No. 09-1

In The Supreme Court of the United States

HOLY SEE,

Petitioner,

versus

JOHN V. DOE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

JEFFREY R. ANDERSON, ESQ.
MICHAEL G. FINNEGAN, ESQ.
JEFF ANDERSON & ASSOCIATES, P.A.
366 Jackson Street, Suite 100
St. Paul, MN 55101
(651) 227-9990

WILLIAM A. BARTON, ESQ.
KEVIN K. STREVER, ESQ.
BARTON & STREVER, P.C.
P.O. Box 870
Newport, OR 97365
(541) 265-5377

MARCI A. HAMILTON, ESQ.
36 Timber Knoll Drive
Washington Crossing, PA 18977
(215) 353-8984
Counsel of Record

Attorneys for Respondent John V. Doe

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

Whether an employe's actions "within the scope of employment" creating the conditions for the sexual abuse of a child are "tortious acts" under the tort exception to sovereign immunity established by the Foreign Sovereign Immunity Act, 28 U.S.C. § 1605(a)(5) (2006).

Whether state tort law determines whether acts are "tortious acts" that are "within the scope of employment."

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties identified in the caption, the following entity is a party in the district court but not in the court of appeals: The Order of the Friar Servants of Mary (The Order of the Friar Servants of Mary, U.S.A., Province, Inc.). Former defendant the Catholic Bishop of Chicago, an Illinois corporation sole, was dismissed on July 15, 2004. Former defendant the Archdiocese of Portland in Oregon, an Oregon corporation sole, was dismissed on September 21, 2004.

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The opinion of the court of appeals (Pet. App. 1a-68a) affirming in part and reversing in part the district court's decision is reported at 557 F.3d 1066 (9th Cir. 2009). The opinion of the district court denying the Holy See's facial motion to dismiss for lack of subject matter jurisdiction (Pet. App. 69a-128a) is reported at 434 F. Supp. 2d 925 (D. Or. 2006).

JURISDICTION

The judgment of the court of appeals was entered on March 3, 2009. The Holy See's timely petition for rehearing was denied on March 27, 2009. The court of appeals issued its mandate on April 6, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1602-1611 (2006), provides in relevant part as follows:

> Section 1605. General exceptions to the jurisdictional immunity of a foreign state
>
> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –
>
> . . .

> (5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to –
>
> > (A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or
> >
> > (B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights[.]

28 U.S.C. § 1605(a)(5).

> Section 1606. Extent of liability
>
> As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state *shall be liable in the same manner and to the same extent as a private individual under like circumstances*; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, *the law of the*

> *place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature*, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

28 U.S.C. § 1606 (emphases added).

STATEMENT OF THE CASE

Nature of the Case

This case is about how the Holy See and its agents mishandled Fr. Andrew Ronan, who was a known child sexual predator in the Archdiocese of Benburb, Ireland, and then the all-boys St. Philips High School in Chicago, Illinois, before he sexually abused John V. Doe, the Plaintiff in this case. Although he readily admitted to sexually abusing a boy in the Benburb Archdiocese and to sexually abusing three boys at St. Philips High School, he was then transferred to St. Alban's Church in Portland, Oregon, where he sexually abused John V. Doe, a minor at the time. Fr. Ronan gained John V. Doe's trust through the position and access to children that the Holy See granted him. John V. Doe, as a child, trusted and relied upon the Holy See to nurture and protect him, which led to his trust and admiration for Fr. Ronan. Pet. App. 131a-153a (Amended Complaint,

Doe v. Holy See, 434 F. Supp. 2d 925 (D. Or. 2006) (No. CV 02-430-MO) (filed Apr. 1, 2004)).

