No. _____

In the Supreme Court of the United States

HOLY SEE,
Petitioner,
v.

JOHN V. DOE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondent John V. Doe seeks to hold petitioner Holy See, a recognized foreign sovereign, vicariously liable for sexual abuse committed by a Catholic priest in Portland, Oregon.

To establish jurisdiction over a foreign sovereign, the tort exception of the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1605(a)(5), requires that a plaintiff's injury be caused by the "tortious act" of an "employee of [the] foreign state while acting within the scope of his . . . employment[.]"

This case presents the following question:

> Whether the FSIA's tort exception confers jurisdiction when the tortious act itself falls outside the scope of employment but state law extends vicarious liability based upon non-tortious precursor conduct falling within the scope of employment.

PARTIES TO THE PROCEEDING

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 Holy See,[1] a foreign sovereign, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

INTRODUCTION

The issue presented by this petition is whether a foreign sovereign can be stripped of immunity based upon a state liability rule that conflicts with the FSIA's federal jurisdictional requirements. For the reasons set forth below, the issue is one of vital importance in FSIA jurisprudence.

By its plain language, the FSIA's tort exception requires a foreign state employee's "tortious act" to be within the scope of employment. Because sexual abuse of a minor is outside the scope of a priest's employment as a matter of law, the tort exception does not provide jurisdiction over respondent's vicarious liability claim.

However, relying on Oregon's vicarious liability rule, the Ninth Circuit concluded that the tort exception's jurisdictional requirements were met because non-tortious "necessary precursor" conduct was within the scope of employment and the tortious act was a "direct outgrowth" of such conduct. The Ninth Circuit's expansive "necessary precursor"/"direct outgrowth" approach conflicts with the tort exception's plain language, violates the rule requiring narrow construction of jurisdictional statutes, and conflicts in principle with this Court's holdings in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S.

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[1] Although the Holy See is known colloquially as the Vatican, Holy See is the correct appellation. *Doe v. Roman Catholic Diocese of Galveston-Houston*, 408 F. Supp. 2d 272, 282 (S.D. Tex. 2005).

428, 441 (1989), *Saudi Arabia v. Nelson*, 507 U.S. 349, 363 (1993), and *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992). By its sweeping incorporation of state liability rules, the Ninth Circuit's decision also violates 28 U.S.C. 1606, undermines the uniformity underlying the FSIA, and conflicts in principle with precedent under analogous provisions of the Federal Tort Claims Act (FTCA), including *Laird v. Nelms*, 406 U.S. 797, 798-99 (1972), *Dalehite v. United States*, 346 U.S. 15, 45 (1953), and *Primeaux v. United States*, 181 F.3d 876 (8th Cir. 1999) (en banc).

OPINIONS BELOW

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. 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.

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. Pet. App. 129a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The FSIA, 28 U.S.C. 1602-1611, 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[.]

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[.]

STATEMENT OF THE CASE

A. Nature of the Case

This case involves claims brought by respondent against the Holy See for alleged sexual abuse by parish priest Andrew Ronan in Oregon. The Holy See filed a facial motion to dismiss for lack of subject matter jurisdiction under the FSIA. Over the course of district court and appellate proceedings, all of respondent's claims against the Holy See were dismissed for lack of jurisdiction except one: the Holy See's alleged vicarious liability for Ronan's sexual abuse of respondent in "the monastery and surrounding areas in Portland, Oregon" in 1965-1966. Pet. App. 140a, 147a-149a (Amended Complaint ¶¶ 15, 34-38).

B. Oregon *Respondeat Superior* Law

Ninth Circuit cases have held that state law governs whether an act is within the scope of employment for purposes of the FSIA's tort exception. *See, e.g.*, *Randolph v. Budget Rent-A-Car*, 97 F.3d 319, 326-27 (9th Cir. 1996). The Oregon Supreme Court has held that "[t]hree requirements must be met to conclude that an employee was acting within the scope of employment[:]"

> (1) whether the act occurred substantially within the time and space limits authorized by the employment;

> (2) whether the employee was motivated, at least partially, by a purpose to serve the employer; and
>
> (3) whether the act is of a kind which the employee was hired to perform.

