff reserves the right to revise the Class definition based upon information learned through discovery.*

39. *Certification of Plaintiff's claims for class-wide treatment is appropriate because Plaintiff can prove the elements of his claims on a class-wide basis using the same evidence as would be used to prove those elements in individual actions alleging the same claim.*

40. *This action has been brought and may be properly maintained on behalf of the Class proposed herein under Federal Rule of Civil Procedure 23.*

41. *Pursuant to Federal Rule of Civil Procedure 23(a)(1), the members of the Class are so numerous and geographically dispersed that individual joinder of all Class members is impracticable. While Plaintiff*

is informed and believes that there are millions of members of the Class, the precise number is unknown to him. Class members may be notified of the pendency of this action by recognized, Court-approved notice dissemination methods, which may include U.S. mail, electronic mail, internet postings, and/or published notice.

42. *Pursuant to Federal Rules of Civil Procedure 23(a)(2) and 23(b)(3), this action involves common questions of law and fact, which predominate over any questions affecting individual Class members, including, without limitation:*

a) Whether USCCB engaged in the conduct alleged herein;

b) Whether USCCB's conduct violates common law as asserted herein;

c) Whether Plaintiff and the other Class members are entitled to equitable relief, including, but not limited to, restitution or injunctive relief; and

d) Whether Plaintiff and the other Class members are entitled to damages and other monetary relief and, if so, in what amount.

43. *Pursuant to Federal Rule of Civil Procedure 23(a)(3), Plaintiff's claims are typical of the other Class members' claims because, among other things, all Class members were comparably injured through USCCB's wrongful conduct as described above.*

44. *Pursuant to Federal Rule of Civil Procedure 23(a)(4), Plaintiff is an adequate Class representative because his interests do not conflict with the interests of the other members of the Class he seeks to*

represent; Plaintiff has retained counsel competent and experienced in complex class action litigation; and Plaintiff intends to prosecute this action vigorously. The interests of the Class will be fairly and adequately protected by Plaintiff and his counsel.

45. *Pursuant to Federal Rule of Civil Procedure 23(b)(2), Defendants have acted or refused to act on grounds generally applicable to Plaintiff and the other members of the Class, thereby making appropriate final injunctive relief and declaratory relief, as described below, with respect to the Class as a whole.*

46. *Pursuant to Federal Rule of Civil Procedure 23(b)(3), a class action is superior to any other available means for the fair and efficient adjudication of this controversy, and no unusual difficulties are likely to be encountered in the management of this class action. The damages or other financial detriment suffered by Plaintiff and the other Class members are relatively small compared to the burden and expense that would be required to individually litigate their claims against USCCB, so it would be impracticable for Class members to individually seek redress for USCCB's wrongful conduct. Even if Class members could afford individual litigation, the court system could not. Individualized litigation creates a potential for inconsistent or contradictory judgments and increases the delay and expense to all parties and the court system. By contrast, the class action device presents far fewer management difficulties, and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court.*

Paragraphs 37 through 46 are statements of Plaintiff's legal position to which no response is required. To the extent that a response is required, Defendant denies the allegations of each and every one of these paragraphs. Defendant specifically disputes that this case can or should be maintained as a class action, that Plaintiff can or should serve as a class representative, and that Plaintiff or any other member of the purported class is entitled to any of the relief requested.

47. *Plaintiff realleges and incorporates by reference all paragraphs as though fully set forth herein.*

Defendant repeats and incorporates by reference its answers to all paragraphs.

48. *USCCB consistently, routinely, and uniformly solicited donations for the Peter's Pence collection as emergency assistance needed for victims of war, oppression, natural disaster, or disease throughout the world. By doing this, USCCB communicated to Plaintiff and to each Class member that any money they donated to Peter's Pence would be used exclusively for these purposes.*

Defendant denies the allegations of paragraph 48.

49. *This was a material representation, as USCCB knew that prospective donors would be inclined to donate to Peter's Pence if they believed their donations were urgently needed by people in dire circumstances. And this was a false representation, because the donations were never going to be routed immediately to the needy, but rather were going to be diverted into investment funds and subsequently into purposes*

such as real estate, Hollywood films, and hefty commissions for fund managers.

Defendant denies the allegations of paragraph 49.

50. *USCCB knew or should have known the representations were false and intended Plaintiff and Class members to rely on them. Plaintiff and Class members decided to donate to Peter's Pence based in part on the representations communicated to them by USCCB.*

Defendant denies the allegations of paragraph 50.

51. *But for USCCB's fraud, Plaintiff and the members of the Class would not have donated to the Peter's Pence collection. Plaintiff and the members of the Class have sustained damage because they contributed money for specific charitable purposes which USCCB did not spend in accordance with its promises. Accordingly, USCCB is liable to Plaintiff and the members of the Class for damages in an amount to be proven at trial.*

Defendant denies the allegations of paragraph 51.

52. *USCCB consistently, routinely, and uniformly solicited donations for the Peter's Pence collection as emergency assistance needed for victims of war, oppression, natural disaster, or disease throughout the world. By doing this, USCCB communicated to Plaintiff and to each Class member that any money they donated to Peter's Pence would be used exclusively for these purposes.*

Defendant denies the allegations of paragraph 52.

53. *USCCB concealed and suppressed the fact that the donations were never going to be routed immediately to the needy, but rather were going to be*

diverted into investment funds and subsequently into purposes such as real estate, Hollywood films, and hefty commissions for fund managers. This was a material fact about which USCCB had or should have had knowledge, and that it concealed from Plaintiff and the members of the Class to mislead them.

Defendant denies the allegations of paragraph 53.

54. *Plaintiff and the members of the Class did not know this fact and could not have discovered it through a reasonably diligent investigation.*

Defendant denies the allegations of paragraph 54.

55. *USCCB had a duty to disclose that donations to Peter's Pence would not be immediately spent on emergency assistance for the needy around the world because (1) USCCB had or should have had exclusive knowledge of the material, suppressed facts; (2) USCCB took affirmative actions to conceal the material facts, including by devising and implementing a promotional program for Peter's Pence that emphasized the need for emergency assistance for the poor; (3) USCCB made partial representations by suggesting in promotional and solicitation materials that donations to the Peter's Pence collection are exclusively to aid the needy in dire circumstances around the world. Plaintiff and Class members decided to donate to Peter's Pence based in part on the representations communicated to them by USCCB's promotions and solicitations.*

Defendant denies the allegations of paragraph 55.

56. *But for USCCB's fraud, Plaintiff and the members of the Class would not have made donations to the Peter's Pence collection. Plaintiff and the*

members of the Class have sustained damage because they contributed money for specific charitable purposes which USCCB did not spend in accordance with its promises. Accordingly, USCCB is liable to Plaintiff and the members of the Class for damages in an amount to be proven at trial.

Defendant denies the allegations of paragraph 56.

57. *Plaintiff realleges and incorporates by reference all paragraphs as though fully set forth herein.*

Defendant repeats and incorporates by reference its answers to all paragraphs.

58. *As described in detail in the factual allegations above, USCCB made false representations to Plaintiff and the members of the Class that resulted in their contributions of money for charitable purposes to their detriment.*

Defendant denies the allegations of paragraph 58.

59. *Under these circumstances as described above, USCCB has received money from Plaintiff and the members of the Class that USCCB, in equity and good conscience, ought not to retain.*

Defendant denies the allegations of paragraph 59.

60. *As a result, USCCB is liable in restitution to Plaintiff and the members of the Class to disgorge and remit to Plaintiff and the Class all monies contributed, in an amount to be proved at trial.*

Defendant denies the allegations of paragraph 60.

61. *Plaintiff realleges and incorporates by reference all paragraphs as though fully set forth herein.*

Defendant repeats and incorporates by reference its answers to all paragraphs.

62. *As described in detail in the factual allegations above, USCCB promoted, advertised, provided instructions for, administered, oversaw, and collected funds from donors throughout Rhode Island and the United States in connection with the Peter's Pence collection. USCCB owed Plaintiff and the members of the Class fiduciary duties in connection with its promotion, solicitation, and handling of all charitable contributions to the Peter's Pence collection.*

Defendant denies the allegations of paragraph 62.

63. *Under the circumstances described in detail above, USCCB breached its fiduciary duties to Plaintiff and the members of the Class by failing to ensure that the charitable contributions to the Peter's Pence collection were spent in accordance with USCCB's promises.*

Defendant denies the allegations of paragraph 63.

64. *As a result of USCCB's breaches of its fiduciary duties, Plaintiff and the members of the Class have sustained damages, and USCCB is liable to Plaintiff and the members of the Class for damages in an amount to be proved at trial.*

Defendant denies the allegations of paragraph 64.

65. David O'Connell, individually and on behalf of the members of the Class, respectfully request that the Court enter judgment in their favor and against USCCB, as follows:

A. Certification of the proposed Class, including appointment of Plaintiff's counsel as Class Counsel;

B. An order temporarily and permanently enjoining Defendants from continuing the unlawful, deceptive, and fraudulent practices alleged in this Complaint;

C. Injunctive relief;

D. Costs, restitution, damages, and disgorgement in an amount to be determined at trial;

E. An order requiring USCCB to pay both pre- and post-judgment interest on any amounts awarded;

F. An award of costs and attorneys' fees; and

G. Such other or further relief as may be appropriate.

Defendant denies the allegations of paragraph 65 and denies that Plaintiff or any member of any purported class is entitled to any relief.

66. *Plaintiff hereby demands a jury trial for all claims so triable.*

Paragraph 66 is a statement of Plaintiff's legal position, to which no response is required.

DEFENSES AND AFFIRMATIVE DEFENSES

Without assuming any burden of proof that Defendant would not otherwise bear, Defendant USCCB asserts the following defenses, all of which are pleaded in the alternative, and none of which constitutes an admission that Plaintiff is entitled to any relief whatsoever.

1. The Court lacks subject matter jurisdiction over the case.

2. The Complaint fails to state a claim upon which relief can be granted.
3. A party required to be joined under Rule 19 of the Federal Rules of Procedure, if feasible, cannot be joined, and the action should not in equity and good conscience proceed between the existing parties in its absence.
4. The Complaint is barred by the applicable statute of limitations.
5. The Complaint is barred by the doctrine of laches.

Dated: July 6, 2020

Respectfully submitted,

/s/ Kevin T. Baine

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Attorneys for Defendant United States Conference of Catholic Bishops

CERTIFICATE OF SERVICE

I hereby certify that, on this date, I caused the Answer of Defendant United States Conference of Catholic Bishops to be filed and served electronically via the Court's ECF System upon counsel of record. I further certify that all parties required to be served have been served.

Dated: July 6, 2020 By: /s/ *Kevin T. Baine*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

David O'Connell, Plaintiff, vs. United States Conference of Catholic Bishops, Defendant.	Civil Action No. 1:20-cv-01365-KBJ **Motion Hearing** (via Zoom) Washington, D.C. January 28, 2021 Time: 1:30 p.m.

Transcript of **Motion Hearing** (via Zoom)
Held Before
The Honorable Ketanji Brown Jackson (via Zoom)
United States District Judge

APPEARANCES

For the Plaintiff: (via Zoom)	**Marc R. Stanley** **Martin Woodward** Stanley Law Group 6116 North Central Expressway Suite 1500 Dallas, Texas 75206
For the Defendant: (via Zoom)	**Emmet T. Flood** **Kevin T. Baine** **Richard S. Cleary, Jr.** Williams & Connolly LLP 725 12th St., Northwest Washington, D.C. 20005

Stenographic Official Court Reporter: (via Zoom)

Nancy J. Meyer
Registered Diplomate Reporter
Certified Realtime Reporter
United States Courthouse, Room 6509
333 Constitution Avenue, Northwest
Washington, D.C. 20001
202-354-3118

PROCEEDINGS

(REPORTER'S NOTE: This hearing was held during the COVID-19 pandemic restrictions and is subject to the limitations of technology associated with the use of technology, including but not limited to telephone and video signal interference, static, signal interruptions, and other restrictions and limitations associated with remote court reporting via telephone, speakerphone, and/or videoconferencing.)

THE COURTROOM DEPUTY: Your Honor, we are here for Civil Action 20-1365, David O'Connell v. United States Conference of Catholic Bishops. I'm going to ask that counsel please state their appearance for the record and introduce any co-counsels that might be present.

MR. STANLEY: Good afternoon, Your Honor. I'm Marc Stanley and my co-counsel is Martin Woodward. We represent Mr. O'Connell and the putative class.

THE COURT: Good afternoon.

MR. STANLEY: Nice to meet you.

MR. FLOOD: And good afternoon, Your Honor. My name is Emmet Flood. I'm here along with my Williams & Connolly colleagues Kevin Baine and Richard Cleary, and we represent the sole defendant, U.S. Conference of Catholic Bishops.

THE COURT: Good afternoon to you as well.

MR. FLOOD: Thank you, Your Honor.

THE COURT: This is a hearing regarding the defendant's motion to dismiss the plaintiff's putative class action complaint. The plaintiff's complaint alleges that -- and I guess I'll call it USCCB, although I'll do my best to keep the acronyms straight. The plaintiff alleges that the defendant is liable for fraud, unjust enrichment, and breach of fiduciary duty based on the USCCB's alleged misrepresentations with respect to how funds that are collected from parishioners pursuant to the Peter's Pence collection are being spent.

In its motion, USCCB contends that this Court lacks subject-matter jurisdiction over O'Connell's claims, which, I believe, is a threshold consideration, even though it does not come first in the motion to dismiss. The motion also maintains that the plaintiff has failed to plead fraud with particularity as required by Rule 9(b) and that the defendant is entitled to judgment on the pleadings under Rule 12(c) or, in the alternative, entitled to summary judgment.

I have reviewed your briefs. I am familiar with your arguments. So I hope that we can just have a discussion that illuminates the various legal issues. Let me start by acknowledging that my hopes of how we will be able to proceed are somewhat limited due to the circumstances, the constraints that we face, in

having to conduct this hearing virtually. We are proceeding by videoconference due to the court's closure as a result of the pandemic, and I found that these circumstances are not exactly ideal for having the kinds of discussions that I ordinarily have with parties that appear before me.

So we'll do our best, but I may have to scale back in terms of my ordinary level of engagement. I will be asking you questions, but probably fewer than I ordinarily would. We won't impose any time limits. I find them distracting, and I'm just trying to get to the heart of the matter. So let's just do that.

And I'm going to alter my typical format just a bit to expedite things in this way. I typically -- even though it is a motion to dismiss, I ask the plaintiffs to start to set the sort of framework of the complaint before we turn to the arguments and dismissal. I think the general complaint is straightforward. So I actually want to start with defense counsel -- it is defense -- the defendant's motion -- and focus in initially on the concerns about jurisdiction. We'll do a round that focuses only on that threshold issue, and the plaintiff can respond, and we'll have any replies.

And then we'll move to what I consider sort of a two-part second set of questions, which is, one, the procedural question of whether the defendant is able to make the arguments that it seeks to advance here about particularity and failing to state a claim as a Rule 12(c), motion and then also the second part of this is the merits of the defendant's argument about why this matter should not be allowed to proceed, whether on particularity grounds or failure to state a claim or otherwise.

One thing that occurred to me as I reviewed this -- and it could be something of a function of the way in which this Court has organized its practices. It occurred to me that the parties haven't really focused on the difference between the plaintiff's individual claim and the class claims with respect to the arguments that they're making about particularity, et cetera. And I'm starting to wonder whether some of the disputes about the complaint and its sufficiency would be resolved by addressing class certification first.