Just as it was for John V. Doe, sexual abuse of a child predominantly occurs with the perpetrator having established a relationship with the victim before the abuse. The highest percentage of childhood sexual abuse is perpetrated by family members or other trusted adults. "In sexual assaults of adults, the offender was a stranger in 25% of incidents, a family member in 12%, and an acquaintance in 63%. In contrast, for victims under age 12, the offender was a family member in 47% of incidents, an acquaintance in 49%, and a stranger in just 4%."[1] The perpetrators gain a child victim's trust and acquiescence through the positions they hold, whether it be as a father, mother, grandparent, other relative, teacher, scout leader, or clergy. Thus, abuse in the vast majority of cases does not involve an abduction by "Mr. Stranger Danger" but rather the establishment of a close relationship with grooming of the child over time with the sexual abuse as simply one marker on the

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[1] NATIONAL CENTER FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT 30 (Sept. 1999), *available at* http://www.ncjrs.gov/html/ojjdp/nationalreport99/toc.html. *See also* OFFICE OF THE GOVERNOR OF IDAHO & OFFICE OF THE ATTORNEY GENERAL OF IDAHO, REPORT TO THE IDAHO LEGISLATURE: PROSECUTION OF CHILD SEXUAL ABUSE 6 (Jan. 2008), *available at* http://www2.state.id.us/ag/sexual_prosecution_reports/2007IdahoProsecutionOfChildSexualAbuseReport.pdf ("46% of the juvenile abusers were acquaintances of their victims, 36% were relatives, and 1.33% was a stranger.").

spectrum of the relationship established by the employee with the child. Unlike sexual assault by a stranger, the sexually predatory act in most cases of child sex abuse is the culmination of many prior acts.

In light of contemporary knowledge of the dynamics of childhood sexual abuse, the Oregon courts have recognized that acts by an employee that are within the "scope of employment" and that culminate in sexual abuse can form the basis of a claim of *respondeat superior*. Therefore, the sexual act itself is not the only act that is relative to determining that a tort has occurred or that *respondeat superior* liability is appropriate. Rather, the behavior with the child that is pursuant to the employment relationship and that leads up to the sexual abuse is actionable in tort, making those acts tortious. *Minnis v. Oregon Mut. Ins. Co.*, 48 P.3d 137, 145 (Or. 2002); *Fearing v. Bucher*, 977 P.2d 1163, 1166 (Or. 1999); *Chesterman v. Barmon*, 753 P.2d 404, 406-07 (Or. 1988).

Oregon Law Regarding What Acts Within the Scope of Employment Establish *Respondeat Superior* Liability

Sexual abuse by trusted adults typically occurs through a complex set of acts over time, not any single act. Oregon law has recognized that actions taken by an employee within the scope of employment in relationship to a child can support a claim of *respondeat superior* liability. While the sexual act

itself may not be within the "scope of employment," *Fearing v. Bucher*, 977 P.2d 1163, 1166 (Or. 1999), other acts associated with and leading up to the abuse plainly within the "scope of employment" are sufficient to establish *respondeat superior* liability for the employer. In other words, the relevant "tortious act" is composed of those actions performed within the scope of employment that established the relationship with the child and created the conditions for the sexual abuse. *Id.* Even more importantly, in a case interpreting the language in *Fearing*, the Oregon Supreme Court elaborated that the intentional tort itself can be a tortious act under the scope of employment. *Minnis v. Oregon Mut. Ins. Co.*, 48 P.3d 137 (Or. 2002).

The court below applied this rule to determine that the acts described in the Amended Complaint were the "tortious acts" within the "scope of employment" that establish *respondeat superior* liability, under Oregon state law and, therefore, satisfy the jurisdictional requirements of 28 U.S.C. § 1605(a)(5) (2006). Pet. App. 34a-35a (*Doe v. Holy See*, 557 F.3d 1066, 1083 (9th Cir. 2009)).

Relevant Proceedings Below

The FSIA codified the principle that while foreign sovereigns generally enjoy immunity from claims by citizens of other states, they should be capable of being brought to justice when their acts are tortious or involve commercial activity. "A foreign state is

normally immune from the jurisdiction of federal and state courts . . . subject to a set of exceptions specified in §§ 1605 and 1607. . . . When one of these or the other specified exceptions applies, 'the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances[.]' " (quoting 28 U.S.C. § 1606). *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488-89 (1983). Under the FSIA's tort exception, the Holy See is liable for its tortious actions just as any individual actor would be. 28 U.S.C. § 1606 ("[T]he foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances[.]").