Chesterman v. Barmon, 753 P.2d 404, 406 (Or. 1988) (citations omitted).

In *Chesterman*, the Oregon Supreme Court held for the first time that a corporation's *respondeat superior* liability could be extended even where the tortious act itself did not satisfy Oregon's three-factor scope-of-employment test. *Chesterman* involved an employee who had ingested a drug while acting within the scope of his employment, leading to hallucinations that resulted in sexual assault. *Chesterman*, 753 P.2d at 406. Because the employee's acts of entering the plaintiff's house and of sexual assault "were outside the authorized limits of time and space, were not motivated by a purpose to serve the employer and were not of a kind which [the employee] was hired to perform[,]" the *Chesterman* court held that they "were, as a matter of law, outside the scope of employment." *Id.*; *see also Fearing v. Bucher*, 977 P.2d 1163, 1166 (Or. 1999) (citing *Chesterman*, 753 P.2d at 406) (stating that the *Chesterman* court "held that the intentional tort itself, the sexual assault, unquestionably was outside the scope of employment"). However, the court held that the corporation still could "be found vicariously liable . . . if *other* acts which were within [the employee's] scope of employment resulted in the acts which led to injury to plaintiff." *Chesterman*, 753 P.2d at 406 (emphasis in original). Finding that the ingestion of the drug – the act preceding the tortious act itself – could satisfy all three

of the scope-of-employment factors, the Oregon Supreme Court permitted the vicarious liability claim to proceed under state law. *Id.* at 406-07.

The Oregon Supreme Court applied the *Chesterman* vicarious liability rule in *Fearing*, a Catholic priest child sexual abuse case against the Portland Archdiocese involving allegations "very similar" to those made by respondent. Pet. App. 34a (panel decision). Like *Chesterman*, the *Fearing* court held that the fact that the tortious act itself was outside the scope of employment did not preclude a finding of vicarious liability:

> As in *Chesterman,* [the priest's] alleged sexual assaults on plaintiff clearly were outside the scope of his employment, but our inquiry does not end there. The Archdiocese still could be found vicariously liable, if acts that were within [the priest's] scope of employment "resulted in the acts which led to injury to plaintiff."

Fearing, 977 P.2d at 1166 (quoting *Chesterman*, 753 P.2d at 406). *Fearing* then engaged in the "inquiry" required under *Chesterman*: whether the precursor acts – *i.e.*, the acts preceding the sexual assault – were within the scope of employment. *Id.* at 1166-68. Finding that the priest's precursor conduct satisfied the second and third factors of the scope-of-employment test, the court concluded that "[a] jury reasonably could infer that [the priest's] performance of his pastoral duties with respect to plaintiff and his family were a necessary precursor to the sexual abuse and that the assaults thus were a direct outgrowth of and were engendered by conduct that was within the scope of [the priest's] employment." *Id.* at 1168; *see also id.* at 1169 (Archdiocese's "*vicarious liability* is

based on conduct that occurred before the abuse") (emphasis in original). The sexual abuse itself, however, remained outside the scope of employment. *Id.* at 1166; *see also, e.g.*, *Schmidt v. Archdiocese of Portland*, 180 P.3d 160, 177 (Or. App. 2008) (citing *Chesterman*, 753 P.2d at 406) (holding that "the alleged sexual assault was not within the scope of [the priest's] employment"), *review allowed on other grounds*, 195 P.3d 911 (Or. Oct. 15, 2008) (Nos. A124850, S056261).[2]

C. Relevant Proceedings Below

The Holy See's motion to dismiss respondent's vicarious liability claim relied on the language of the FSIA's tort exception, which requires in relevant part that a plaintiff's injury be caused by the "tortious act" of an "employee of [the] foreign state while acting within the scope of his . . . employment." 28 U.S.C. 1605(a)(5). Because the Oregon Supreme Court has held that sexual abuse of a minor is "clearly" outside the scope of a Catholic priest's employment, *Fearing*, 977 P.2d at 1166, the Holy See argued that the district court lacked subject matter jurisdiction over respondent's vicarious liability claim.