I know that I -- you know, as part of my routine, I say the class action allegations, and sometimes that works, but perhaps in this case we might need to do the class discussion first, but obviously not in this context, since we haven't prepared for it, but I think we should keep that in mind as we figure out how we're going to deal with this particular motion.

So let me start with defense counsel, Mr. Flood, and have you address jurisdiction.

MR. FLOOD: Thank you, Your Honor.

If I might -- first of all, let me say that the – the bishops conference -- and I may just call it the Conference, which might be simpler than the long acronym.

THE COURT: Perfect.

MR. FLOOD: The Conference -- our position is we agree with the Court's initial statement that it is a threshold matter. And we also, as Your Honor noted, argued it last in the sequence. And I'd like to begin by giving the Court an idea of why we did that.

It seems to -- to us that there are two principles of very broad application that have indisputable bearing on the case. One is the principle we argue for here that there are situations in which a civil court should not insert itself into what are internal questions of church governance. That principle is not limited merely to a church administration or property disputes or doctrine, but it also covers, in our view, matters like internal governance, which includes spending decisions. We think this case is covered by that principle and have so argued.

But there's another principle of quite general application that we think is here, and I hope, Your Honor, this explains why we approached the matter the way we did. Churches and, you know, ministers, you know, representatives of religious orders acting, you know, in their official capacity do not have some immunity from fraud claims. That's just a fact. No one can cloak him- or herself in vestments or under a church's rubric or ejus and say you may not approach me in a civil court. That's not just the law.

And so our -- our -- our approach here was undertaken on the following thought; that if we in our briefing discussed something of the particulars of what is asserted here, we -- that could we use that as an opportunity because we believe it would generally shed light on the problem of the degree of difficulty, entanglement, intrusiveness and show just what it is that plaintiff seeks to have the Court do here. And that's -- so those are the two sort of background thoughts that explain the sequencing we adopted.

THE COURT: All right. I mean, that's totally logical, but I do think that if the Court does not have jurisdiction, as you claim, with respect to the first

principle that you articulated, then my view of whether and to what extent the plaintiffs have sufficiently alleged fraud given the allegations of the complaint is not on the table. So as a threshold matter, I think, it's important for me to evaluate your ecclesiastical abstention contentions. So can we start there?

MR. FLOOD: So --

THE COURT: Yes.

MR. FLOOD: Of course, Your Honor.

The -- what the -- what the plaintiff seeks here, in a nutshell, is a ruling from a civil court that will provide some kind of scheme or schedule or internal rule of a decision for a Court to adopt in which it asks the Court to impose that rule on a religious organization. So the gravamen of plaintiff's complaint is that he was under the impression that the donation he gave would be used immediately and exclusively for some purpose.

And his view of the matter is that a civil court based on what we regard as very thin allegations here -- but save that for letter -- later -- should be able to tell a religious institution how it should spend its money; right? When you say -- this is not -- it's not alleged and not brought as a simple case of somebody lied to me and here's the lie and I would like to vindicate the lie.

THE COURT: Let me -- let me ask you why you say that, Mr. Flood, because I marked in the complaint, for example, paragraph 32, which is pretty clear with respect to the -- what I thought was the essence of the alleged fraud, which is that there is a great disparity

between how this Peter's Pence fund collection is being marketed and what the vast majority of the collection is actually used for. And if that is the statement, isn't that a classic fraud kind of
dynamic?

In other words, he's not saying you can't use the money for these other means because it violates the guidelines -- I know that's in there, but I feel like that's a red herring -- you know, because the -- the church is supposed to be using this money in a certain way. I think the essence of the fraud claim is here's all the marketing material that tells people what you are using it for and, lo and behold, according to the plaintiff, it's not being used for those purposes.

MR. FLOOD: Your Honor, I think the first point to make in response is that if we want to call statements on the website marketing material about Vatican use, that should be fairly read side by side with the Vatican's own website about how it's used. And we've quoted from the website in our opposing papers. And it's very clear on the Vatican website that what appears in plaintiff's complaint is only some of the available uses, and the Vatican website makes no secret that it is also used generally for the needs of the Holy Father. And so that's -- that -- and I think that there's no getting around plaintiff's intention to ask this Court to sort out which uses are immediate enough and which uses are exclusive enough. And --

THE COURT: Except -- except, Mr. Flood, the problem, I think, with that argument is that that's the kind of thing that you would argue to the jury as to why it is that you -- your client was not fraudulent. It's not an argument that accepts the allegations in the complaint as true, which one does on a 12, at least,

(b)(6) kind of theory. And we'll talk about whether or not you're even able to bring that kind of argument at this point in the case. But assuming you are, don't I have to accept what the plaintiff says about the allegations -- excuse me -- about the, you know, marketing of this, notwithstanding the fact that there may be some other evidence that the plaintiff is mischaracterizing what's actually going on?

MR. FLOOD: Your Honor, I don't think you have to accept it for this purpose, and I think the reason is that, to use Your Honor's terms, we're talking about marketing here, and this plaintiff has not alleged that he was the recipient of marketing in this form. It's very clear from his complaint that he doesn't seem ever to have seen the USCCB website.

THE COURT: But you're shifting, Mr. Flood. You're not talking about this plaintiff and his standing and his ability to raise these allegations; right? I want to isolate the allegations in the complaint and determine whether or not, if true, they state a claim for fraud.

And -- and I understood you to be saying that, well, what's really being stated here is not a fraud claim. It is a claim that the church should be spending the money in certain ways and that's the kind of thing that courts can't get involved in. All that might be true, but I'm finding allegations in this complaint that appear to be stating a claim of fraud in the traditional sense. Here's what you're saying, Conference, and here's what you're actually doing, and that's a fraud.

Now, whether or not Mr. O'Connell actually saw it, all of those are other questions as to why there might be defects. I just want to know whether you're right

that the essence of the claim is something that this Court cannot consider because it goes to church policy and doctrine in the way that you suggest.

MR. FLOOD: Your Honor, I think it goes directly to church policy, church use of funds, church governance and administration. And the reason I say that is the -- the plaintiff, Mr. O'Connell's own opposition in response to this motion, says that he wants to take discovery on how funds travel from -- from the -- from the collection plate all the way to what he calls Swiss hedge funds. He's asking the Court to sort out which modes of internal transmission in a religious body may or may not be fraudulent.

What he does not do, we submit, is ever allege that the Conference had knowledge of any purported fraud. And the Conference is the sole defendant here. And so he -- he only brings the case against one defendant, and then he wants to use that to expand, if we take his pleadings and his submissions at face value, into the universal church. And that -- and once you expand it to universal church and it becomes questions of allocation and promptness of distribution, you're into the core of church governance, and he doesn't make any secret that that's what he wants to do in the case. And this appears at page 22 of his opposition. At page -- you know, throughout his opposition, he makes clear that this Court is going to have to decide whether there is fraud on not only the USCCB website but on the Vatican website. He's asking you to make that call.

THE COURT: But I thought you said at the beginning -- I thought you said at the beginning that churches are not immune by their nature to claims of fraud. And so to the extent that he is seeking to trace the money and figure out whether or not the

contributions that are being made by parishioners are actually going to charitable works or going to Hollywood, that that's just a means of proving his case that there's a fraudulent expenditure going on in light of what you -- the Conference has said about what happens to these funds.

I don't necessarily see it as the Court deciding whether or not the expenditures, the investments, the real estate purchases and whatnot, are lawful or are consistent with church doctrine or anything else. I mean, I understand the nature of what you're saying, that he's seeking discovery into actually how the money moves, but everything about discovery is relative to a purpose. And it sounds to me from the complaint and from what he's argued that the purpose of doing that is just to show that the statements that are being made about what's happening to this money are not true, which is the essence of a classic fraud claim.

MR. FLOOD: Well, Your Honor, first of all, no one is immune, per se, from a claim of fraud. I think that's well established. You can't be a church and maintain that position.

With that said, however, the degree of intrusiveness necessary to establish a purported fraud does implicate Article III in subject-matter jurisdiction. There's just no question about it.

That's why the Supreme Court and various, you know, lower courts have said that presumptively the default position is that civil courts should not get involved in -- you know, in entanglement questions. In terms of the *Bible Way* case from the D.C. Court of Appeals, questions of how money was spent, where it

flowed, what was the accounting, you don't get involved. But the Court -- the cases also say that if there is a case of fraud that can be brought and can be decided purely on the basis of neutral principles, then we have a different kettle of fish.

This case cannot be decided, it's our submission, on the basis of neutral principles. We'll have to get involved in how much is too much, and I think this is on the face of the complaint. If you say exclusively, then is any deviation from exclusive? And -- and as an aside, nothing says exclusive in our materials, but --

THE COURT: Well, that's the answer, Mr. Flood. That's why I wouldn't have to get involved; right? Isn't -- isn't the degree of intrusiveness or entanglement that you're highlighting here relative to the statements that the church made; so that if the Conference says this money is exclusively being diverted to charitable -- or, you know, purpose for -- given to charitable works, that's the statement on the table, then evidence concerning the money going somewhere else is relevant under the rules of evidence. And through neutral principles, the Court and a jury could decide whether or not there was fraud. I don't know what you mean that it's not to be evaluated via neutral principles or that the Court is going to have to decide how much is too much.

MR. FLOOD: Your Honor, I think to take the last point first, I think the "how much is too much" question is certainly implicated by the claim that the money was not distributed immediately. I think immediate and immediacy is a question of degree. I think it's not possible to lay down a single universal principle that separates the satisfactorily and immediate from the unlawfully delayed.

As to exclusive, Your Honor, if we had a very different case than this one in which someone stood up and spoke to this defendant and said you're going to give a hundred dollars and every penny is going to go to this specific purpose, we'd have a different case; but we don't have that here. The – the client -- or I'm sorry. The plaintiff has pled the case in a way that ineluctably invites the Court into the question of how much is too much on the -- what he calls the exclusivity question. There is no --

THE COURT: All right. Well, let me ask Mr. Stanley.

I mean, do you have anything more to say on jurisdiction before I ask him respond to your well-taken point?

MR. FLOOD: I don't think so, Your Honor, except if there's anything I could assist the Court in understanding why we put the jurisdictional point last. I think I've said my peace, but I realize it's a little bit unorthodox given Your Honor's statement, but we thought some education on the -- inform the Court on -- on the fraud and other claims would help to assist in understanding the degree of entanglement and intrusiveness. That's all.

THE COURT: That's very helpful. Thank you.

So, Mr. Stanley, you have been listening to this dialogue, and Mr. Flood makes the important and interesting argument that -- that this Court would necessarily have to evaluate how much is too much in the context of analyzing your fraud claim given the allegations that you've made. Why is he wrong about that?

MR. STANLEY: Okay. I'd like to come back to that in one second, if I may.

THE COURT: Sure.

MR. STANLEY: I'd like to just set the stage. And, that is, we absolutely agree that the ecclesiastical abstention applies if a Court is required to interpret religious doctrine or practice in order to resolve claims against a religious organization. If the claims can be resolved, like Mr. Flood said, in a neutral and generally applicable principles of law, you have subject-matter jurisdiction.

So we offer an example in our -- in our response about a defrocking of a Serbian Orthodox priest that goes too far. And the Court should abstain on a lawsuit about that. That's church doctrine.

In this case, what we're talking about is not the actions of the Vatican. We're talking about the actions of the Conference, not how the Vatican did it, but what the Conference represented to the parishioners. We did not -- we cannot, have not yet sued the Holy See. Whether that happens in the future, that's another issue, but that's not up for debate today.

In my case, we just settled a class action -- we had a class certified against an organization called Gospel for Asia. In that case what was happening was they were soliciting donors. There were 179 categories you could make a contribution for: water buffalos, bicycles, motorcycles, lamps, heating lamps, stuff that would go to southeast Asia. And they promised a hundred percent of it would be spent there on those items. In fact, it's our position that none of it was spent on that. Yet, they were a religious organization, and they tried to say the same thing.

The class was eventually certified, and the Eighth Circuit said no. I mean, this is a proper class certification. You represented these people. You sought -- the representation was made, the class members donated to it, and you didn't spend the money as you promised.

THE COURT: Can I just ask you because --

MR. STANLEY: Please.

THE COURT: -- I think Mr. Holm -- Mr. Flood has isolated a little bit of daylight between the positions that you're talking about with respect to total abstention and -- and the ability to be able to proceed. And by that I mean, you suggested in the Eighth Circuit case that you just mentioned that the representations that were being challenged were that a hundred percent of the money was going to some organization.

My question -- and I think Mr. Flood's argument -- is whether if the representation is not that definitive, if it's just we're going to be giving this money to charity, would evaluating whether or not that is a fraudulent statement in light of where the money actually goes open the door to the kinds of entanglement that courts have been worried about in this abstention context?

MR. STANLEY: Not at all. And, in fact -- well, I need to break it into two ways. One, we're not suing the Holy See for how they spent the money. We're suing the Conference for representing to us -- and if you actually look at their representations, look at what they actually said -- and I'll come back to that. I'll find that in a second. In the -- in the -- from the pulpit the week before it was read, the week after, what people

were told, and by their own guidelines, that their job is to ensure that the money was spent as represented.

In this case, just so you know, the Vatican is actually engaged in lawsuits right now against the Swiss investment funds involving Peter's Pence. They just got letters rogatory in the last month in Switzerland to obtain documents on the fraud that was made by certain cardinals and monsignors in how they were investing this money. So they're upset about it too. It's not just the donors that are upset.

But regardless of that, let's go back and look at what was actually said. And I need to pull up that document and -- you're right. It's difficult in doing it this way. We attached the flyer they put out, and I'll make it bigger so I can read it. Footnote 7, there's an attachment that said --

THE COURT: Is this your complaint, because that's what I'm sort of focused on.

MR. STANLEY: Yes, in the complaint, footnote 7. And I can actually -- may I share my screen? Is that easier?

THE COURT: No, I have it. I have it. Thank you.

MR. STANLEY: The week before the collection, "Next week, we will take up the Peter's Pence Collection, which provides Pope Francis with the funds he needs to carry out his charitable works around the world." The benefits proceed our brothers -- "The proceeds benefit our brothers and sisters on the margins of society, including the victims of war, oppression, and natural disasters. Please be generous."

Okay. They say it's going there. Just like my Gospel for Asia case, it's going somewhere, not to posh condo projects in London, not to Swiss investment funds -- where they lost a lot of money -- not to movies.

All right. This week, same thing, almost the same statement. And then nothing about, hey, we're going to invest this. It -- it -- if, by the way, Your Honor, they said: Hey, we're going to invest this and grow it so when there are emergencies the Pope can use that -- if they said in there, by the way, the Pope might use this to satisfy deficits in the Vatican budget, if they said they put -- might use it for anything like that and people were told that, that's fine.

Then they say: Thank you for your generous contribution. You're helping people around the world. Our point is it didn't go to that. Ten percent went to that, maybe, and the discovery is going to show that. But what the discovery is also going to show is they promised every year that they would ensure that the money went exactly as promised. And from 2011, when they came out with that promise, to the present, they never did anything to show that the money was actually being spent for poor people. They never did anything -- year after year -- this 2019 thing and 2020, even this year, they came out with the same representations without telling people, hey, there's a controversy here on how the money is being spent.