The Holy See submitted a motion to dismiss for lack of subject matter jurisdiction in order to avoid its responsibility for the sexual abuse of John V. Doe by Ronan.

The Holy See's motion was denied based on conduct that fell within the tortious act exception to sovereign immunity in the Foreign Sovereign Immunities Act. 28 U.S.C. § 1605(a)(5) (2006). The tortious act exception is designed to capture harms "caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment[.]" 28 U.S.C. § 1605(a)(5). The plain language of the FSIA states that the extent of liability under the act means "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances[.]" 28 U.S.C.

§ 1606. Because the Oregon Supreme Court has held that "intentional criminal acts of employees" are captured within the *respondeat superior* doctrine "if the acts that lead to the criminal conduct were within the scope of employment," *Fearing v. Bucher*, 977 P.2d 1163, 1166 (Or. 1999), the acts in the case at bar were encompassed by Oregon *respondeat superior* law as to any "private individual" and so "the foreign state shall be liable in the same manner." 28 U.S.C. § 1606.

The district court endorsed the plain language of the FSIA and its purpose of applying the same law to private individuals and foreign states when confronted with like circumstances. The district court held that "'[t]he "scope of employment" provision of the tortious activity exception essentially requires a finding that the doctrine of respondeat superior applies to the tortious acts of individuals.'" *Doe v. Holy See*, 434 F. Supp. 2d 925, 949 (D. Or. 2006) (quoting *Joseph v. Office of Consulate Gen. of Nigeria*, 830 F.2d 1018, 1025 (9th Cir. 1987)). Since there is no cause of action for "scope of employment," the district court examined the meaning of this term within the *respondeat superior* claim and found that Oregon law creates a "theory of 'scope of employment' in which an employer is liable not only for the torts of his employee when the employee is acting within the scope of his employment . . . but also for the intentional criminal acts of employees if the acts that lead to the criminal conduct were within the scope of employment." 434 F. Supp. 2d at 949 (citing *Fearing*, 977 P.2d at 1166.) (internal citation omitted). Thus, the

district court concluded that the tortious act exception applied because, under Oregon law, "plaintiff has sufficiently alleged facts showing that Ronan's conduct preceding the sexual abuse fell within the scope of his employment. Under Oregon law, this is sufficient grounds upon which to hold Ronan's employer liable under a theory of respondeat superior." *Id.* at 950.

The Ninth Circuit, relying on the same precedent as did the district court, agreed that "'the "scope of employment" provision of the tortious activity exception essentially requires a finding that the doctrine of respondeat superior applies to the tortious acts of individuals.' . . . 'This determination is governed by state law.'" *Doe v. Holy See*, 557 F.3d 1066, 1082 (9th Cir. 2009) (quoting *Joseph*, 830 F.2d at 1025 (internal citation omitted)). Contrary to the Holy See's assertion that sexual assault by a priest is *per se* outside the scope of employment, the Ninth Circuit appropriately relied upon the Oregon Supreme Court's clarification of the dictum regarding intentional torts in *Fearing*. *Minnis v. Oregon Mut. Ins. Co.*, 48 P.3d 137, 145 (Or. 2002). The *Minnis* decision read Oregon law to include even the intentional tort within the "scope of employment." *Minnis*, 48 P.3d at 145. The Ninth Circuit observed that "*Minnis* thus makes clear that, rather than holding that sexual abuse is not within the scope of employment, *Fearing* created an alternative test . . . applicable when a plaintiff has alleged an intentional tort: An intentional tort is within the scope of

employment, and can support *respondeat superior* liability for the employer, if conduct that was within the scope of employment was 'a necessary precursor to the' intentional tort and the intentional tort was 'a direct outgrowth of . . . conduct that was within the scope of . . . employment.'" 557 F.3d at 1083 (quoting *Fearing*, 977 P.2d at 1163). The Ninth Circuit concluded that, in short, Doe's "allegations are thus very similar to those in Fearing." *Id.* Applying Oregon law pursuant to the FSIA, the Ninth Circuit held that "Doe has clearly alleged sufficient facts . . . as required to come within the FSIA's tortious act exception. § 1605(a)(5). The Holy See is therefore not immune from Doe's respondeat superior claim." *Id.*