The district court disagreed. Relying on language from *Joseph v. Office of Consulate Gen. of Nigeria*, 830 F.2d 1018, 1025 (9th Cir. 1987), the district court held that "'[t]he 'scope of employment' provision of the tortious activity exception essentially requires a

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[2] Sexual abuse of a minor by a priest is outside the scope of employment under Oregon law because it is not motivated to serve the employer (second scope-of-employment factor) and is not the kind of act which the priest was hired to perform (third scope-of-employment factor). *Cf. Chesterman*, 753 P.2d at 406.

finding that the doctrine of respondeat superior applies to the tortious acts of individuals.'" Pet. App. 111a. Citing *Fearing*, the district court held that "Oregon has adopted an expansive 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." *Id.* (citations omitted). The district court concluded that the tort exception's requirements were met because respondent "has sufficiently alleged facts showing that Ronan's conduct preceding the sexual abuse fell within the scope of his employment" (*id.* at 112a) and thus had alleged "sufficient grounds upon which to hold Ronan's employer liable under a theory of respondeat superior." *Id.* at 113a.

The Ninth Circuit agreed with the district court. Like the district court, the court of appeals stated that the tort exception's "scope of employment" provision "'essentially requires a finding that the doctrine of respondeat superior applies to the tortious acts of individuals.'" Pet. App. 31a-32a (quoting *Joseph*, 830 F.2d at 1025). Referring to *Fearing*, the court stated that "the Oregon Supreme Court has directly addressed whether a church can be liable under respondeat superior for the actions of a priest who sexually assaults a parishioner." *Id.* at 32a. The court acknowledged that "*Fearing* stated that the priest's 'alleged sexual assaults on plaintiff clearly were outside the scope of his employment under the traditional test'" but noted that the scope of employment "inquiry" under *Fearing* did not end there. *Id.* at 33a (quoting *Fearing*, 977 P.2d at 1166). Instead, a putative employer could still be liable under Oregon law if "'acts that *were* within [the priest's] scope of

employment resulted in the acts which led to injury to [the] plaintiff.'" *Id.* (emphasis in original) (quoting *Fearing*, 977 P.2d at 1166). The court of appeals concluded that, under Oregon law, "[a]n 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.'" *Id.* at 34a (quoting *Fearing*, 977 P.2d at 1168). Finding that respondent had alleged the precursor conduct required under Oregon law – *i.e.*, Ronan acting as respondent's "priest, counselor and spiritual adviser" (*id.* at 34a) – the court of appeals concluded that the Holy See is "not immune from [respondent's] respondeat superior claim." *Id.* at 35a.

REASONS FOR GRANTING THE WRIT

Congress explicitly required a "tortious act" to be within the scope of employment under the tort exception. Because sexual abuse of a minor is outside the scope of a priest's employment, there is no jurisdiction over respondent's vicarious liability claim. The court of appeals' finding of jurisdiction in the absence of a tortious act falling within the scope of employment conflicts with the FSIA's plain language and principles underlying the FSIA's statutory scheme, including that only a jurisdictionally-significant act or activity attributable to a foreign sovereign can strip a foreign sovereign of its immunity from suit.

The Ninth Circuit found jurisdiction because "necessary precursor" conduct was within the scope of Ronan's alleged employment and the sexual abuse was

a "direct outgrowth" of such conduct. The Ninth Circuit's expansive "necessary precursor"/"direct outgrowth" approach violates the FSIA's plain language and conflicts in principle with this Court's holdings in *Amerada Hess* and *Nelson*, where this Court rejected similar approaches to jurisdiction under the FSIA. The Ninth Circuit's approach is also inconsistent with *Weltover*, where this Court held that courts should not incorporate "unexpressed" jurisdictional requirements into the FSIA. As this Court has held both within and outside the context of the FSIA, federal jurisdictional statutes must be narrowly construed. The Ninth Circuit's expansion of the FSIA's jurisdictional reach by judicial decree conflicts with this basic principle of statutory interpretation.