THE COURT: All right. But is the essence of your claim that you have a problem with how they're spending the money, whether they're spending it for poor people or not, or are you focused in on the statements that have been made?

MR. STANLEY: I guess I have to dummy down for myself. The dummy down for myself is what did you promise the class? We promised the class -- what did you solicit the class for? We solicited the class exclusively -- nothing else. We, the Conference of Bishops, told our dioceses, who were required to report to us, and the churches, who were required to report to us -- we supervise them. We told them to say to our parishioners we need money for poor people in immediate need. We need it now. Please give generously. Whether we need it or not, we need it for poor people. Help your brothers and sisters on the margins of society, including victims of war, oppression, and natural disasters.

Not -- not $170 million going to profit to the guy that started the apartment -- the condo project in London. He made $170 million off of Peter's Pence. Not to the guy in Switzerland who made a lot of money. It's going to our brothers and sisters on the margins of society, including victims of wars, oppression, and natural disaster. It didn't go to them, hasn't gone to them, 2011 to present.

I think what the jury will find is 10 to 20 percent went to them and the rest simply did not. And year after year, even though they promised they would ensure donor intent is fulfilled -- and that's really important. They promised donor intent would be fulfilled. It is not being fulfilled. That's fraud. There's nothing religious about this. If I --

Judge, I do a lot of fundraising. If I raise money for a building, which I just did, and I take the money instead for a religious organization -- I did it for a religious group, Jewish senior housing -- and we take

the money instead and we put the money for salaries, because that's what we decided to do, that's fraud.

I'm not asking you to decide anything religious about abortion, about whether -- same sex marriage, about whether priests can marry, about -- in my religion whether something is kosher or not. We're not going that far. We're simply saying to the Conference, you represented the money is going here, didn't go there. You've had -- year after year, you're making the same representation. You're promising you're going to follow up and make sure the money was spent as promised. Did you do what you promised? And it's fraud if not. There's no religious encroachment whatsoever.

THE COURT: All right. Mr. Flood.

MR. FLOOD: Thank you, Your Honor.

Picking up the last point and also something Your Honor said about paragraph 32. I don't think we actually have here fairly read a specific allegation that these funds have been diverted to noncharitable uses. What we have is an allegation that there are some newspaper reports that say that the Peter's Pence funds were invested and invested in some, you know, different modalities that some persons might find unusual or worse. But I think it's very important that the record not be without more from the plaintiff that they are actually asserting through specific allegations that these have, in fact, been diverted to noncharitable uses.

THE COURT: Let me -- let me explore that a little bit, because I'm trying to understand what you mean. At the pleading stage, people plead upon information and belief all the time, and their source could be a

newspaper article. I mean, I don't take you to suggest that plaintiffs should have already done all of the discovery that's necessary to figure out where this money is going.

MR. FLOOD: I -- I totally agree, Your Honor, but I -- if I'm reading the complaint correctly and fairly -- and I've also looked at the newspaper reports -- I don't view the newspaper reports as saying this money has been diverted in the way that I think a reasonable person would agree that, you know, using the money to go to Las Vegas and gamble or using the money to buy, you know, some -- a minister's brother-in-law a condo or something is diversion.

The reports are about investments. The investments have caused some people to question the character or quality of them. That's not the same thing. I think it's important as saying the money isn't stolen.

THE COURT: But why is that not a jury argument, Mr. Flood? Why isn't this a jury argument? You're just saying there's no fraud here, and that's not really the province of these early-pleadings-stage kinds of motions. You're saying they're wrong; you know, to the extent that the plaintiff is alleging that we are -- we've acted inappropriately or improperly or we've not done what we said we were going to do, he's wrong. And that's -- that's -- that is what the jury is supposed to decide at the end of day or what you would be entitled to summary judgment regarding after all the facts come out and the Court assesses it.

MR. FLOOD: Your Honor, I don't disagree as to the great run of cases, but Article III jurisprudence here cautions courts at the threshold to look hard so that

we don't wind up in an entanglement situation. And our position is that if, as I believe counsel is asking, the Court is going to have to assert itself into questions of how much is too much, where is the money going; if this is an investment, is it an improper investment. That is the kind of thing forbidden by Article III. And it's forbidden both to -- to a Court, we submit, but also to a jury.

I mean, that's why these motions get made at the threshold. Because if a juror -- 12, you know, of our fellow citizens are going to sit in Your Honor's court and decide the question of, well, you know, I didn't like the Elton John movie or, you know, nobody said anything about, you know, high-end London condos or whatever the newspaper accounts say, that itself on the assumption that these are actually investments, for which there's no contrary allegation, is itself exceptionally intrusive. And it would open up --

THE COURT: And absolutely the defendant would have the opportunity to make that argument at summary judgment before the jurors would be engaged, but on the basis of the allegations, I'm just not so sure, especially when we have cases like *Ambellu*, RICO fraud claims, not barred, you know, on this basis.

So it's clear, as you conceded, that churches can be subject to fraud claims, and any fraud claim is going to require the Court and ultimately a jury to evaluate the truth of the matter being asserted. And that -- you know, the question, I guess, is whether or not that amounts to the kinds of entanglements that you are asserting.

And I'll have to look at the cases. I think I understand that issue. Unless you want to say something more about jurisdiction -- you said something about paragraph 32 that I mentioned?

MR. FLOOD: Yes, Your Honor. It's -- I -- I think I folded my point into my response to Mr. Stanley, which is that the great disparity between marketing and use at this stage, there is no allegation of unlawful use. There is an allegation that newspapers reported certain investments. And that's the only point I wanted to make.

THE COURT: Right. And let me just underscore that the Court does not understand Mr. Stanley to be making an argument about unlawful use, and that that may well be where, you know, we're sort of blurring the lines between entanglement or not concerning the -- the money at issue. So I think I understand your argument.

Did you want to move to your sort of -- what you consider to be the key here, the first set of principles, the arguments about -- about the failure to state a claim, I guess and Rule 9(b)?

MR. FLOOD: I will, Your Honor. If I might be allowed 30 seconds on the prior points.

THE COURT: Sure.

MR. FLOOD: Just by way of supplementation/clarification, it's not our position that churches are generally subject to all kinds of fraud claims, but, rather, that an appropriately pled case, in which there is no intrusion and in which the case can either be resolved entirely by neutral civil law principles, there is an opening there. We don't think

this case meets that, but it's -- but I wanted to make sure I wasn't on the record as having conceded that there is a general openness to this under Article III.

THE COURT: Understood.

MR. FLOOD: Thank you, Your Honor.

On our point about -- about the rules. Your Honor, you broke this into two parts. So I will take Part 1 first from the question whether the -- whether the kinds of arguments we -- we made are cognizable by a district court for there having been made under Rule 12(c). The short answer, it will not surprise the Court, is that we believe that they can be. And we think that there's several reasons for this. Perhaps the most noteworthy -- or the first in order, I think, derives from the language of the federal rules themselves.

We have brought a 12(b)(6)-type -- 12(b)(6)-type motion pursuant to 12(c), and we've done that because we believe -- procedural point, Your Honor. The case was brought in Rhode Island federal court. Predecessor counsel for the Conference moves on, as I remember it, only venue grounds. Maybe it was personal jurisdiction as well. In any event, they succeeded. Their argument was so persuasive that even Mr. O'Connell's counsel agreed and sought a transfer.

All right. The -- they did not file on every conceivable available ground. I have not asked for predecessor's counsel opinion on why. I think it's a fair

presumption, because it is well settled in the rules themselves, that a person is not -- a defendant is not obligated to bring a 12(b)(6)-type motion at the beginning because the opportunity to do that is

preserved by Rules 12(g) and 12(h)(2)(B). And so we -- we are proceeding on that basis. We think that the 12 -- that the Rule 12(b)(6) grounds are perfectly appropriate at this stage, even under Rule 12(c).

THE COURT: All right. Let me just -- I -- I did write about this in *Murphy*, and Mr. Stanley points that out in his opposition. And I -- I'm still very, very perplexed by the confusion that appears to have arisen about these different rules.

You suggest that Rule 12(b)(6) and Rule 12(c) motions are of the same type. But, in fact, as I said in -- in *Murphy*, they're actually two different types of motions. They both can relate to whether or not the plaintiff states a claim upon which relief can be granted. That argument can be the same, but the motions are different. And they have different bases, and they have different results.

So let me ask you this: If you're bringing a Rule 12(c) motion, which you are saying you're trying to do here, are you seeking judgment on the pleadings as a result of that motion or what -- what is it that you're asking the Court to do if I grant your 12(c) motion?

MR. FLOOD: Your Honor, we're asking you to -- to grant the motion for all the reasons set forth in *Iqbal* and *Twombly* and by the D.C. Circuit in the *Rollins* case.

THE COURT: But that's a -- that's dismissal. So there are two different things that a court can do in a situation like this, and they, in fact, track the differences between 12(b) and 12(c).

I understood 12(c) to be a motion for judgment on the pleadings. A motion for judgment says I win

judgment preclusively. Not dismiss the plaintiff's case or dismiss his claims. That's Rule 12(b).

So I'm asking you are you seeking judgment as a result of the Court's -- let's say I agree with you concerning their failure to state a claim. Are you asking me for judgment?

MR. FLOOD: Your Honor, we're asking for the full panoply of relief that may be available under 12(c). If that's just judgment -- and I think there would be problems at this stage if judgment were granted -- that's agreeable to us, but I also think that the *Rollins* case makes very clear that the 12(b)(6)-type grounds are available for vindication on a 12(c) motion.

THE COURT: All right. Let me explain to you. I haven't read the *Rollins* case, but I'll explain my understanding, and then we can move to the -- to the merits of this; all right?

MR. FLOOD: Sure.

THE COURT: 12(c) is a motion for judgment on the pleadings. And I appreciate that Rule 12(h)(2) says that you can -- you can make the argument that a plaintiff has failed to state a claim upon which relief can be granted by a motion under Rule 12(c).

But when you are doing that, I say in *Murphy* -- and -- and this is my view of the rules -- you're actually making a different kind of argument about their failure to state a claim than you are in the Rule 12(b) scenario in the following sense. As a Rule 12(b) motion, you are saying, Your Honor, I would like to test the allegations of the complaint. I want you to assume for the purpose of this motion that the facts that are being alleged in the complaint are true. And I say looking

only at those allegedly true facts, you can say this person has failed to state a claim and you dismiss their complaint as a result.

Alternatively, under Rule 12(c), when you're asking for a judgment on the pleadings, you have answered, and when the Court looks at both the complaint and the answer, it appreciates that there's no material dispute of fact regarding the allegations of the complaint. So a Rule 12(c) motion in that context says, Your Honor, we agree as a matter of fact with the allegations in the complaint. There's no need to go to trial. There's no need to go to discovery. Everybody's in agreement about the basic facts here. And appreciating that, understanding that, we win, says the defendant.

Now, plaintiff can also bring a motion for judgment on the pleadings under Rule 12(c) to say we win. The defendant has agreed to all of the material facts, and given those facts, when you look at the legal standards, we win.

That is why, even though they both are failure to state a claim arguments, one is assuming the facts are true, testing the allegations of the complaint, they fail to state a claim. The other is there is no dispute of fact. Everything they say is true, and yet they still don't win and, therefore, judgment comes to us. It's almost like we're at the end of the case, as though we've done everything we need to do, we get judgment.

The second scenario is also a failure to state a claim because relief cannot be granted to the plaintiff given those true facts; all right?

I said this in *Murphy*. That's my view. And as a result, I look at your -- your answer, and I don't see the

kinds of concessions that are necessary with respect to the material facts to tee up procedurally a Rule 12(c)-type motion. And I think you, therefore, have waived your ability to make the kind of Rule 12(b)-type argument, because you had to make that before you answered.

The outstanding question -- and I'm going to ask this of both of you -- is whether you can make a Rule 12(b) kind of argument post-answer, and I'm not sure.

Mr. Flood, why don't you tell me a little bit about that.

MR. FLOOD: Well, Your Honor, I begin by saying I very much hope you can because the kind -- I hope we can, rather, because the kind of argument that we've made is a 12(b)(6)-type argument. We don't think it's waived, and not only -- and we don't think that for a couple of reasons.

First, I think that were it to be determined that we've waived it, I think there would be an element of unfairness in that. You know, the initial motions made in Rhode Island federal court were made against the backdrop of a set of federal rules that preserves the ability to make those kinds of arguments later, which is to say that no party is obligated to make every available 12(b)(6) -- 12(b), rather, grounds for dismissal in a first motion or they are forever waived. That's not -- that's not the -- the text and purpose of the rules.

And so the idea we -- that we may have waived by reason of the procedural sequence in this case, especially when we're here in front of Your Honor because plaintiff successfully moved the case, having essentially agreed with -- with us about -- about the

jurisdictional flaw -- venue flaw. So I just think there's an element on fairness, and I think if you look at Rule 1 --

THE COURT: I'm sorry. Can I just ask you because -- I must not understand the procedural history enough to be able to evaluate what you're saying. Was there something about the circumstances in Rhode Island that made it necessary for the defendant to answer?

MR. FLOOD: I don't think so, Your Honor. I mean, I think the circumstances were such that there clearly was not proper venue, and I think that the plaintiffs, once they saw the motion on that basis, understood that.

THE COURT: Right. So the unfairness would only arise if there was something that made the defendant answer such that they then lost their ability to make these kinds of arguments. The defendant presumably could have brought their motion for transfer, had the case transferred, the answer is still outstanding, and brought their 12(b)(6) motion to dismiss; right?

MR. FLOOD: Well, Your Honor, I'm not sure that the -- that the cases permit the sequential motions of that sort; right? And for the extended matters to Your Honor, the possibility of doing that was proposed to Mr. Stanley by my partner, who said he was not agreeable to that. And given the very short timetable because -- as Rule 12 provides, once that first decision is entered on the venue question, there's a very brief time to make the -- file an answer.

And so we did it on that abbreviated time and then very promptly by -- consistently, as we believe, with the text of the rules -- brought the 12(b)(6)-type motion

under 12(c). And I just think the idea that it's forever waived if you don't bring it in a very first motion --

THE COURT: Well, Mr. Flood, I mean, I get your point in general. I don't understand it to be unfair because the rules are what they are, but I get your point that, you know, it seems like, wow, this is forever waived. But the question is: What is the "it"?

The only argument that is waived in this sense is the mere testing of the allegations of the complaint, and there are many, many defendants who don't even bother with the motion to dismiss, especially in a fraud-type case where they understand that there are genuine issues of material fact as to what is going on, and they answer. And then they answer, and they move for a very rapid discovery schedule or, you know, early motion for summary judgment because they say we win on -- you know, we know that this isn't true and so they just move the case that way.

So it's not as though you don't get to litigate this matter, like you're waiving something substantial. The only thing you're waiving is the ability to make an argument that, based purely and solely on the allegations of the complaint taken as true, the plaintiffs cannot proceed, and it sounds to me like you have many other arguments for why you think they can't.

MR. FLOOD: Your Honor, I'm -- I'm compelled to disagree with the Court on the question of whether we're waiving something, whether we just haven't waived something substantial. It seems to me that the -- that the right afforded by the rules and preserved by Rules 12(g) and 12(h) to bring *Iqbal*- and *Twombly*-type arguments under 12(c) is something very

substantial. It would be substantial for any defendant, but it's particularly substantial for a church defendant that enjoys a degree of protection or immunity or ecclesiastical abstention.