The Ninth Circuit concluded that based upon the Amended Complaint, Doe had sufficiently pled facts for his *respondeat superior* (vicarious liability) claim against the Holy See to proceed. *See* Amended Complaint, *Doe v. Holy See*, 434 F. Supp. 2d 925 (D. Or. 2006) (No. CV 02-430-MO) (filed Apr. 1, 2004).

The decision below was based on the Amended Complaint filed April 1, 2004. Amended Complaint, *Doe v. Holy See*, 434 F. Supp. 2d 925 (D. Or. 2006) (No. CV 02-430-MO) (filed Apr. 1, 2004). It stated: "Plaintiff came to know Ronan as his priest, counselor and spiritual adviser . . . [and] developed great trust, reverence and respect for the Roman Catholic Church and its agents. Thus, Ronan was a person of great influence and persuasion as a holy man and authority figure." Amended Complaint at 6 ¶ 13, *Doe v. Holy*

See, 434 F. Supp. 2d 925 (D. Or. 2006) (No. CV 02-430-MO). The trust formed through the performance of Ronan's spiritual duties as an agent of the Holy See and the Roman Catholic Church enabled Ronan to molest Plaintiff despite the knowledge of his proclivities by his employer. "As a result of these special relationships . . . Plaintiff trusted and relied upon Defendants to nurture and protect him while he was in Defendants [sic] care and custody." *Id.* at 6-7 ¶ 14. Finally, the development of a unique bond between Ronan and Plaintiff in the course of their relationship as pastor and parishioner created the conditions necessary for the sexually predatory behavior to happen. "In late 1965 or early 1966, when Plaintiff was approximately 15 to 16 years old, Ronan, using his position of authority, trust, reverence, and control as a Roman Catholic priest, engaged in harmful sexual contact upon the person of Plaintiff on repeated occasions." *Id.* at 7 ¶ 15.

There is presently a motion pending in the District Court of Oregon to submit a Second Amended Complaint pursuant to Fed. R. Civ. P. 15(a)(2) (2009). *See* Plaintiff's Motion to Amend the Complaint, *Doe v. Holy See*, No. CV 02-430-MO (D. Or., July 15, 2009).

REASONS FOR DENYING THE WRIT

The certiorari petition provides no reason for this Court to review this case, especially at this time. The

decision below was determined by the plain language of the statute and is not in conflict with any decisions of this Court. There is no split in authority among the lower courts regarding what law applies to determine what acts constitute tort liability under the tort exception to sovereign immunity. Secs. 1605 and 1606. Moreover, the case is currently in a procedural posture that counsels against this Court's review.

I. There Is No Split in Authority Regarding Application of the Tort Exception to Sovereign Immunity Under the FSIA

The decision below is not inconsistent with this Court's cases. Nor is there a split in authority regarding the interpretation of the tort exception to sovereign immunity under the FSIA justifying this Court's review. The Petitioner attempts to create the impression of conflict through vague generalizations and dicta drawn from cases not reaching the meaning of "tortious acts" or "scope of employment" in the tort exception and, usually, not reaching any decision involving the tort exception.

A. None of This Court's Cases Cited by the Petitioner Interpret the Tort Exception to Sovereign Immunity – Which Is the Sole Subject of the Petition

The Petition argues that the decision below is inconsistent with this Court's cases interpreting the FSIA. In fact, the cases cited do not even address the

FSIA language at the base of the Petitioner's claims. While each has dicta that can be construed as relevant to the general principles behind the FSIA taken as a whole, none of the cases cited conflicts with, let alone precludes, the Ninth Circuit's holding and interpretation of the tort exception in the FSIA in this case.