The Ninth Circuit's unbridled incorporation of Oregon's vicarious liability rule also violates section 1606, which applies substantive liability rules only where a foreign state is already held to lack immunity. In the analogous FTCA context, this Court in *Dalehite* and *Laird* required adherence to the limits imposed by federal statutory jurisdictional requirements against conflicting state liability rules, notwithstanding that the FTCA explicitly incorporates substantive liability rules into the immunity determination itself. Allowing state liability rules to govern the federal jurisdictional inquiry – contrary to the FSIA's explicit requirements – defeats one of the central purposes of the FSIA, namely to create "a uniform body of law concerning the amenability of a foreign sovereign to suit in United States courts." *First Nat'l City Bank v. Banco Para El Comercio Exterior De Cuba (Bancec)*, 462 U.S. 611, 622 n.11 (1983).

I. By Finding that Jurisdiction Lies Even When the Tortious Act Itself is Outside the Scope of Employment, the Ninth Circuit's Decision Conflicts With the Tort Exception's Plain Language, Disrupts the FSIA's Statutory Scheme, and Undercuts the International Doctrine of Foreign Sovereign Immunity

a. The tort exception's plain language requires that a plaintiff's injury be caused by the "tortious act" of an "employee of [the] foreign state while acting within the scope of his . . . employment." 28 U.S.C. 1605(a)(5); *see also Permanent Mission of India to the United Nations v. City of New York*, 127 S. Ct. 2352, 2356 (2007) ("We begin, as always, with the text of the statute."). Circuit courts agree that the exception requires the tortious act itself to be within the scope of employment. *See O'Bryan v. Holy See*, 556 F.3d 361, 385 (6th Cir. 2009) (holding under Kentucky law that the tort exception does not apply to claims against the Holy See for clergy sexual abuse because "the alleged acts of sexual abuse were not done while the alleged tortfeasors were acting within the scope of employment"), *petition for cert. filed*, 77 U.S.L.W. 3645 (U.S. May 7, 2009) (No. 08-1384); *Moore v. United Kingdom*, 384 F.3d 1079, 1088 n.11 (9th Cir. 2004) ("statute provides jurisdiction only for scope-of-employment torts."); *Moran v. Kingdom of Saudi Arabia*, 27 F.3d 169, 173 (5th Cir. 1994) (holding that the tort "exception can only be met if the officer or employee of the foreign state was acting within the scope of his employment at the time he committed the tortious act or omission."); *see also* H.R. REP. NO. 94-1487, at 21 (1976) (stating that the tort exception denies immunity for claims for personal injury "caused

by the tortious act" of foreign state employees "acting within the scope of their authority").[3]

b. The tortious act underlying respondent's vicarious liability claim is the alleged sexual abuse. Pet. App. 148a (Amended Complaint ¶ 36); Pet. App. 8a (panel decision) (stating that respondent "alleged that the Holy See was vicariously liable for Ronan's abuse of [respondent]"); *see also Fearing*, 977 P.2d at 1169 ("The action here clearly is *based on* child abuse: Were it not for [the priest's] alleged sexual abuse of plaintiff, there would be no action. . . . The fact that the Archdiocese's *vicarious liability* is based on conduct that occurred before the abuse does not alter the nature of the underlying action.") (emphasis in original). As set forth above, the Oregon Supreme Court held that sexual abuse of a minor is "clearly" outside the scope of a priest's employment. *Fearing*, 977 P.2d at 1166; *Chesterman*, 753 P.2d at 406; *see also Schmidt*, 180 P.3d at 177; *Bray v. Am. Prop. Mgmt. Corp.*, 988 P.2d 933, 935 (Or. App. 1999) (stating that *Fearing* court recognized that "the tortious act was not itself within the scope of the employment"); *JC2 v. Grammond*, 232 F. Supp. 2d 1166, 1169 (D. Or. 2002) (*Chesterman* court "recognized that the sexual assault itself was outside the scope of employment"); William W. Bassett, *Religious Organizations and the Law* § 8:34 (2008) ("The Oregon Supreme Court [in *Fearing*] agreed that the priest's sexual assaults were 'clearly outside the