At the end of the day, Your Honor, a similar question was presented -- and I -- refer the Court to a decision by Judge Cooper of this Court on a question like this, and the answer he provided, drawing, I think, in part on Your Honor's own jurisprudence in this area was -- was this: Can a 12(b)(6)-type argument -- can -- can this motion to dismiss type Rule 12 arguments be brought under Rule 12(c). And his answer was sometimes they can and sometimes they can't. And when he was -- and this case is called Jimenez against McAleenan, who was the Secretary of HHS, I think, a couple years ago.

And -- and in deciding that a 12(b)(6)-type motion could be brought, Judge Cooper quoted, actually, from the *Rollins* case that I mentioned. And the *Rollins* case says, very expressly, other circuits have held that *Iqbal* and *Twombly* apply to 12(c) motions -- and it gives some citations -- and we do likewise.

Now, I -- I had not read Your Honor's jurisprudence in this area in the *Murphy* case and *Alliance of Artists* and some of your other opinions in this to extend across any and every conceivable Rule 12(c) case. I did not find -- I confess, Your Honor, I did not read the briefs in all those cases, but I did not find in any of the Court's opinions a situation in which the defendant posing the 12(b)(6)-type argument in a 12(c) posture had made the rule-based arguments under Rules 12(g) and 12(h)(B)(2) [sic]. I just didn't see that there. And so perhaps Your Honor's jurisprudence does extend across every possibility, but it seemed to me --

THE COURT: I mean, I just don't understand how it can't. Because I don't know what it means to have Rule 12(c) and Rule 12(b)(6) mean the same thing. I don't understand what it means to say we'd like to bring a Rule 12(b)(6) argument as a Rule 12(c) motion when those are different things; when one is asking for judgment versus asking for dismissal when Rule 12(b) says a motion asserting any of these defenses must be made before pleading if a responsive pleading is required.

I don't know what it means to suggest that we don't have to worry about that part and we can just say the same thing in the context of a Rule 12(c) motion. And so my attempt in *Murphy* and looking at Wright and Miller and working through it is to explain why it is that there's language in (h)(2), for example, that makes it seem as though you might be able to do that, but, in fact, it's really not opening the door to repeating a Rule 12(b)(6) kind of analysis after the answer.

So let me have Mr. Stanley respond, he wants to. I think it's unlikely that I'm going to change my view of what's happening with the rules. So the question, I think, that is most productive at this point, Mr. Flood, is whether Rule 9, your arguments about particularity, are actually also encompassed by this waiver of process or prospect or whether Rule 9 is something else entirely that really doesn't have to do with the timing of an answer.

MR. FLOOD: Your Honor, I think that --

MR. STANLEY: May I respond on Rule --

MR. FLOOD: Oh, I'm sorry.

THE COURT: Yes. Go ahead, Mr. Stanley. Just -- you can respond on this point that we've been making and then go to Rule 9.

MR. STANLEY: Yeah, I'm not going to belabor it. I do want to correct the record, though. Mr. Flood, I guess, wasn't involved in this at the time, but if you look at Document 14, we agreed to a consent motion for extension of time to answer the complaint. There wasn't a rush to answer. We gave them plenty of time to answer it. That was their choice.

The truth is that the table's already set for counsel, for Mr. Flood and Mr. Baine, by the Rhode Island counsel. There were two different sets of lawyers, and they could have, as the judge said, simply done a motion to transfer. And they didn't go that way. They went with a 12 -- Rule 12(b) motion, which required the Court's consideration, would have required us to -- to resolve it. So the fairness is we've been through that process once. It wasn't extraordinarily heavy on us, but we did do it. And --

THE COURT: Mr. Stanley, let me just be clear. You said -- so you say in responding to your complaint, they filed the Rule 12 motion and it included a transfer component; is that what it was?

MR. STANLEY: That's what it was, yes, ma'am. Let me find it exactly, and I'll tell you the -- it was -- I'm going -- there it is. Motion to dismiss. It's Document No. 7 in this case and a brief, and it was under Rule 12 to dismiss it, Rule 12(b).

And so the Court eventually found that as moot, but that was their -- their -- their response. I actually expected them -- when they got the case to D.C., I expected them to say, hey, we didn't really take a stab

at some of the 12(b)(6) stuff, are you okay with us taking another bite at the apple before we answer.

THE COURT: Yes. Can I pause?

Mr. Flood, why didn't you do that; right? Isn't that your unfairness issue? In other words, you appreciated that there was some limitation with respect to 12(b)(6) because when you came to D.C., you sought to move under 12(c).

MR. FLOOD: That's correct, Your Honor.

THE COURT: So why didn't you try to reopen the 12(b) motion that you had previously -- that had you previously issued or -- you know, the motion that you had before in Rhode Island?

MR. FLOOD: The short answer, Your Honor, is that I was not quarterbacking the case at that point. My partner Mr. Baine is -- is muted on the line, and my understanding is he did reach out to counsel and suggest to him that we would like to file a motion of that sort, and -- and now I will read you counsel's response to that, Your Honor.

Actually, I'll begin with Mr. Baine. This is May 26th of last year.

THE COURT: I'm sorry. When did the answer come in? Was it prior to the filing of the original motion to transfer/dismiss?

MR. FLOOD: No, Your Honor. On that subject, I don't believe my client through predecessor counsel actually moved for a transfer. I think that the motion was made by Mr. Stanley on behalf of the plaintiff, and I'm advised that we, in fact, did not move for a transfer.

THE COURT: Okay.

MR. FLOOD: The transfer motion was made solely by the plaintiff --

THE COURT: Okay.

MR. FLOOD: -- and was granted by the Court. So I'm happy to have the opportunity to clear that up.

Given the timing until the transfer was made -- I have a chronology here somewhere, Your Honor -- around the third week, I believe, of May in 2020. The transfer order was issued on May 21 by a Rhode Island federal court denying the motion as moot and granting plaintiff's motion, which it calls a cross-motion in its minute order, to transfer. And so that's the 21st.

I think under the rules there's only -- there are only three weeks then to answer that absent an extension of time, and, of course, if it were possible to actually file another 12(b) motion before the answer, it would make sense, of course, to extend that time to permit a full motion.

I now come to the record in -- in the matter -- or to -- to the back and forth. On May 26th, my -- my partner Mr. Baine, you know, asked for an extension of time. He believed -- he -- he worded the request as a 30-day extension for time to respond. He did not use the word "answer" or the word "move." He used the more general term.

In response, same day, Mr. Stanley wrote back and said nice to meet you, et cetera, and said we agree to --

MR. STANLEY: That's actually not true. Can I -- I have the email up. He did talk about a motion in his initial letter.

MR. FLOOD: Well --

MR. STANLEY: Can we -- can we at least make the record correct? He says: I understand our response by way of answer or motion is now due on June 4th. So he was contemplating a motion when he did that.

MR. FLOOD: Answer -- answer or motion is, of course, generic for all possibilities.

MR. STANLEY: Right.

MR. FLOOD: And I'll gladly provide this exchange to the Court.

THE COURT: All right.

MR. FLOOD: But if I --

THE COURT: Keep going, Mr. Flood.

MR. FLOOD: If I may finish just one sentence,

Your Honor. The response says: We agree to a July 6th answer date, but we do not agree that a section -- second motion to dismiss would be proper. And in those circumstances, Your Honor would have -- motion being -- with an opposition to any effort to bring a motion having been clearly stated. What we adopted is rather than make an emergen- -- rush motion and burden the Court with that, to answer and then promptly move under 12(c).

THE COURT: Not getting into your litigation

strategy, you could have also disputed that; right? I mean, the Court does have process for these for adjudicating early stage disputes between the parties regarding what is the appropriate course of action. And it may well be that the initial Court's determination that your -- that your motion to dismiss

was moot was actually not correct, such that you were entitled to renew your motion to dismiss and should have never been adjudicated on the merits in the previous forum.

Mr. Stanley.

MR. STANLEY: Yes. That's exactly right. And that was our position. And he responded by saying: Thank you for agreeing to the 30-day extension. And that's not a rush. That's several weeks plus 30 days. I understand your position. It is not our intention to file another preanswer motion. The motion for judgment on the pleadings or motion for summary judgment would not be precluded upon providing an answer. That was their choice to go this way. And then he -- I complimented him on working with Thurgood Marshall. And he compli- -- he talked about that, and we talked about that for a moment. But that was it.

And then he agreed to prepare a stipulation. We agreed to sign it. I liked our position. So I definitely was taking that position. I did not -- I wasn't sure I was going to win if it actually went that way, but they chose to go a different route, and that was evident in their response.

THE COURT: Well, that -- that was actually helpful just to understand fully why Mr. Flood is suggesting that there might be a fairness issue.

To the extent that they did previously bring a motion to dismiss under 12(b)(6) timely and prior to the answer and it was never ruled upon, I do now understand at least your suggestion, Mr. Flood, that it would be fair to allow you to make those same arguments in this context.

Now, on the other hand, as Mr. Stanley is suggesting and given the Court's own evaluation of the rules, that may well have been, you know, your choice; that -- that your -- and I see that Mr. Baine has popped up. Maybe he'd like to say something, but let me just finish putting on the table my thought that perhaps, you know, the -- the parties proceed at their own peril to the extent that they are making an evaluation of what they believe the rules require or allow, and if the thought was, well, we'll do this as a 12(c) motion because it's our understanding that the rules allow it, if the Court disagrees, then you would necessarily be precluded.

Mr. Baine.

MR. BAINE: Your Honor, thank you. I'm not dressed for court because I took at face value the Court's request that only people who are speaking appear.

THE COURT: That's quite all right.

MR. BAINE: But since people have tried to characterize why I made decisions, I'd like the opportunity to explain it, if I may.

THE COURT: You may.

MR. BAINE: And it's simply this: That I thought that Mr. Stanley was correct when he said that the rules don't allow a second motion pursuant to Rule 12(b)(6) to dismiss the complaint because the rules say that failure to state a claim can't be raised on a second motion solely under 12(b)(6). It says if you want to do that, if you've made any motion under Rule 12(b) that's denied, you have to answer.

THE COURT: But the motion wasn't denied, Mr. Baine. The mistake may have been that what happened was that the original motion really doesn't count as a motion because the Court just --

MR. BAINE: That's what I wanted to get to. That's what I wanted to get to. The rules say you can't make a second 12(b) motion, but -- so you have to -- so normally you have to answer and then make the failure-to-state-a-claim argument under 12(c), which is expressly allowed by the rules.

Now, my point about the unfairness here is simply this -- and, quite frankly, if the Court thinks that the motion should be brought under 12(b)(6) and not under 12(c), we would respectfully ask to amend the motion to make it under 12(b)(6). But the reason why we thought we had to make it under 12(c) was because ordinarily when you -- when you made one 12(b)(6), the rules say, well, you can't make a second one.

Normally what would have happened after the 12(b)(1) motion in Rhode Island, which the defendant concedes was proper, was correct, the Court would have dismissed the case. The complaint would have been refiled in D.C. We would have filed a motion under Rule 12(b)(6) to dismiss the new complaint. But the defendants persuaded the judge to transfer the case rather than dismiss it. And so we thought well, we can't make a second motion and label it 12(b). We have to label it 12(c).

THE COURT: I understand your point.

(Indiscernible simultaneous cross-talk.)

MR. BAINE: -- wrong about that, we hereby move to amend it to make it under 12(b).

THE COURT: All right.

MR. BAINE: But it shouldn't be a game of gotcha. It shouldn't be a game. It should be -- we should look at the rules and try to -- try to follow a procedure that's -- that's just and fair to us. If I made the mistake of putting the wrong letter after 12 in the motion, my mistake.

THE COURT: Well, I -- I totally understand your point, and we'll sort it all out.

I just want, you know, everyone who comes before me to at least appreciate that there is actually a distinction between 12(b) and 12(c) with respect to what the Court is supposed to be doing, what the parties are supposed to be arguing. And I know that many, many courts have said, oh, these are basically the same thing. And in my view, they're not.

MR. BAINE: And all I --

THE COURT: It matters.

MR. BAINE: All I can say, Your Honor, is you're correct. That at this stage, because we've answered it, you may also look at the answer as well as the complaint. Then you have to ask the same question: Now that I see the answer and now I see the complaint, has the plaintiff alleged facts which would entitle the plaintiff to relief? And we don't think it has. We don't think they have.

THE COURT: But -- but in that view of the world, Mr. Baine, the answer does no work. In other words, just looking at the answer doesn't matter if I'm asking the same questions.

My view is that 12(c) actually requires an answer for a reason and that you're doing something when you

issue judgment on the pleadings on the basis of both the complaint and the answer. Not just I look at the answer and I put it down and I go back to the 12(b) world.

But all that said, I mean, we've sort of, you know, been around this corner. All I'm suggesting is that it is possible that in -- and I do understand with all of the machinations moving around, I consistently and typically transfer cases with pending motions, with the motion still pending, because I never want to do anything to the parties' rights concerning pleadings that they have made or motions they have made if it's not my case. So I figure the judge who gets it can decide what to do with this motion.

It appears in this situation that the motion was somehow mooted before the case was transferred, which led to confusion about whether it had been handled and, therefore, if you make it again in this context, is it a second motion that violates the rules or whatever? And it seems to me that in that circumstance, the -- the defendant has a good argument that it isn't a second motion; that it doesn't transgress the rules in that way because we were never -- you know, we never got any answer or relief with respect to our first motion under these circumstances, especially since the plaintiff was the one who requested the transfer.

So all that said, you know, I'll have to go back and see whether -- you know, what I think about that, and maybe they'll be -- you know, give you an opportunity to evaluate in writing as to whether or not the Court should construe the motion that exists as one under 12(b)(6). But I think if it sticks as a 12(c) based on my

view, you lose because 12(c) is not doing what it is that you're requesting me to do in this context.

Mr. Stanley.

MR. STANLEY: I just want to say two things. One, that was the route they chose, and the rules are very clear; a motion asserting any of the 12(b) defenses must be made before a pleading -- before pleading if a responsive pleading is allowed. They went and chose to do the responsive pleading. So it's now too late. That's the path they chose.

In terms of fairness, we're now a year down after we filed the suit, and we're -- we're out of the starting gate, in our view, and ready to get discovery.

THE COURT: But there's no prejudice to you,

Mr. Stanley, if they were allowed to make these motions. I mean, I understand the rules preclude it, but if they -- if the Court were to somehow construe this as a 12(b)(6) that was properly filed in light of the unique circumstances of this case, you're not necessarily prejudiced by that, are you?

MR. STANLEY: I think so. I -- we could have at least argued -- we could have argued beforehand that it wasn't inappropriate, but the real point is I think it sets a bad precedent. The rules clearly state that once you file an answer, it's too late to do it. And I think that sets a bad precedent. I think you talked in the *Tapp* case that you can't convert a 12(c) into 12(b) motion. And I just don't think it's proper.

THE COURT: All right. I understand this. I think it was very helpful. And, Mr. Baine, thank you for coming on and explaining your perspective, and the procedural history was helpful.

Let's talk about -- let's assume for a second that we are moving forward with the arguments that are being made. What -- what about this particularity, Mr. Flood? And let me -- let me just home in, in the interest of time, on my concern. It's something that I articulated at the beginning, which is: As I read your motion, it seems to be making particularity arguments only with respect to the plaintiff's individual claim, but the complaint is a class -- a putative class action complaint.