The Petition relies heavily on this Court's decision in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989), even though the decision is not on point. This Court in *Amerada* did not reach the question of whether the tort must be within the "scope of employment" of the agent because the injury itself took place 5,000 miles outside the United States and the FSIA's tort exception only applies to "those cases in which the damage to or loss of property occurs *in the United States*." 488 U.S. at 439. Moreover, the Petition cites the House Report stating "Congress' primary purpose in enacting § 1605(a)(5) was to eliminate a foreign state's immunity for traffic accidents and other torts committed in the United States, *for which liability is imposed under domestic tort law*." Cert. Pet. 23 (quoting H.R. Rep. No. 94-1487, at 21) (emphasis added). Liability "imposed under domestic tort law" is determined by state tort law – in this case a vicarious liability claim based on Oregon law – which the Ninth Circuit did in fact apply as it would to any other private entity. Petitioner's citation to *Saudi Arabia v. Nelson,* 507 U.S. 349 (1993), is likewise unavailing. The tortious act exception was not even at issue in

that case – presumably because both the injury and the proximate conduct to Mr. Nelson both occurred outside the United States and would have fallen under *Amerada Hess*.

Petitioner further attempts to manufacture inconsistencies with this Court's cases through reference to *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 620 (1992) (holding that Argentina's unilateral rescheduling of the maturity dates of bonds was a commercial activity with direct effects in the United States under 28 U.S.C. § 1605(a)(2) of the FSIA). *See* Cert. Pet. 18, 20. Once again, however, the Petitioner has relied upon a case that did not interpret the terms of the tort exception.

The Petition also relies upon *Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 498 (1983), to suggest that state law should not determine what acts count as "tortious acts" and what is within the "scope of employment." Instead, Petitioner suggests that this Court create out of whole cloth a federal common law definition of these standard tort law terms. Cert. Pet. 22, 24, 26, 28. However, *Verlinden* did not begin to suggest that the tort exception to FSIA be interpreted according to newly crafted common law by this Court. To the contrary, the Court declined to address any of the FSIA exceptions, because the court of appeals had not directly addressed which exception(s) might apply.

Petitioner invokes *First Nat'l City Bank v. Banco Para El Comercio Exterior De Cuba (Bancec),* 462

U.S. 611, 633-34 (1983), but again, it is a case that is not at odds with the decision below. Cert. Pet. 23, 24, 28. *Bancec* dealt with the question whether a government instrumentality may be held liable under the FSIA for actions that were taken by the sovereign. 462 U.S. at 621. That issue simply is not raised in these proceedings. Finally, the Petition cites *Republic of Austria v. Altmann,* 541 U.S. 677 (2004), for its unremarkable statement that one of the FSIA's purposes is to "clarify [ ] the rules that judges should apply in resolving sovereign immunity claims." Cert. Pet. 29 (quoting *Altmann*, 541 U.S. at 699). It provides no basis for arguing that the decision in this case was inconsistent with this Court's cases.[2]

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[2] The Petition also relies upon *Republic of Philippines v. Pimental,* 128 S. Ct. 2180, 2190 (2008), but the plaintiffs in that case did not even invoke either the tort or the commercial activity exception. It is also off-point when it attempts to use the "direct effects" language of the commercial activity exception in order to argue for a federal common law interpretation of "scope of employment." Cert. Pet. 18. It is more likely that "direct effects" was addressed exclusively to commercial activity. Congress noted that "commercial activity . . . would include not only a commercial transaction performed and executed in its entirety in the United States, but also a commercial transaction or act having a 'substantial contact' with the United States." H.R. Rep. No. 94-1487, at 17. Congress further noted that "[n]either the term 'direct effect' nor the concept of 'substantial contacts' embodied in section 1603(e) is intended to alter the application of the Sherman Antitrust Act[.]" H.R. Rep. No. 94-1487, at 19. Congress seems to be defining commercial activity based on language in *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945). In *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 619 & n.2 (1992), this Court did not reject the suggestion