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[3] This Court has reached the same conclusion under similar language in the FTCA. *See infra* at 26; *see also Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 117 (2001) ("A variable standard for interpreting common, jurisdictional phrases would contradict our earlier cases and bring instability to statutory interpretation.").

scope of employment.'").[4] The Oregon Supreme Court's holding is consistent with the overwhelming consensus of state and federal courts that sexual abuse is not within the scope of a priest or pastor's employment. *See Tichenor v. Roman Catholic Church*, 32 F.3d 953, 960 (5th Cir. 1994) ("It would be hard to imagine a

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[4] The Ninth Circuit was bound to follow the clear holding of *Fearing*, the Oregon Supreme Court case directly on point. *See Riley v. Kennedy*, 128 S. Ct. 1970, 1985 (2008) ("A State's highest court is unquestionably the ultimate exposito[r] of state law."). However, notwithstanding *Fearing*, the Ninth Circuit opinion at one point states that *Minnis v. Oregon Mut. Ins. Co.*, 48 P.3d 137 (Or. 2002) "makes clear" that sexual abuse of a minor is within the scope of a priest's employment. Pet. App. 34a. *Minnis*, an insurance case involving a pizzeria, did not overturn *Fearing*'s unambiguous holding that sexual abuse of a minor is "clearly" outside the scope of a priest's employment. Instead, *Minnis* held that the sexual assault by the pizzeria manager was outside the scope of his employment, made clear that *Fearing* examines whether precursor acts are within the scope, and simply limited the *Fearing* vicarious liability rule to acts within the time and space of employment. *Minnis*, 48 P.3d at 143, 145. Moreover, a recent post-*Minnis* Oregon court of appeals case reiterated the *Fearing* rule with respect to sexual abuse of a minor by a Catholic priest. *See Schmidt*, 180 P.3d at 174-77 (discussing *Chesterman*, *Fearing* and *Minnis*, and holding based upon *Chesterman* that "the alleged sexual assault was not within the scope of [the priest's] employment"); *see also Gooding v. Wilson*, 405 U.S. 518, 526 n.3 (1972) (federal courts follow holdings of state court of appeals as to state law). Finally, the Ninth Circuit based jurisdiction on precursor conduct in this case. *See* Pet. App. 34a (finding that respondent's allegations meet the "necessary precursor"/"direct outgrowth" "standard"); *id.* (relying on the precursor conduct of respondent coming "to know Ronan as his priest, counselor and spiritual adviser"). By substituting precursor conduct for the tortious act under the tort exception's scope of employment inquiry, the Ninth Circuit ran afoul the statutory provisions and precedent set forth in this petition.