So even if I agree with you, that he hasn't said who, what, where, when with respect to the, you know, summer of 2018 in his own circumstance, are you making the argument that the complaint in general fails on Rule 9(b) grounds?

MR. FLOOD: Your Honor, I think the only succinct way I can say it is we're making the argument that this complaint alleging these facts fails on Rule 9(b) grounds. We're not in a position to move on any complaint other than the one brought, and the complaint brought alleges facts relating to Mr. O'Connell, and, in our view, those do not survive the 9(b) rigors.

THE COURT: Let me put it this way. Let's say I cross out the paragraphs that relate to Mr. O'Connell -- and there's only a couple -- and I left in everything elsewhere where he says here are all the statements that the Conference has made, he quotes at length, he says where they come from, you know, this is in the bulletin announcement, this is provided to all the churches to be read from the pulpit, this is on the website, all that remains, and the only thing that I cross out, pursuant to your argument, is the section

starting on page 14, paragraphs 34 through 36; all right?

Are you suggesting that what remains is not particular enough under Rule 9(b)?

MR. FLOOD: Your Honor, there's a couple -- I need to take this from a couple of different angles. First of all, without an individual plaintiff -- you know, some plaintiffs -- some groups -- some- -- someone other than Mr. O'Connell whom -- who does not actually allege that he heard this, there's no hearer, there's no receiver. And so all the elements -- for example, the reliance element is missing. If that's all -- if this is all we have are these three paragraphs, some of the other elements that are, you know -- that are fundamental components of -- of a fraud claim are just not there.

THE COURT: And so you think it's not enough that it alleges that these statements were made and that millions of dollars come in from parishioners around the world, or at least around the country, as a result?

MR. FLOOD: Your Honor, I think it is nowhere near enough, and there are any number of reasons why. First of all, this plaintiff doesn't allege that he read or saw or heard those statements before he acted.

THE COURT: No, I'm not talking about him. I'm talking about the class allegation claims. An individual plaintiff can say this sort of thing happened to me but describe the scheme more broadly. And I'm trying to understand whether you are suggesting that the -- that the individual plaintiff, all of the particulars of his own potential individual claims have to be in there. And if they're not, why doesn't that just eliminate the ability for the individual claim to advance but not the class claim?

MR. FLOOD: Your Honor, the -- the plaintiff and plaintiff's counsel are the masters of this complaint. One would think that if one were intent on -- on seeking the kind of remedy sought and on, you know, surviving the preliminary motions and pursuing this through the normal process, there would be a plaintiff who could actually say here's what I heard and here's what I replied on and here's how I was wronged.

You're putting me, candidly, Judge, in an impossible position to say what somebody else might say if they had heard it. Let me point out that the statements referred to on the website are -- are statements that -- they're on the website, just as the Vatican statements, which complement them, are on a website. And -- but I don't know how the case will go forward as a class other than on an analogy to what we know now. I would be speculating if I did otherwise. And on analogy --

THE COURT: So shouldn't we -- shouldn't we do the class part first then? I mean, this was my -- my point in raising this is shouldn't we sort out the class allegations under these circumstances? Where you're saying these are website statements, we don't know who saw, we don't know who heard, we don't understand the reliance -- not from a Rule 9(b) standpoint necessarily, because I think you understand what it is he's talking about, but just in terms of can this go forward as a class action, shouldn't we sort that out? And then in the context of that, we will know whether Mr. O'Connell is typical, whether he's an adequate representative based on what he says happened to him?

MR. FLOOD: Well, Your Honor, in -- in all candor, this is a little bit outside my lane and my zone of preparation today.

THE COURT: Okay.

MR. FLOOD: If -- if we could give you an informed opinion on that, you know, by written submission, obviously we'd be glad and -- and promptly prepared to do just that.

But it seems to me, Your Honor, that if -- if a complaint is brought and it's brought as a putative class action -- and there are roughly 50 million Catholics in the United States and on any given Sunday, you know, I surmise maybe half of them are in the pews. And if the plaintiff comes forward with -- if counsel comes forward with this sole plaintiff and he turns out to be a person who didn't hear any of this and, if in addition to that -- and here I'd like to supplement something Your Honor said. Excuse me.

I don't believe there is an allegation that my client, the Conference, automatically provides or imposes or gives the scripted material, from which he's asking you to draw this inference, to the diocese. That's an assumption that -- that I have not been allowed to test yet. And it is a multi-step inference for which there is no predicate.

THE COURT: But wait. I'm sorry, Mr. Flood. Again, I'm just -- I'm getting confused because many of your arguments, in my view, start getting into summary judgment territory as opposed to the allegations in the complaint.

So I see on paragraph 24 the allegation that the Conference also furnishes specific instructions for

Peter's Pence appeals to be read from the pulpit at church services. And then he quotes something that says, in parens, "*Please read this text from the pulpit, or include it as part of your weekly announcements.*" So there is an allegation in the complaint that the Conference is providing specific instructions to the parishes to make these statements, and we have to accept that as true at this stage; right? That's what *Iqbal* and *Twombly* tell us; right?

MR. FLOOD: Your Honor, we have to -- you have to -- our submission is you have to take the complaint in its totality. And if something in the allegations, his intention or -- contradicts something else or something on the website, which plaintiff is relying on, you should look to that.

The Conference's website, you know, fairly read makes it pretty clear, I think, that this is -- although this -- he has read the text correctly, it is not, by any means, obligatory. He has not alleged as a fact that the Conference has actually provided to his diocese and from there to his parish and from there to the pulpit in his case. And there are a couple of places on the site, which it's clear, and it says, you know, I mean, how to give for Peter's Pence: If your diocese -- archdiocese does not participate, if you want further information for resources. Now, I didn't want to introduce a body of factual information in response to an opening -- or as supplement to a motion of this sort.

But if he's going to say that the instructions were provided, then he's got to take into account that the website and nothing else that he's pointed to actually supports that. It's a bare allegation in -- in intention and contradiction, I submit, with the website itself.

THE COURT: All right. Mr. Stanley.

MR. FLOOD: That's our claim.

THE COURT: Mr. Stanley.

MR. STANLEY: Thank you.

First of all, I want to remind everybody that the Conference said in their -- in their motion -- I mean in their reply -- for the purpose of this motion we are ". . . not disputing any of Plaintiff's allegations, such as they are." And if you look at the allegations themselves, it's different than what Mr. Flood said.

If you look at paragraph 48 under fraud, it says that they -- the Conference consistently, routinely, and uniformly solicited donations for the collection. By doing this, they ". . . communicated to Plaintiff and to each Class member that" -- they communicated to us -- that the money would be -- ". . . they donated to Peter's Pence would be used exclusively for these purposes." And if you go down -- it says material representation.

Then we go to paragraph 50, and it says, ". . . Plaintiff and Class members decided to donate to Peter's Pence based in part on the representations communicated to them by" the Conference. It does say that the plaintiff did rely on it.

And then on the next paragraph, it says the same thing. But for it, he wouldn't have given. He had damages. And so we did say that O'Connell did, in fact, rely on the Conference's representations to them as flooded down to the church.

THE COURT: And, Mr. Flood, if that turns out to be not true, which I assume will be the Conference's position, isn't that the work of discovery and summary

judgment and, if I can't figure it out based on the evidence, eventually trial. That's the essence of the -- the claim to be evaluated going forward, isn't it, Mr. Flood?

MR. FLOOD: Your Honor, I think that -- that the Court ought to evaluate that claim in the context of the other claims. And the other claim -- one of the other claims is he heard something from the pulpit, but he does not give it any content. To get from a script that is available to dioceses on the -- on the Conference's website to an actual hearing by a plaintiff and actual reliance requires multiple factual steps. And the burden is on the plaintiff to make -- allege at least enough --

THE COURT: But only isn't that in the context of helping the defendant to understand the nature of the fraud? I mean, I -- I sometimes think defendants make too much of Rule 9(b) and its assertion that you have to plead fraud with particularity when the cases indicate that really its function is just to make sure that we don't have such vague allegations concerning fraud that a defendant doesn't have any idea what really to defend itself against.

Here we have particular statements. We have an allegation of reliance on such statements by the plaintiff and other class members. We have an allegation that those statements mattered because at least the plaintiff -- and he alleges also class members -- gave the money because they heard these solicitations and they believed the representations that were being made and an allegation that, in fact, those statements were not true, because at the end of the day, the money was not being used for what was being represented.

I -- I'm just struggling to understand why that's unclear from a Rule 9(b) standpoint and why you suggest that that's not sufficient to at least get us past -- at least on the class-wide claims to get us past this very initial early hurdle that the rules require.

MR. FLOOD: Your Honor, the short of it is that

Mr. O'Connell is -- wants to pursue a fraud claim. Fraud requires a specific false representation. The thing that he says is false he never alleges that he heard, and the thing he says he heard he can't particularize enough to know whether it's even false.

The whole approach to -- plaintiff's whole approach to the complaint is like one of these little paper toys that adults would make for me when I was a boy. And on one side was a blue coloring, and on the other side was yellow. And they could spin it like a top, and it looked like it was green. But I -- it wasn't green. There was a blue side and a yellow side. And if plaintiff wants to be green, he should say that he heard a thing that misled him personally; and he never does that.

He says in his opposition on page 16, in the -- footnote 17, he says his ". . . fraud allegations are based on USCCB's affirmative representations." But USCCB, he doesn't allege, actually ever made any representations at all to him. Because he doesn't have that, he asks you to draw an inference. And he asks you to draw it as, I presume, one of those fair inferences as permissible from a complaint when a reviewing court at this stage looks at the facts alleged.

But he does not allege any connecting inferences between what is on one version of a script and what he heard. He doesn't do it because he can't tell you what he heard, and he doesn't do it because he doesn't allege

the connecting joints. He wants a three- or four-stage inference, and we submit that's too much to ask at this stage of the case.

THE COURT: Mr. Stanley.

MR. STANLEY: Again, paragraph 48 says just the opposite of what Mr. Flood is saying. You can't recast this. By doing these communications -- by doing the representations or what they set out, they -- the Conference ". . . communicated to Plaintiff and to each Class member that any money he donated to Peter's Pence would be used exclusively for these purposes." He said he received a communication from them.

THE COURT: All right.

MR. FLOOD: But, of course, Your Honor, it doesn't say he received that communication, and I think that's the key.

THE COURT: And I also think that that -- you -- you are not suggesting, Mr. Flood, that you wouldn't be able to make that kind of argument in the summary judgment context after, of course, you depose plaintiff and have gotten the full statement as to what he heard or what he saw? You'd make this same argument to me at summary judgment, wouldn't you?

MR. FLOOD: Your Honor, I think we will make any argument that Your Honor will permit at that stage, if we find ourselves at that stage.

My only point is that these burdens in a fraud claim, you know, rest in the first instance with the plaintiff. Plaintiff has to come forward with particulars of this sort. We submit he hasn't done it as to the content of the statement. We submit also that he certainly hasn't done it as to allegations, you know,

that -- that my client, the Conference, made false statements, that they knew they were false and in making them they intended to deceive somebody. He hasn't even responded --

THE COURT: How can you ever say more about knowledge? Isn't in the complaint enough to say that the Conference, you know, makes these statements and the record demonstrates that the -- the newspaper says the money is not going and I allege, upon information and belief, that the Conference knew the money wasn't going at the time they made the statement? How can you say more than that from a particularity standpoint?

MR. FLOOD: Well, it seems to me, Your Honor, that -- that if the -- if the gist of the complaint, as -- as I -- I believe it's fair to say, is that the money was not spent exclusively and immediately, then plaintiff ought to say something about how the -- the defendant -- here the only defendant -- knew that and, nevertheless, made the statements knowing and understanding that they were false. And he doesn't do anything of the kind. I mean, I understand --

THE COURT: It's not enough, in your view, for him to say that the Conference is responsible for collecting these solicitations, that the Conference is responsible for -- he makes some statements about what the Conference does; right?

MR. FLOOD: He does, Your Honor. And -- and, again, you know, I think there just comes a point, I think, where the Court -- we -- we, you know, respectfully ask the Court to look at the website.

There is nothing in the record and there's -- the record is the wrong term, and I withdraw that term,

Your Honor. There's nothing in the complaint and there's nothing on the website -- and much to the contrary -- to suggest or -- or show that the Conference oversees this; that it actually does the solicitations, that it collects the money, that it's responsible for conveying it. All of that is just unfounded and that a lack of basis is set forth on the very website they invoke for other purposes.

THE COURT: So you believe that I can go to the website in order to test the proposition at paragraph 3 that the Conference has solicited and collected hundreds of millions of dollars in donations from parishioners, you think that at this stage of the case the Court is to go to the website and try to determine whether it provides evidence that supports or rebukes this statement?

MR. FLOOD: Your Honor, I don't think you need to -- it's a question of -- of having the Court find evidence, at least not at this stage. But if plaintiff can use the website as a sword, we ought to be able to use at this stage the same website as a shield to this -- the assertions made there. And if you go there, you will find -- at least in two different places -- number one, that -- that the -- the Conference does not collect this money and, number two, that the money is not to be sent to the Conference. It's to be sent to the nunciature.

THE COURT: I just -- I guess I don't understand your view that a shield is supposed to be what's happening at the motion to dismiss stage. I'm just confused by that, because the motion to dismiss stage, a defendant is not shielding him—or herself. The defendant is, in fact, accepting for the purpose of the motion what plaintiff says. That's what I thought

those motions do. Now, maybe I'm wrong about that. I don't think so. And if that's the case, my looking at the website is not helpful from the defendant's perspective because I'm just testing the allegations of the complaint.

MR. FLOOD: I don't disagree with -- with Your Honor's description of the Court's role here, but it seems to me -- and while I'm not familiar with any cases from -- from the district courts in this circuit, there's good case law in -- in other -- in other circuits to the effect that if a plaintiff makes an assertion and -- and includes a website as part of the complaint and if in the other parts of the website that assertion is flatly contradicted, then the Court adopts the view of the website in contradiction to it. I mean --

THE COURT: So is there a part of the website that says, quote, the Conference does not solicit or collect money from parishioners for the Peter's Pence collection?

MR. FLOOD: Your Honor, there's certainly a part that says send your money directly to -- to the nunciature and don't send it to us. And -- and there is nothing else on the website, I'm confident, that says the diocese -- that the Conference, rather, oversees the collection or does the collecting or retains the collection or anything of that sort.

THE COURT: So the absence of a statement by the Conference indicating that it does this, you think, is sufficient contradiction that I at the motion to dismiss stage can take that to undermine what the plaintiff has said here?

MR. FLOOD: Your Honor, I think the absence of that, combined with the affirmative statements that

the money is supposed to go directly to the nunciature are more than adequate in the absence of, you know, greater detail by the plaintiff.

THE COURT: All right. Mr. Stanley.

MR. STANLEY: I don't think that they're bank robbers, but if a boss tells someone like me -- my boss tells me I want you to plan a bank robbery, I want you to hire -- go get the bank robbers, tell them how they're going to do it, give them all the plans, tell them exactly what they're going to do, have them rob the bank on this day, then have them send the money straight to me, you won't touch it, you can say I'm out -- I'm out of -- I'm out of trouble. Certainly in RICO and other cases -- we haven't alleged RICO yet -- but the issue here is really the false representation that they made. They represented -- and if you look at -- at their One Church One Mission, they say very clearly that we and you, the churches -- the dioceses and the churches, are going to follow this set of rules ". . . to adhere to the fundamental principle of 'donor intent.' Donors should be informed about the intended uses of donated resources. Donors must be assured that the gifts will be used for the purposes in which they were given." Recognition, handle with confidentiality, et cetera. Then they go back and forth --

THE COURT: I understand, Mr. Stanley. Help me to understand that set of allegations. Because the thing that worries me a little bit about your reliance on that is the conversation that we had at the beginning about entanglement.