(Continued on following page)

B. The Petition Cites to No Case in Conflict With the Decision Below, Because Each Case Cited Utilizes the Appropriate State Substantive Law to Determine Whether There Is Liability Under *Respondeat Superior*

The Petition further attempts to create the impression that the decision below is at odds with decisions in courts other than the Supreme Court. Again, there is no such conflict. The principle that state tort law informs the FSIA's tort exception is uncontroversial and widely accepted. *See O'Bryan v. Holy See*, 556 F.3d 361, 383 (6th Cir. 2009) (applying Kentucky *respondeat superior* law to determine whether the tortious act exception of the FSIA applies); *Moran v. Kingdom of Saudi Arabia*, 27 F.3d 169, 173 (5th Cir. 1994) (finding district court's determination that tortious activity exception to immunity did not apply was not a clearly erroneous application of Mississippi law).

The FSIA, or at least its tort exception, 28 U.S.C. § 1605(a)(5), was based upon the FTCA and the decisions with respect to that statute inform similar issues in the FSIA. The Petition, however, fails to note that the reasoning of the court below is consistent with how this Court has read the same

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that the FSIA's "direct effect" requirement embodied *Int'l Shoe*. While *Weltover* found the conduct sufficient under "minimum contacts," the interpretation that "direct effects" is merely defining commercial activity is more sound than the Petitioner's interpretation.

language in the Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1) (2006). It is well-settled that the "scope of employment" inquiry under the FTCA is derived from the *respondeat superior* doctrine which is in turn determined by state law. In *Williams v. United States*, 215 F.2d 800, 810 (9th Cir. 1954), the Ninth Circuit upheld the district court's use of federal common law in defining "scope of employment" for the tort of a U.S. serviceman under the FTCA as "acting in line of (naval) duty." This Court vacated this reasoning in *Williams v. United States*, 350 U.S. 857, 857 (1955), with a two-sentence decision directing lower courts to apply state law to determine the meaning of "scope of employment": "This case is controlled by the California doctrine of respondeat superior. The judgment is vacated and the case is remanded for consideration in the light of that governing principle."

Every circuit to address the issue since *Williams* has applied state law to determine the meaning of "scope of employment." *See Devlin v. United States*, 352 F.3d 525, 532-33 (2d Cir. 2003) ("[*Williams v. United States*] held that the phrase 'while acting within the scope of his office or employment' in section 1346(b) [of the FTCA] is to be given meaning by the law of the relevant state."); *Ross v. Bryan*, 309 F.3d 830, 834 (4th Cir. 2002) (citing *Williams* and applying state law to determine scope of employment); *Primeaux v. United States*, 181 F.3d 876, 878 (8th Cir. 1999) (same); *Bennett v. United States*, 102 F.3d 486, 489 (11th Cir. 1996) (same); *Garcia v.*

United States, 62 F.3d 126, 127 (5th Cir. 1995) (same); *Richman v. Straley*, 48 F.3d 1139, 1145 (10th Cir. 1995) (same); *Flechsig v. United States*, 991 F.2d 300, 302 (6th Cir. 1993) (same); *Pelletier v. Federal Home Loan Bank*, 968 F.2d 865, 876 (9th Cir. 1992) (same); *Duffy v. United States*, 966 F.2d 307, 314 (7th Cir. 1992) (same); *Attallah v. United States*, 955 F.2d 776, 780 (1st Cir. 1992) (same); *Nelson v. United States*, 838 F.2d 1280, 1282 (D.C. Cir. 1988) (same); *McSwain v. United States*, 422 F.2d 1086, 1087-88 (3d Cir. 1970) (same).