more difficult argument than that [the priest's] illicit sexual pursuits were somehow related to his duties as a priest or that they in any way furthered the interests of . . . his employer."); *O'Bryan*, 556 F.3d at 385 (Kentucky law); *Schovanec v. Archdiocese of Oklahoma City*, 188 P.3d 158, 161 (Okla. 2008) (Oklahoma law); *Doe v. Liberatore*, 478 F. Supp. 2d 742, 758 (M.D. Pa. 2007) (Pennsylvania law); *Paul J.H. v. Lum*, 736 N.Y.S.2d 561, 561 (N.Y. App. Div. 2002) (New York law); *Tercero v. Roman Catholic Diocese of Norwich*, 48 P.3d 50, 58 (N.M. 2002) (New Mexico law); *C.J.C. v. Corp. of Catholic Bishop of Yakima*, 985 P.2d 262, 272 (Wash. 1999) (Washington law); *Gibson v. Brewer*, 952 S.W.2d 239, 246 (Mo. 1997) (Missouri law); *Alpharetta First United Methodist Church v. Stewart*, 472 S.E.2d 532, 535-36 (Ga. Ct. App. 1996) (Georgia law); *Kennedy v. Roman Catholic Diocese of Burlington*, 921 F. Supp. 231, 233-34 (D. Vt. 1996) (Vermont law); *L.L.N. v. Clauder*, 552 N.W.2d 879, 888 (Wis. Ct. App. 1996) (Wisconsin law), *rev'd on other grounds*, 563 N.W.2d 434 (Wisc. 1997); *Dausch v. Rykse*, 52 F.3d 1425, 1435-36 (7th Cir. 1994) (Illinois law); *Byrd v. Faber*, 565 N.E.2d 584, 588 (Ohio 1991) (Ohio law); *Destefano v. Grabrian*, 763 P.2d 275, 287 (Colo. 1988) (Colorado law); *Doe v. O'Connell*, No. C.A. NO. 86-0077, 1988 WL 1016799, at *7 (R.I. Super. Jan. 28, 1988) (Rhode Island law); *Rita M. v. Roman Catholic Archbishop*, 232 Cal. Rptr. 685, 690 (Cal. Ct. App. 1986) (California law).[5]

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[5] This result is not limited to cases involving priests or pastors. The accepted rule in a wide range of contexts is that sexual abuse or assault is not within the scope of employment. *See, e.g.*, *Andrews v. United States*, 732 F.2d 366, 370 (4th Cir. 1984) (South Carolina law; physician's assistant); *Doe v. Swift*, 570 So. 2d 1209, 1213 (Ala. 1990) (Alabama law; psychologist); *Porter v. Harshfield*,

c. The tort exception requires that an employee commit the "tortious act . . . while acting within the scope of his . . . employment." 28 U.S.C. 1605(a)(5). Given that sexual abuse of a child is outside the scope of a priest's employment as a matter of law, jurisdiction does not lie over respondent's vicarious liability claim under the tort exception. The Ninth Circuit's decision to the contrary – which permits jurisdiction even though the tortious act is outside the scope of employment – violates the tort exception's plain language.

d. By permitting jurisdiction to lie in the absence of a jurisdictionally-significant act within the scope of authority or employment, the Ninth Circuit's approach also disrupts the FSIA's statutory scheme. An act or activity attributable to the sovereign is required to strip immunity under all of the FSIA exceptions. *See Phaneuf v. Republic of Indonesia*, 106 F.3d 302, 308 (9th Cir. 1997) (stating that "the foreign state retains its immunity when its agent acts outside the scope of his authority" and holding that apparent authority is insufficient to confer jurisdiction under commercial

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948 S.W.2d 83, 86 (Ark. 1997) (Arkansas law; radiology technician); *Sharples v. State*, 793 P.2d 175, 177 (Hawaii 1990) (Hawaii law; psychiatrist); *Godar v. Edwards*, 588 N.W.2d 701, 707 (Iowa 1999) (Iowa law; school district's curriculum director); *Doe v. Westlake Acad.*, 12 Mass. L. Rptr. 353, 2000 WL 1724887 (Mass. Super. 2000) (Massachusetts law; mental illness program employee); *Bozarth v. Harper Creek Bd. of Ed.*, 288 N.W.2d 424, 426 (Mich. Ct. App. 1979) (Michigan law; teacher); *Maguire v. State*, 835 P.2d 755, 758 (Mont. 1992) (Montana law; developmental center employee); *Cosgrove v. Lawrence*, 522 A.2d 483, 484-85 (N.J. Super. Ct. App. Div. 1987) (New Jersey law; therapist); *Medlin v. Bass*, 398 S.E.2d 460, 464 (N.C. 1990) (North Carolina law; school principal); *Birkner v. Salt Lake County*, 771 P.2d 1053, 1058 (Utah 1989) (Utah law; therapist).