So to the extent that you're suggesting that what is wrong here is that the plaintiff -- excuse me -- that the Conference and the Vatican are not actually following

its own guideline, then doesn't Mr. Flood have a point; and is that the function of your pointing to these other statements about ensuring that donors 'monies goes to their intended uses?

MR. STANLEY: First of all, are we still talking about 9(b), or have we gone back to the motion to dismiss or something else?

THE COURT: We're sort of talking about same time, 9(b) and motion to dismiss, but I wanted to make sure that I understood -- you -- you at various points said it's critical, Your Honor, that you understand that the Conference at times has guidelines and statements and rules about ensuring that donors' money goes to where it's intended.

And I'm just trying to flesh out whether any part of your claim is about the failure to do what they said they were going to do with the money.

MR. STANLEY: Well, no. The failure to understand what was being done with the money, not what -- not promising what they're going to do. We all encounter people who make representations to us in general things, whether they have a right to or not, that sometimes they just don't check. They don't know what they're talking about.

They continued year after year with a very specifically worded solicitation that they promised that -- me, as -- I wouldn't know any better if I'm in a church and they say, hey, do something right. There's this special collection going to people with special needs, they're suffering from poverty, they're -- they're on the edges of society. Please give this money now.

They don't know -- have a clue one way or the other -- we're going to find through our discovery they never checked to see if that was true or not, year after year after year. Yet they promised to. Not only did they promise to -- to themselves, but they promised to the churches, to the dioceses, and the churches and the parishioners, the rules of the game for these special collections are that we're going to know what we're talking about. We're going to make sure that when you give money that you're giving to something real, and that's --that's the neglect I was talking about before.

THE COURT: Mr. Stanley, but you're not bringing -- I didn't understand you to be bringing or making some kind of a negligence claim; right? What you've just articulated is a whole other set of duties that, I guess, one could make a claim about, that's separate and apart from the fraud.

MR. STANLEY: It's not just negligence. If you know something not to be true and there was no -- from the last -- from 2015 on, they knew it wasn't true, and they kept doing it over and over again. So there will be a time period from 2011 to 2015 where they actually knew. And discovery is going to let us get into these documents and see what they knew and didn't know about Peter's Pence. But if they knew that it wasn't going there, but yet every year they repeated the same thing, that's fraud. It's a --

THE COURT: Obviously. So you're using -- so you're using this notion of a duty to ensure that the money is going to where it's supposed to go to fulfill the element of knowledge in the context of the fraud; that -- that you're saying because there's this requirement that they have adopted to ensure the donor funds are used for precise purposes, one could

infer that they knew when they made the representations that it was going to X place that it really wasn't?

MR. STANLEY: Right.

THE COURT: Okay.

MR. STANLEY: Yes.

THE COURT: I mean, I think I understand it. You said that there's overlap between that and the totally separate kind of claim about negligence with respect to their following their own guidelines and that that claim might well raise the kinds of concerns that Mr. Flood is talking about with respect to entanglement, et cetera.

MR. STANLEY: We think they knew for most of these years it wasn't going as they were doing [sic], and that's fraud. There may be a line, and we may lose on 2011 to 2012, 2013, 2014. I haven't seen the documents yet. They may have known. They may not have known. I don't know the answer.

But I believe that -- and that when we go for class certification we'll add some documents to let us know exactly what we're going for on that, if they did know or should have known. We'll look at that and make those arguments to the Court then.

But for 9(b), again, we say that he heard the representations. We'll make -- they can take the – the deposition of the -- the reverend who made the representations. They can take the deposition of the bishop who sent it down there and find out what was said and not said. And we have tons of other people in the wings who have contacted us after this lawsuit was filed that say I'm angry about this. This is exactly

what I thought I was giving a lot of money to, and I'm really not happy with it, and they also want to join in as members of the class or class representatives, if we need to substitute or add somebody. But there is a large outcry of this. I'm not picking on the church because it's a church. It's the fraud of it, the fact of what happened here.

THE COURT: All right. I think I understand. Let me give Mr. Flood a chance, and then I'll come back to you finally, Mr. Stanley. I'm -- I'm mindful of the time.

Mr. Flood.

MR. FLOOD: Your Honor, to -- to Mr. Stanley's last observations, as a matter of survival on adequacy of the motion at this point, it's not enough that he believes that my client, the bishops' conference, knew about its uses or, you know, diversions or allocations that his client doesn't approve of. He has to allege that, and he hasn't alleged that. There was no specific allegation with any semantic content that doesn't fail under Your Honor's analysis at the front of the *Tran* case to show that.

It's not enough to say they knew. It's not enough to say, you know, they knew or should have know known. If you look at the complaint, it says in paragraph 15 they ". . . knew or should have known" that Peter's Pence contributions were diverted. That's boilerplate. At 49 --

THE COURT: So -- sorry. What, Mr. Flood, are they supposed to say? What would they need to have said in order to satisfy Rule 9 for this purpose?

MR. FLOOD: Respectfully, Your Honor, at a minimum, I should think they ought to say something

about why it is that -- you know, something factual, not by way of an explanation, but allege some facts that show that the Conference, which has a coordinating role in the promotion for those dioceses to then elect to follow through and actually have the -- have the campaign, that why it is in doing that there's any reason, in fact, to think that they knew how the Vatican, which handles contributions from six continents, was actually allocating its funds, and they don't do that.

It's a -- it's -- I think there's a tendency with churches -- and I suppose not only the churches -- to think of it as a single monochromatic, monolithic organization in which everyone knows what everybody else is doing, but the conference is -- is an independent entity. It's a nonprofit. It's based in D.C. It's not in Rome. And I just don't think it's enough at the threshold to say, these guys, if they didn't know how the Vatican was spending this money, by golly, they should have and that's fraud. I just respectfully submit something more than that is required to satisfy --

THE COURT: At the allegation stage. Not at the -- I mean, you are probably correct if the facts don't bear out that they actually knew, but I just am worried about the suggestion that prediscovery a plaintiff in a fraud case has to have specific facts concerning information that really is only in the purview of the defendant, which is what they knew at any particular time. The plaintiff can allege that, and then we go to discovery. And when it's clear that they didn't actually know, you win.

MR. FLOOD: With -- Your Honor, I don't disagree with the rule as you formulate it with the following

qualification: If in addition to the arch- -- to the Conference -- I keep saying the archdiocese. I apologize. If in addition to the Conference, they had also alleged that my son's swim team was a participant in this and they had some role, one would expect there to be allegations about why it is that they had the kind of knowledge that would obligate them to go forward in a case like this.

THE COURT: Only insofar as your son's swim team has nothing to do with this. He says in his complaint that this very institution, the Conference, is the one that's collecting the money. And he says that the Conference, through these other guidelines, indicates that donor money is supposed to go to where it's supposed to go. So it's not as though they're your son's swim team or somebody who has nothing to do with the allegations at issue here. And the question is just whether it's enough having made those allegations at the very beginning of the case to get past this initial hurdle.

MR. FLOOD: I agree, Your Honor. I don't want to overparse your language, but it's not enough, I submit, to say they had something to do with it. I think much more is required is -- because it's fraud. It has been particularized.

Now, this is not something -- I'm not suggesting that there's some insanely draconian legal gloss that attaches to Rule 9(b). We all know it's actually to the contrary. But if you sue a single defendant and you sue them in fraud, it's not enough to say, as plaintiff says four, five, six times, they knew or should have known. Knew or should have known is the language of negligence.

THE COURT: But, Mr. Flood, these -- he's also alleging that these are the very defendants who are making the statement that he says is fraudulent; right? I take your point in the world in which the person -- the party at issue is someone who doesn't have any connection to the allegedly fraudulent statement or to the underlying facts that would indicate that this is fraud.

But he says these are the people who are making the statements, see the website, see the brochures and materials. These are the people who, he alleges, are collecting the money; right? So they're not just random people. They're -- they're the statement makers and the money collectors. And so the question is saying they knew at the time they made the statement, is that sufficient or do they have to have --or does he have to have more in terms of how they might know or what is the org chart between the Conference and the Vatican?

And I'm just not sure -- given the allegations that place the Conference at the center of this with respect to the alleged misrepresentations, I'm not sure he needs to say more than when they made the statement, they knew.

MR. FLOOD: Well, and our response to that, Your Honor, I think is, number one, when they made the statement, they need to make it to him.

Number two, the statement that he points to, which is in the script, it does not say what he interpreted it to mean and cannot be fairly read to say immediate and exclusive.

Number three, if you're going to identify a defendant as a fraudster in a complaint, you ought to come forward with facts, you know, specific enough to

show why they had the improper mental state and -- and knowledge and also an attempt to deceive.

There's -- there's really nothing in the complaint that's not the kind of boilerplate ruled out by -- by the rule and the case laws about -- about this knowledge element and this intent element. They're asking you to assume that because they managed to cobble together, you know, pieces of the website that nobody has ever alleged to have seen.

THE COURT: All right. Any final thoughts on this, Mr. Flood? I'm going to give Mr. Stanley the last word, but I'm happy to entertain any other arguments that we haven't touched on here.

MR. FLOOD: With Your Honor's leave, I know we touched on this, but if I could say one last thing about the jurisdictional argument. The basis -- the centerpiece of the complaint is that Mr. O'Connell gave money but he didn't -- but his gift was not used, exclusively and immediately solely for the poor.

THE COURT: I'm sorry. I didn't hear you. Solely for --

MR. FLOOD: For the poor or the displaced.

THE COURT: Thank you.

MR. FLOOD: I'm sorry. This necessarily, unavoidably invokes questions of church governance and how money is spent. You cannot claim that the fraud consists in imperfect immediacy or fatal lack of -- of directness and at the same time say this can be decided on neutral principles. Inevitably, unavoidably the Court or a jury will be put in a position ultimately of saying how much is too much, how soon is too soon. And the same thing goes with exclusivity.

THE COURT: Can I ask you how much is too much but not relative to the canons or to the Bible; right? I mean, it's not asking whether this is true or untrue as it relates to religious teachings, is it?

MR. FLOOD: No, not at all, Your Honor. This is not a doctrine case, you know, or -- you know, like the defrocking case that -- that my counterpart mentions. This is about the use of church funds for the church's charitable purposes.

THE COURT: Can I -- if the Court's ultimate ruling -- and I'm -- I don't know how we get here, but I'm just trying to play out what you're suggesting about entanglement. What if the answer is the defendants just have to say exactly what is happening to the money? They don't have to change their practice. They don't have to give more to the poor versus, you know, not. And so it's not really about are you breaking some sort of rule or law or principle based on how you allocate money, but the answer is just you have to tell people this is what we do with the money. Why isn't that a neutral principle kind of analysis?

MR. FLOOD: Well, I think, Your Honor, because in -- in the real world, in the world of hierarchal church with worldwide jurisdiction and a bishops' conference located in one country, to avoid, you know, the -- the very rigorous -- to survive a motion to dismiss, the only possibility in the world in which Your Honor's suggestion becomes law is to have a kind of disclosure that is so detailed, so ramified it would be like one of those -- you know, all the disclaimers on those -- on those medication commercials for people my age that I see. You have to say it's going here and there's not going to be any of this and you don't have to worry about that and the other thing.

The bishops' conference in one country, I submit, doesn't know what the Vatican does. I'm not offering that as a proposition of fact to create a factual issue. I'm just saying that in the natural scheme of things, given the nature of the church and where the -- the Conference fits, they're just not, by reason of structure, in a position to have that knowledge.

THE COURT: And so isn't Mr. O'Connell's claim that they shouldn't be telling people where it goes? So fine. They don't know what the Vatican does with the money. The essence of the fraud claim is here are all these statements where they're telling people it goes to the poor. And so isn't the answer don't say where it goes. Don't solicit; right? It's not -- that's not complicated.

Don't solicit money telling people this goes to the poor if you either don't know where it goes or if it's going to all of these investments and whatever before it gets to the poor, such that people are confused or people feel as though they haven't been leveled with in terms of how this money is being allocated.

MR. FLOOD: With respect to Your Honor, I don't think that could be the answer. And I don't think it could be the answer because the -- the -- the alternative you've given is -- and I don't mean to mischaracterize it. Sounds like you've either got to tell them everything or you've just got to be quiet about it. And I think both are -- I think that the "be quiet about it" is just utterly impracticable. I don't think you can ask parishioners in the pews to give money without giving them some sense of where it might go. This is kind of a rhetorical point about how appeals work.

On the other side -- on the other part of the disjunction, I don't think you can itemize every conceivable use because I don't think, in a local church, meaning the church in this or that country, is going to have that information and I also --

THE COURT: But can I ask you --

MR. FLOOD: Could I have one last point, Your Honor?

THE COURT: Yeah.

MR. FLOOD: Just one.

And I also think to insist on that as a rule of law for churches that raise money going forward is to impose an exceptionally intrusive and burdensome standard on something that at least before this case I'm not aware any Court has ever contemplated.

THE COURT: Can I -- can I ask you a hypothetical? And then I'll move to Mr. Stanley.

MR. FLOOD: Of course, Your Honor.

THE COURT: This is not this case because you are alleging that -- or maybe -- I don't know. We haven't really seen your side of the case yet, but I can imagine you would argue that, you know, as the Pope apparently did in some of the responses to the articles, that he's making investments and some percentage of it is going to the poor.

But in a world in which -- let's say a hundred percent of the money was going to, you know, Vatican operations and none of it was going to the poor and yet we had the same facts concerning solicitations being made with the statement this is going to the poor, is that a viable basis for a fraud claim or would that still

be subject to the entanglement concerns that you're talking about?

MR. FLOOD: The short answer, Your Honor, is I don't know. It's a whole lot closer to actionable fraud than what we have here, because I think that a 100-percent erroneous assertion, it would be highly problematic from a deception standpoint. Now that, I think, alone doesn't give a plaintiff -- in Your Honor's hypo, I don't think that is enough alone to deliver all elements of the fraud. But I think, you know, it does sound to me like it's a false statement and on Your Honor's hypo, it's an in- -- inarguably false statement that can't be qualified away, not what we have here.

THE COURT: And -- and no defense, I'm a church, this would have you looking at my uses of the money, wouldn't be -- would you or would not be able to make the kind of jurisdictional claim that you're making here?

MR. FLOOD: Your Honor, I'd want to know a whole lot more about the factual context, but I think the best I can say on -- on your hypo is it would be a much more difficult case than what we have here. Because the idea of the -- of, you know, faithful discretion, the idea, you know -- the things that are said on the Vatican website, that's all taken out of play. If everybody is lying about this, then I think, you know, a church member -- I think -- let me put my point differently and then I'll -- and then I'll shut up.

I think Your Honor's hypothetical becomes very close to those very rare -- I can only find two of them -- cases in which a church says -- in which the Court has said, you know, somebody who raises money in a subscription, where there's a specific purpose, clearly

identified commitment forms are filled out -- for example, to building a building, and then they don't build the building and just keep it in the church treasury -- courts have allowed those kinds of cases to go forward, and I think Your Honor's hypothetical, if not on all fours, is much, much closer to that.

THE COURT: All right. Thank you.