Petitioner also relies upon cases that do not even reach FSIA issues. *Moore v. United Kingdom*, 384 F.3d 1079, 1088 (9th Cir. 2004) (failing to reach application of FSIA's tort exception when suit was precluded by NATO status of forces agreement), and cases that indicate that even an intentional tort might be part of the scope of employment. *Tichenor v. Roman Catholic Church*, 32 F.3d 953, 959 n.22 (5th Cir. 1994) (outside FSIA, applying Mississippi law finding employer was not liable for employee's intentional or criminal acts unless employer either authorized or ratified act, but noting, "[i]n some rare instances, an intentional or criminal act could be within the employee's scope of employment."); *Doe v. Liberatore*, 478 F. Supp. 2d 742, 758 (M.D. Pa. 2007) (applying Pennsylvania law in non-FSIA context and determining that rather than *respondeat superior*, negligent retention and supervision were proper causes of action under which Archdiocese might be liable for abusive acts of priest, but noting, "'[i]n

certain circumstances, liability of the employer may also extend to intentional or criminal acts committed by the employee.'" (quoting *Fitzgerald v. McCutcheon*, 410 A.2d 1270, 1271 (Pa. Super. Ct. 1979))).

II. The Procedural Posture of This Case Makes It an Inappropriate Vehicle for This Court's Consideration of the Tort Exception

Following the Ninth Circuit's decision, John V. Doe submitted a motion to submit a Second Amended Complaint with the District Court in this case. Plaintiff's Motion to Amend the Complaint, *Doe v. Holy See*, No. CV 02-430-MO (D. Or., July 15, 2009). If the motion to amend is granted, Petitioner has indicated that it may file a motion to dismiss the Second Amended Complaint on jurisdictional grounds. Holy See's Opp. to Plaintiff's Motion to Amend, *Doe v. Holy See*, No. CV 02-430-MO (D. Or., August 7, 2009). And, therefore, the same issues raised here are likely to be raised again, but on the basis of a more fully elaborated set of facts and allegations.

The District Court has not yet ruled on the motion to submit a Second Amended Complaint. *See* Plaintiff's Motion to Amend the Complaint, *Doe v. Holy See*, No. CV 02-430-MO (D. Or., July 15, 2009) (pending). The court recently granted Petitioner's motion to file a sur-reply in response to the Plaintiff's reply to its opposition to the motion to amend the

complaint. Motion for Leave to File Sur-Reply Regarding Plaintiff's Motion to Amend the Complaint, *Doe v. Holy See*, No. CV 02-430-MO (D. Or., Oct. 7, 2009).

If this Court were to grant the Petition at this time, without being able to take into account the additional allegations of the Second Amended Complaint, it would lead to piecemeal, unnecessary, and costly litigation for both parties.[3]

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[3] Nor should this case be held in light of *Samantar v. Yousuf*, 552 F.3d 371 (4th Cir. 2009), *cert. granted*, ___ S. Ct. ___, 2009 WL 1725968 (Sept. 30, 2009) (U.S. No. 08-1555), which deals with two issues, neither of which are raised in this case. Certiorari was granted in *Samantar* on two issues: First, "[w]hether a foreign state's immunity from suit under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1604, extends to an individual acting in his official capacity on behalf of a foreign state." Petition for Writ of Certiorari at i, *Samantar v. Yousuf*, No. 08-1555, 2009 WL 1759041 (U.S., June 18, 2009). Second, "[w]hether an individual who is no longer an official of a foreign state at the time suit is filed retains immunity for acts taken in the individual's former capacity as an official acting on behalf of a foreign state." *Id.*

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court DENY the petition for certiorari.

Respectfully submitted,

MARCI A. HAMILTON, ESQ.
36 Timber Knoll Drive
Washington Crossing, PA 18977
(215) 353-8984
hamilton02@aol.com
Counsel of Record

JEFFREY R. ANDERSON, ESQ.
MICHAEL G. FINNEGAN, ESQ.
JEFF ANDERSON & ASSOCIATES, P.A.
366 Jackson Street, Suite 100
St. Paul, MN 55101
(651) 227-9990

WILLIAM A. BARTON, ESQ.
KEVIN K. STREVER, ESQ.
BARTON & STREVER, P.C.
P.O. Box 870
Newport, OR 97365
(541) 265-5377

Attorneys for Respondent
John V. Doe

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