activity exception); *Velasco v. Gov't Of Indonesia*, 370 F.3d 392, 400 (4th Cir. 2004) (agreeing with Ninth Circuit that actual authority is required to confer jurisdiction under commercial activity exception); *Dale v. Colagiovanni*, 443 F.3d 425, 429 (5th Cir. 2006) (same); *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1103-05 (9th Cir. 1990) (waiver exception only applies if the foreign state defendant himself waived immunity); *Zappia Middle East Const. Co. v. Emirate of Abu Dhabi*, 215 F.3d 247, 252 (2d Cir. 2000) (holding, under expropriation exception, that acts of another entity "cannot be attributed to a government that has not authorized the private entity to act on its behalf."); *In re Republic of Philippines*, 309 F.3d 1143, 1150 (9th Cir. 2002) (stating, under immovable property exception, that "[t]he FSIA's exceptions focus on actions taken by or against a foreign sovereign."); 28 U.S.C. 1605(a)(6) (jurisdiction over actions to enforce an arbitration agreement limited to agreements "made by the foreign state"); 28 U.S.C. 1605A(a)(1) (requiring "official, employee, or agent" to be "acting within the scope of his or her office, employment, or agency" under terrorism exception). The Ninth Circuit's holding that jurisdiction can lie over a foreign sovereign even though there is no jurisdictionally-significant act within the scope of employment consequently undermines a central principle underlying the FSIA's statutory framework.

e. The Ninth Circuit's approach not only disrupts foreign sovereign immunity in the United States. As this Court recently reaffirmed, foreign sovereign immunity derives in part from "'fair dealing'" and "'reciprocal self-interest.'" *Republic of Philippines v. Pimentel*, 128 S. Ct. 2180, 2190 (2008) (quoting *Nat'l City Bank of N.Y. v. Republic of China*, 348 U.S. 356, 362 (1955)). When a United States court denies a

foreign state immunity in the absence of a jurisdictionally-significant act attributable to the sovereign itself, the United States government faces potentially the same vast expansion of jurisdiction in foreign courts. *See De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1398 (5th Cir. 1985) ("In the field of international law, where no single sovereign reigns supreme, the Golden Rule takes on added poignancy."). Once the loss of foreign sovereign immunity is disconnected from acts attributable to the sovereign, the international doctrine of foreign sovereign immunity is severely undercut.

II. The Ninth Circuit's Decision to Confer Jurisdiction Based Upon Non-Tortious Precursor Conduct Violates the Tort Exception's Plain Language, Conflicts in Principle with this Court's Precedent, and Expands the FSIA's Jurisdictional Reach By Judicial Decree

Notwithstanding the plain language of the statute and the Oregon Supreme Court's holding in *Fearing*, the Ninth Circuit found jurisdiction over respondent's vicarious liability claim under Oregon law because "necessary precursor" conduct was within the scope of employment and the tortious act was a "direct outgrowth" of such conduct. Pet. App. 34a.

a. As set forth above, the tort exception's plain language requires the "tortious act" to be within the scope of employment. 28 U.S.C. 1605(a)(5). Conduct preceding the tortious act does not satisfy the exception's explicit requirement. Accordingly, the Ninth Circuit's "necessary precursor"/"direct outgrowth" approach conflicts with the tort exception's requirements.

b. The Ninth Circuit's approach also conflicts in principle with this Court's holdings in *Amerada Hess*, *Nelson* and *Weltover*. As Chief Justice Rehnquist's majority opinion in *Amerada Hess* recognized, Congress knew how to base jurisdiction on a "direct outgrowth" theory when it wanted to:

> Under the commercial activity exception to the FSIA, § 1605(a)(2), a foreign state may be liable for its commercial activities "outside the territory of the United States" having a "direct effect" inside the United States. But the noncommercial tort exception, § 1605(a)(5), upon which respondents rely, makes no mention of "territory outside the United States" or of "direct effects" in the United States. Congress' decision to use explicit language in § 1605(a)(2), and not to do so in § 1605(a)(5), indicates that the exception in § 1605(a)(5) covers only torts occurring within the territorial jurisdiction of the United States.