MR. FLOOD: Thank you, Your Honor.

THE COURT: Mr. Stanley, I'll give you the final word.

MR. STANLEY: Thank you very much.

Again, none of that happened here. The representations, it's not very complex. They give a very small paragraph of what they passed down, what they're going to do with the money. It didn't say, hey, we're going to build a rainy day fund, we're going to invest in apartments and condos in London or Swiss funds or movies, and then if it spins off profit, we'll have a bigger one or we will lose money. It didn't say one day we might use it for church deficits.

This was the rule of the game. Give money for this. And our client will testify that he did not give money to the church. He gave money as a pass-through. He was giving money to poor people. His goal was not to give any money to the church. His goal was to give money to people who were on the edges. And --

THE COURT: But I guess Mr. Flood's point is, all right. So fine. Even if the allegations in the complaint are true, that only 10 percent of this money actually ends up going to poor people, does the Court really have the authority to evaluate that in -- in order to assess whether or not there's fraud?

MR. STANLEY: Yes. Because our position will be -- and, again, the discovery will allow us to show behind there that a hundred percent was supposed to go to the poor people, not 10 percent. And that when it turns out, the facts that come out, that the money went to Cardinal Becciu's relatives instead of poor people -- and they aren't poor -- they went to investment fund managers in Switzerland, they went to -- 170 million went to this profit, went to this developer in London, who was very suspicious, that the multi-fund -- it went wrong. This was run amuck. This was a fund that nobody -- who was watching whatever. It wasn't done right.

Again, our client's testimony will be he expected a hundred percent of it to go to the poor, not to be gone this way, and it was very poorly done.

THE COURT: Is that an expectation that just comes from him, or are you saying that's what they said?

MR. STANLEY: That's what they said to him. It was going to go to the poor and people in the margin. And, again, discovery will show this, and we'll get this out, but that's our position.

As to the bottom line, we're happy with our complaint. It's -- as you said in the *Tapp* case, "It is . . . axiomatic that for the purpose of the court's consideration of the Rule 12(c) motion, all of the well-pleaded factual allegations in the adversary's pleadings are assumed to be true and all contravening assertions in the movant's pleadings are taken to be false."

And any contravening assertions they simply denied, but this other stuff about what's on the Pope's

website, that's in their -- in their motions. But our pleadings, the well-pleaded factual allegations, are assumed to be true, which is also what they said in their reply. For the purpose of this motion, the Conference is not disputing any of the plaintiff's allegations.

So we're resting on our pleading, we're happy with our pleading, and we think the Rule 12(c) should be denied, and we think denying (b) allegations, we think there's -- we told -- we told them what he relied on and we gave it out very clearly.

THE COURT: But you don't say on June 12th, 2018, while in this particular church service, Pastor So-and-So said X; right?

MR. STANLEY: We did -- you have to -- maybe -- maybe not clearly on that day, and you talked about that in your *Tran* case. You said you don't have to give every -- it's just give them fair notice of what's going. But what we do say is that this is a once-a-year solicitation, a special collection once a year. What we do say is that O'Connell heard that and he relied on it and he donated money. So, yeah, we do say it.

And, again, they can take the deposition of the pastor, see what he -- the Father to see what -- what he said and what was instructed to him to say. We can get all that there, but O'Connell is going to say that's exactly what he heard. And that's what he said here. And if you look, it's very clear -- paragraphs 48 to 51 are very clear on that.

THE COURT: All right. Thank you very much. I will take the motion under advisement and issue a written ruling.

MR. STANLEY: Thank you for your patience.

THE COURT: Thank you.

MR. FLOOD: Thank you, Your Honor.

THE COURT: Have a good day.

(The proceedings concluded at 3:34 p.m.)

CERTIFICATE OF OFFICIAL COURT REPORTER

I, Nancy J. Meyer, Registered Diplomate Reporter, Certified Realtime Reporter, do hereby certify that the above and foregoing constitutes a true and accurate transcript of my stenograph notes and is a full, true, and complete transcript of the proceedings to the best of my ability.

Dated this 1st day of February, 2021.

/s/ Nancy J. Meyer
Nancy J. Meyer
Official Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter
333 Constitution Avenue Northwest,
Room 6509
Washington, D.C. 20001

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID O'CONNELL, individually and on behalf of all others similarly situated, Plaintiff, v. UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, Defendant.	Case No. 1:20-cv-001365-JMC

JOINT STATUS REPORT AND DISCOVERY PLAN

Pursuant to Fed. R. Civ. P. 26(f), Local Rule 16.3(c), and this Court's Order of November 28, 2023, Plaintiff David O'Connell (Plaintiff) and Defendant United States Conference for Catholic Bishops (Defendant), submit the following Joint Status Report and Discovery Plan. In exhibits 1 and 2, Plaintiff and Defendant have each submitted a Proposed Scheduling Order, consistent with their positions set forth below. This report includes a succinct statement of all agreements reached and, where the parties could not agree, a succinct description of the parties' positions. The parties are prepared to provide further briefing should the Court so request.

1. Likelihood of Disposition by Dispositive Motion

Plaintiff's Position: Plaintiff does not believe that this case is likely to be disposed of by way of dispositive motion.

Defendant's Position: Defendant acknowledges that the Court denied Defendant's motion to dismiss for lack of subject matter jurisdiction and motion for judgment on the pleadings, and denied without prejudice Defendant's motion for summary judgment. Defendant has appealed the Court's order on its motion to dismiss for lack of subject-matter jurisdiction and motion for judgment on the pleadings, and notes that Defendant's motion for summary judgment may be renewed at a later date.

2. Joinder, Amendment of Pleadings, and Narrowing of Issues

The Court stated that the parties may "conduct discovery and then we can set a deadline for amending pleadings at the appropriate time." 11/17/23 Hr'g Tr. 15:1-5. Accordingly, the parties have not included a deadline for amending pleadings in their proposed scheduling orders.

The parties agree that factual or legal issues may not be narrowed at this time.

3. Assignment to Magistrate Judge

The Parties do not agree to the assignment of a Magistrate Judge for all purposes.

4. Possibility of Settlement

The parties do not believe that there is a realistic possibility of settling the case at this time.

Defendant's Position: Defendant has asked Plaintiff for his estimated damages. Defendant's understanding is that Plaintiff will only settle on a class-wide basis. Defendant is not willing to settle on a class-wide basis.

5. Alternative Dispute Resolution

The parties do not believe that the case would benefit from alternative dispute resolution at this time.

6. Resolution by Summary Judgment or Motion to Dismiss

Plaintiff's position: Plaintiff does not believe that the case can be resolved by motion for summary judgment or motion to dismiss. Plaintiff's proposed schedule is set forth in exhibit 2.

Defendant's Position: Defendant acknowledges that the Court denied Defendant's motion to dismiss for lack of subject matter jurisdiction and motion for judgment on the pleadings, and denied without prejudice Defendant's motion for summary judgment. Defendant has appealed the Court's order on its motion to dismiss for lack of subject-matter jurisdiction and motion for judgment on the pleadings, and notes that Defendant's motion for summary judgment may be renewed at a later date.

Defendant has proposed a deadline for filing a motion for summary judgment in its proposed scheduling order.

7. Initial Disclosures

The parties stipulate to extend the deadline to exchange initial disclosures until at least January 24, 2024.

Plaintiff's Position: Plaintiff believes that the parties should proceed to exchange Rule 26(a)(1) initial disclosures on January 24, 2024. Plaintiff does not believe that discovery should be bifurcated, as explained further below. In addition, Plaintiff

contends that initial disclosures are necessary regardless of whether discovery is bifurcated.

Defendant's Position: Defendant states that, because discovery should initially be limited to issues relating to class certification, initial disclosures should be deferred until after the class-certification decision. *See infra* Pt. 13. If the Court orders that discovery should not be limited to issues relating to class-certification, Defendant agrees that initial disclosures should be due January 24, 2024.

8. Discovery

Plaintiff believes that discovery should not be bifurcated. Defendant believes that class certification and merits discovery should be bifurcated. The Parties' positions on bifurcation are set forth in section 13 below. The parties' respective proposed schedules are included in exhibits 1 and 2.

The parties agree that a protective order is needed, will make best efforts to negotiate an agreed one, and will submit any disputes to the Court for resolution. The parties have proposed deadlines for the submission of an agreed protective order and any related disputes.

Defendant's Position: Defendant's proposed schedule reflects a good-faith attempt at sequenced discovery, featuring precertification discovery, class certification briefing, merits discovery, and summary judgment briefing. Defendant's proposed schedule also provides for expert disclosures and *Daubert* motion practice in connection with class-certification and summary-judgment briefing. Defendant has based this proposed schedule on Plaintiffs' request for the production of documents dated July 6, 2020.

Defendant has requested additional information from Plaintiff concerning contemplated subjects of discovery, but Plaintiff has declined to provide that information.

9. Preservation and Production of Documents and Electronically Stored Information ("ESI")

The parties discussed the preservation of ESI at the Rule 26(f) conference and have taken appropriate steps to ensure the preservation of ESI, including by suspending any applicable automatic deletion of potentially discoverable ESI. The parties agree to make best efforts to negotiate an agreed ESI Order, and have proposed deadlines for the submission of an agreed ESI Order and any disputes to the Court.

10. Claims of Privilege

Defendant claims a privilege for, at a minimum, internal Church communications.

The parties agree to make best efforts to negotiate an order under Federal Rule of Evidence 502, and have proposed a deadline for the submission of a proposed order under Federal Rule of Evidence 502 to the Court.

11. Expert Discovery

The parties believe that the requirements for exchange of expert witness reports and information under Fed. R. Civ. P. 26(a)(2) should not be modified at this time. The parties have proposed case schedules in exhibits 1 and 2.

Plaintiff's Position: Plaintiff believes that class certification expert reports should be exchanged together with class certification briefs and that Plaintiffs' motion for class certification and class-

certification *Daubert* motions should be heard together, as is common practice. This will streamline the schedule and will allow the Parties and the Court to address these closely related issues together.

Defendant's Position: Defendant asserts that the schedule should sequence expert disclosures and depositions before *Daubert* motion practice, and *Daubert* motion practice before class-certification motion practice. This will facilitate an orderly progression of discovery, as expert discovery will inform *Daubert* motion practice, and *Daubert* motion practice may inform class-certification motion practice.

12. Class Actions

The parties disagree on whether discovery relating to class certification and to merits should be bifurcated. *See infra* Pt. 13. The parties have proposed case schedules in exhibits 1 and 2.

Defendant's Position: Defendant has included deadlines for class-related fact and expert discovery, and for class-certification motion practice, in its proposed schedule. Defendant asserts that *Daubert* motion practice relating to class certification should precede class-certification motion practice, as the resolution of any *Daubert* motions may inform the parties' class-certification motion practice.

13. Bifurcation

Plaintiff believes that discovery should not be bifurcated. Defendant believes that class certification and merits discovery should be bifurcated.

Plaintiff's Position: Plaintiff agrees that class certification is a threshold issue that should be

decided at an early stage. But, as explained below, bifurcating discovery is impractical, will prejudice Plaintiff, and will lead to disputes, inefficiencies, and delay. Accordingly, the Court should reject Defendant's proposal to bifurcate discovery. It should instead follow what other courts in this District have done in similar situations: refuse to formally bifurcate discovery, but set an early deadline for class certification briefing to focus the parties' initial efforts on certification issues. *See, e.g.*, *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 258 F.R.D. 167, 176 (D.D.C. 2009) (adopting this approach and collecting cases); *In re Domestic Airline Travel Antitrust Litig.*, 2017 U.S. Dist. LEXIS 232974, at *25 (D.D.C. Jan. 30, 2017) (same).

In deciding whether to bifurcate discovery, "Courts must consider the degree to which the certification evidence is 'closely intertwined' with, and indistinguishable from, the merits evidence in determining whether bifurcation is appropriate." *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 258 F.R.D. 167, 173 (D.D.C. 2009). "The Supreme Court had directed courts considering class certification motions to engage in a 'rigorous analysis' to determine whether Rule 23's prerequisites have been satisfied, an analysis that will frequently []overlap with the merits of plaintiff's underlying claim." *McEwan v. OSP Grp.*, L.P., 2016 U.S. Dist. LEXIS 42798, at *7 (S.D. Cal. Mar. 30, 2016) (emphasis added). And indeed here, the evidence that Plaintiff needs to prove that common questions predominate is closely intertwined with and indistinguishable from the evidence Plaintiff needs to prove his underlying claim.

As set forth in the Complaint, Plaintiff claims that Defendant committed fraud by making material misrepresentations and omissions about how the Peter's Pence collection would be used when soliciting charitable contributions from Plaintiff and the putative class. *See* Complaint, Count I. Plaintiff also claims that Defendant breached its fiduciary duties by failing to ensure that the charitable contributions by Plaintiff and putative class members were spent in accordance with the promises it made. *See* Complaint, Count II.

To establish that common issues of law and fact predominate as to his fraud claims as required by Rule 23 (a class certification issue), Plaintiff will need evidence showing what representations about the Peter's Pence collection were made to Plaintiff and putative class members; whether those representations were false; and whether Defendant knew or should have known they were false. Plaintiff will also need evidence showing that Defendant is responsible for the representations at issue. This evidence will show that Defendant made substantially similar representations that were false in substantially the same way to putative class members, meaning that the key issue of whether Defendant made misrepresentations is a common, class-wide issue. And, this same evidence is precisely the evidence Plaintiff will need to establish that Defendant made actionable misrepresentations to Plaintiff and the putative class in the first place (a merits issue). *See, e.g.*, Complaint ¶¶18-25 (summarizing evidence).

Similarly, to establish that common issues of law and fact predominate as to his breach of fiduciary duty

claims (a class certification issue), Plaintiff will need evidence showing what promises were made to putative class members about how the Peter's Pence Collection would be used; whether Defendant was responsible for making those promises and for collecting the Peter's Pence charitable contributions from putative class members; and whether Defendant failed to ensure that the funds it collected were used according to the promises that were made. This evidence will show that Defendant breached its fiduciary duties to Plaintiff and the putative class in substantially the same way, meaning that the key issues of whether Defendant owed the putative class fiduciary duties and whether Defendant breached its fiduciary duties is a common issue. And, this evidence is precisely the same evidence Plaintiff will need to establish that Defendant owed and breached fiduciary duties Plaintiff and the putative class in the first place (a merits issue).

In short, in this case, "[d]iscovery relating to class certification is closely enmeshed with merits discovery, and in fact cannot be meaningfully developed without inquiry into basic issues of the litigation." *In re Rail Freight*, 258 F.R.D. at 175 (quoting *Gray v. First Winthrop Corp.*, 133 F.R.D. 39, 41 (N.D. Cal. 1990)). As a result, "bifurcating discovery risks prejudicing plaintiff, who must meet a high burden to show certification of the class is proper." *Obertman v. Electrolux Home Care Prods.*, 2020 U.S. Dist. LEXIS 107147, at *5 (E.D. Cal. June 17, 2020). It will "create[] unnecessary gaps in the evidence as a defendant has a strong incentive to withhold evidence even if such evidence 'overlap[s] with the merits of the plaintiff's underlying claim'" *Ahmed v. HSBC Bank USA, Nat'l Ass'n*, 2018 U.S.

Dist. LEXIS 2286, at *8-9 (C.D. Cal. Jan. 5, 2018). And, it will lead to unnecessary duplication of effort and burden on the parties and witnesses, for example by requiring that many fact witnesses be deposed twice (once on class certification and then again on issues related to merits).

In addition, "Bifurcated discovery fails to promote judicial economy when it requires 'ongoing supervision of discovery.' If bifurcated, this Court would likely have to resolve various needless disputes that would arise concerning the classification of each document as 'merits' or 'certification' discovery." *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 258 F.R.D. 167, 174 (D.D.C. 2009) (rejecting Defendant's proposal to bifurcate). Here, the parties already have disputes about whether discovery should be classified as "merits" or "certification" discovery, *see* §7 (parties dispute whether initial disclosures constitute "merits" or "certification" discovery), and—given how certification and merits issues are closely intertwined—will surely have many if discovery is bifurcated. This will waste party and judicial resources and is a second independent reason to reject Defendant's proposal to bifurcate. *Id.* (denying bifurcation and adopting proposal substantially similar to what Plaintiff proposes here for this reason among others); *Ahmed*, 2018 U.S. Dist. LEXIS 2286, at *8-9 (explaining that courts are "reluctant to bifurcate class-related discovery from discovery on the merits" for this reason); *see True Health Chiropractic, Inc. v. McKesson Corp.*, 2015 U.S. Dist. LEXIS 7015, at *7 (N.D. Cal. Jan. 20, 2015) ("[T]he line between 'class certification discovery' on the one hand, and 'pure merits' discovery on the other, can be difficult to discern.").

Finally, bifurcation will result in a much more lengthy case schedule and, as a result, delay resolution or trial. Indeed, under Defendant's proposed schedule, trial would be delayed until Spring 2027 (over seven years after this case was filed). Under Plaintiff's schedule, trial could realistically proceed a year or more sooner.

Defendant argues that disputes over potential attempts by Defendant to claim privilege as to "internal Church communications" will result in motion practice and delay the Court's decision on class certification. But such disputes are likely to arise regardless; for example, *any* records of Defendant's collection, administration, accounting, or disposition of *any* donated funds—without which Plaintiff cannot show whether Defendant complied with its duties to ensure donor money was ultimately spent as Defendant represented to class members—could be subject to Defendant's anticipated "privilege" claims. Thus, resolving all such closely related disputes at once (instead of attempting to parse out only evidence unrelated to the "merits" and then have the same dispute again over similar "merits" evidence) will preserve the resources of the Court and the parties. And, in any event, class certification will be decided months sooner under Plaintiff's proposal than under Defendant's.

Finally, Defendant argues that "it is a common practice to defer merits discovery in cases against religious bodies asserting First Amendment defenses." (citing *Collette v. Archdiocese of Chicago*, 200 F. Supp. 3d 730 (N.D. Ill. 2016); *Pardue v. Center City Consortium Schools of the Archdiocese of Washington, Inc., et al.*, 875 A.2d 669 (D.C. 2005)). But

the cases it cites are not about bifurcating class discovery and merits discovery. Rather, in those cases, a First Amendment issue (different from the one here) turned on a disputed fact. So, to allow the First Amendment issue to be decided first, those cases allowed limited discovery to proceed only on that issue. That situation has nothing to do with the present situation, where Defendant's First Amendment issue turns on the pleadings not a disputed fact and has already been decided in Plaintiff's favor, and the dispute is about whether class and merits discovery should be bifurcated.

In sum, the Court should not bifurcate discovery. Following the common-sense approach of *In re Rail Freight* and *In re Domestic Airline Travel*, and the Court should instead set a case schedule through class certification, as Plaintiff proposes.

Defendant's Position: Defendant requests that this Court bifurcate discovery, with discovery prior to the deadline for Plaintiff's motion for class-certification limited to that issue.

This Court has discretion to order bifurcation of discovery. In *Hubbard v. Potter*, for example, the court ordered bifurcation of discovery, and the assigned Magistrate Judge entertained discovery motions. 2007 WL 604949, *2 (D.D.C. Feb. 22, 2007) (directing limited discovery tailored to particular case). In determining whether bifurcation is appropriate, "courts consider the following factors: (1) expediency, meaning whether bifurcated discovery will aid the court in making a timely determination on the class certification motion; (2) economy, meaning 'the potential impact a grant or denial of certification would have upon the pending litigation,' and whether

the definition of the class would 'help determine the limits of discovery on the merits;' and (3) severability, meaning whether class certification and merits issues are closely enmeshed." *Ballard v. Kenan Advantage Grp., Inc.*, 2020 WL 4187815, at *1 (N.D. Ohio July 20, 2020) (quoting 3 Newberg on Class Actions, § 7:17 (5th ed.)); *see also In re Domestic Airline Travel Antitrust Litig.*, 2017 WL 11565592, * 4 (D.D.C. Jan. 30, 2017).

Each of these factors favors bifurcation in this case. First, bifurcation aids the court in the timely determination of a class certification motion. The parties agree that the class-certification deadline should precede the summary-judgment deadline. Although there may be some overlap between merits and class-based discovery (*e.g.*, discovery relating to the typicality of Plaintiff's claims), discovery into other subjects—*e.g.*, knowledge under Plaintiff's claim of fraud—may be unnecessary to a determination of class certification under Fed. R. Civ. P. 23. Spending party and judicial resources on that discovery will prolong the timeline before this Court determines whether class-certification is appropriate.

Plaintiff maintains that bifurcation would prolong discovery by a year or more, but there is no basis for that assertion. Plaintiff has not proposed any case deadlines beyond the class-certification hearing. And Plaintiff's proposed pre-certification fact-discovery period—as one would expect, given the breadth of contemplated discovery—roughly doubles Defendant's in duration. The length of Defendant's proposed schedule is due in large part to the sequencing (as is common) of fact discovery, expert discovery, *Daubert* motion practice, and class-certification motion practice. By contrast, Plaintiff's

proposed schedule includes a lengthy fact discovery period, following by near-contemporaneous expert disclosure, *Daubert*, and class-certification motion practice deadlines. To facilitate an orderly case schedule, those deadlines would need to be extended and sequenced.

Second, bifurcation promotes economy. That is because full merits discovery is likely to embroil the parties and Court in disputes over the scope of appropriate discovery. As in any case, each party may have certain protected communications or work product. And here, given the nature of the allegations and Defendant's status as a religious organization, there are additional privileges relating to documents or communications bearing on the First Amendment and matters of church governance.

This is not a theoretical concern. Although Plaintiff has declined Defendant's request to provide information concerning proposed subjects of discovery beyond its first requests for production of documents dated July 6, 2020, those requests seek communications with the "Holy See, Vatican City, [and] Apostolic Nunciature." RFP 19. Defendant claims a privilege for, at a minimum, internal Church communications, and assertion of that privilege may well generate motion practice. Motion practice relating to the assertion of a First Amendment privilege will (at a minimum) delay the class-certification decision. Insofar as that request relates to the merits of Plaintiff's claims, bifurcation enables the parties to avoid disputes arising from the particular First Amendment issues at play in this case.

Plaintiff's only answer is to say that privilege disputes are likely to occur regardless of the scope of discovery. But as a matter of efficiency, it is surely in the interest of the Court and parties to avoid disputes where possible. And as a matter of fairness, and mindful of "the need to protect the rights of all parties"—both recognized considerations in the case law—it is likewise appropriate to fashion discovery to avoid unnecessary disputes. *In re Domestic Airline Travel Antitrust Litig.*, 2017 WL 11565592, * 4 (D.D.C. Jan. 30, 2017).

Given the risk of intruding on matters of church governance, it is a common practice to defer merits discovery in cases against religious bodies asserting First Amendment defenses. *See, e.g.*, *Collette v. Archdiocese of Chicago*, 200 F. Supp. 3d 730, 735 (N.D. Ill. 2016) (denying motion to dismiss, but limiting the scope of discovery to the "narrow" issue of the applicability of the "ministerial exception"); *Pardue v. Center City Consortium Schools of the Archdiocese of Washington, Inc., et al.*, 875 A.2d 669, 670-72 (D.C. 2005) (affirming order of Boasberg, J., barring suit under application of the "ministerial exception," following limited discovery only on that issue).[1] Plaintiff dismisses these cases as involving threshold determination of First Amendment rights, which could obviate the need for further discovery. But bifurcation was necessary in those cases because courts seek to fashion discovery in cases implicating the First Amendment to avoid intrusion into church

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[1] Although it is Defendant's position (as explained in its earlier dispositive motion) that the First Amendment bars this case from proceeding at all, Defendant acknowledges that this Court denied that motion. That order has been noticed for appeal.

governance. The Supreme Court has frequently and recently "radiate[d] ... a spirit of freedom for religious organizations, an independence from secular control or manipulation." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 186 (2012) (citing *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952)). Recognizing that the "very process of inquiry" can "impinge on rights guaranteed by the Religion Clauses," *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979), courts enforce protections to avoid the entanglement created by a "protracted legal process pitting church and state as adversaries." *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985). And that would be the result if church personnel and records here are "subject to subpoena, discovery, [and] the full panoply of legal process designed to probe the mind of the church." *Id*. And here, denial of Plaintiff's motion for class certification is likely to terminate the case—and, as in the above-captioned bifurcated matters, obviate any further discovery. Indeed, the sensitivity of merits discovery is a relevant consideration even outside the First Amendment context. In *Ballard*, a putative class action under the Fair Credit Reporting Act, the court recognized that the "avoidance of premature disclosure of sensitive" information supported bifurcating discovery. 2020 WL 4187815, at *2.

As mentioned, the case appears unlikely to proceed in the event that the putative class is not certified, because the individual plaintiff's damages are presumably *de minimis*. The Manual for Complex Litigation has recognized that in such cases, "discovery into aspects of the merits unrelated to

certification delays the certification decision and can create extraordinary and unnecessary expense and burden." Manual for Complex Litigation (Fourth) § 21.14 (2004). As a result, merits discovery risks the expenditure of resources on a claim unlikely to be pursued.

Third, as stated, although there may be overlap between merits and class-certification discovery, there are issues that do not require discovery before the class-certification question. Plaintiff asserts that discovery on the merits—for example, the elements of knowledge and falsity under Plaintiff's fraud claim—is required for this Court's class-certification determination, but nowhere explains why that is so. And more fundamentally, it is not the case (as Plaintiff suggests) that the prospect of discovery disputes forecloses bifurcation here. To the contrary, the *Hubbard* case involved a dispute concerning the appropriate scope of class-certification discovery following bifurcation. That dispute was resolved, and the case proceeded. And here, proceeding with merits and class-certification at the same time is likely to generate a greater number of discovery disputes, because of the important First Amendment interests at stake.

Defendant's proposed schedule reflects bifurcation of class-related and merits discovery.

14. Pretrial Conference

Plaintiff's Position: Plaintiff believes that the Court should set the date of the pretrial conference following its decision on Plaintiff's anticipated motion for class certification.

Defendant's Position: Defendant proposes a pretrial conference of February 15, 2027.

15. Trial Date

The parties request that the Court set a trial date at the pretrial conference.

16. Other Matters

Plaintiff's Position: Plaintiff believes that Defendant's attempt to appeal an interlocutory order is meritless and that the appeal will be summarily dismissed for lack of jurisdiction.

Defendant's Position: Defendant notes that it filed a Notice of Appeal on December 18, 2023. The Court of Appeals issued an Order to Show Cause on December 22, 2023. That order requires Defendant to provide the Court of Appeals with Defendant's basis for appellate jurisdiction. Defendant will comply with that Order, and reserves the right to move to stay proceedings in this Court pending the resolution of the issues presented by the Order to Show Cause.

Dated: January 3, 2024

Respectfully submitted,

By: *Simon Franzini*

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID O'CONNELL, individually and on behalf of all others similarly situated, Plaintiff, v. UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, Defendant.	Case No. 1:20-cv-001365-JMC

EXHIBIT 1

[DEFENDANT'S PROPOSED] SCHEDULING ORDER

Upon consideration of the Parties' Joint Status Report and Discovery Plan filed on January 3, 2024, and having been fully apprised of the premises, it is hereby ORDERED that Defendant's proposed schedule is adopted as follows:

Event	Deadline
February 15, 2024	Proposed Protective Order, ESI Order, Rule 502 Order
April 15, 2024	Party Document Productions re: Class Certification
June 15, 2024	Fact Depositions re: Class Certification
August 1, 2024	Expert Disclosures re: Class Certification
September 15, 2024	Rebuttal Expert Disclosures re: Class Certification

October 15, 2024	Completion of Fact and Expert Discovery re: Class Certification
November 15, 2024	*Daubert* Motion(s) re: Class Certification
45 Days after Motion is filed	Opposition to *Daubert* Motion re: Class Certification
30 Days after Opposition is filed	Reply ISO *Daubert* Motion re: Class Certification
April 1, 2025	Motion for Class Certification
45 Days after Motion is filed	Opposition to Motion for Class Certification
30 Days after Opposition is filed	Reply ISO Motion for Class Certification
15 days after briefing is complete	Oral Argument/Evidentiary Hearing on Motion for Class Certification
August 15, 2025	Commencement of Merits Discovery
September 1, 2025[2]	Initial Disclosures
December 15, 2025	Close of Fact Discovery re: Merits
February 15, 2026	Disclosure of Expert Reports re: Merits

[2] The parties stipulate that, if the Court orders that merits discovery should proceed alongside class certification discovery, initial disclosures should be due January 24, 2024.

April 1, 2026	Disclosure of Rebuttal Expert Reports re: Merits
May 1, 2026	Deadline for Expert Depositions re: Merits
May 1, 2026	Close of Discovery
June 1, 2026	*Daubert* Motion(s) re: Merits
45 Days after Motion is filed	Opposition to *Daubert* Motion re: Merits
30 Days after Opposition is filed	Reply ISO *Daubert* Motion re: Merits
September 15, 2026	Motion(s) for Summary Judgment
45 Days after Motion is filed	Opposition to Motion for Summary Judgment
30 Days after Opposition is filed	Reply ISO Summary Judgment
February 15, 2027	Pretrial Conference
30-60 days after pretrial conference	Trial

SO ORDERED.

Dated:

_____

JUDGE JIA M. COBB
U.S. District Court for the District of Columbia

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID O'CONNELL, individually and on behalf of all others similarly situated, Plaintiff, v. UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, Defendant.	Case No. 1:20-cv-001365-JMC

EXHIBIT 2

[PLAINTIFF'S PROPOSED] SCHEDULING ORDER

Upon consideration of the Parties' Joint Status Report and Discovery Plan filed on January 3, 2024, the Court adopts the following schedule through class certification:

Event	Deadline
Proposed Protective Order, ESI Order, Rule 502 Order	February 15, 2024
Close of discovery re Class Certification issues	December 13, 2024
Motion for Class Certification Deadline to Serve Opening Expert reports re: Class Certification	February 17, 2025

Opposition to Motion for Class Certification Deadline to Serve Rebuttal Expert reports re: Class Certification	45 Days after Motion is filed
Reply ISO Motion for Class Certification	30 Days after Opposition is filed
Daubert Motion(s) re: Class Certification	30 Days after Opposition is filed

Following the Court's decision on class certification, the Parties are ORDERED to meet and confer regarding the remaining case schedule and file a supplemental Rule 26(f) report setting forth their proposed case schedule(s) within 14 days of the Court's order on class certification.

SO ORDERED.

Dated:

_____

JUDGE JIA M. COBB
U.S. District Court for the District of Columbia