Amerada Hess, 488 U.S. at 441 (footnote omitted); *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 843 (D.C. Cir. 1984) ("Any mention of 'direct effect[s]' is noticeably lacking from the noncommercial tort exception. When Congress uses explicit language in one part of a statute to cover a particular situation and then uses different language in another part of the same statute, a strong inference arises that the two provisions do not mean the same thing."). As applied to the circumstances here, Congress' decision to use explicit "direct effect" language in section 1605(a)(2) and not in 1605(a)(5) demonstrates that a "direct outgrowth" theory – the theory relied upon by the

Ninth Circuit – is not permitted under the FSIA's tort exception.

The Ninth Circuit's "necessary precursor" theory poses similar problems. Congress knows how to base jurisdiction on precursor acts: the terrorism exception, for example, confers jurisdiction for "the provision of material support or resources" by a foreign official, employee or agent. 28 U.S.C. 1605A(a)(1). However, the tort exception is silent as to jurisdiction based on precursor acts. And, in *Nelson*, this Court rejected reliance on acts preceding an intentional tort to establish jurisdiction under the FSIA:

> The Nelsons allege that, at the time petitioners recruited Scott Nelson and thereafter, they failed to warn him of the possibility of severe retaliatory action if he attempted to disclose any safety hazards he might discover on the job. In other words, petitioners bore a duty to warn of their own propensity for tortious conduct. But this is merely a semantic ploy. For aught we can see, a plaintiff could recast virtually any claim of intentional tort committed by sovereign act as a claim of failure to warn, simply by charging the defendant with an obligation to announce its own tortious propensity before indulging it. To give jurisdictional significance to this feint of language would effectively thwart the Act's manifest purpose to codify the restrictive theory of foreign sovereign immunity.

Nelson, 507 U.S. at 363 (citations omitted). Circuit courts agree that precursor acts do not serve as substitutes for the jurisdictionally-significant acts required under the statute. *See, e.g., Gerding v. Republic of France*, 943 F.2d 521, 527 (4th Cir. 1991)

(quoting *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1513 (D.C. Cir. 1988)) (jurisdiction under commercial activity exception not intended to be based upon "'merely precursors to commercial transactions.'"); *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1524-25 (D.C. Cir. 1984) (Scalia, J.) (non-tortious precursor acts in the United States could not satisfy tort exception's situs requirement).

The Ninth Circuit's approach also conflicts in principle with this Court's decision in *Weltover*. The *Weltover* Court overturned a line of circuit cases that had required that a "direct effect" under the FSIA's commercial activity exception be both "substantial" and "foreseeable." Justice Scalia, writing for the majority, rejected "the suggestion that § 1605(a)(2) contains any unexpressed requirement of 'substantiality' or 'foreseeability.'" *Weltover*, 504 U.S. at 618. Given that any "necessary precursor"/"direct outgrowth" theory is similarly "unexpressed" in the tort exception, the Ninth Circuit's expansive reading of the FSIA's tort exception is inconsistent with *Weltover*.

c. *Amerada Hess*, *Nelson* and *Weltover* reflect this Court's narrow reading of jurisdictional statutes. *See Amerada Hess*, 488 U.S. at 434 (quoting *Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845)) ("We start from the settled proposition that the subject-matter jurisdiction of the lower federal courts is determined by Congress 'in the exact degrees and character which to Congress may seem proper for the public good.'"). In fact, courts have repeatedly held that the FSIA's jurisdictional provisions must be "narrowly construed." *Haven v. Polska*, 215 F.3d 727, 731 (7th Cir. 2000); *see also MacArthur Area Citizens Ass'n v. Republic of Peru*, 809 F.2d 918, 921 (D.C. Cir. 1987) ("the

legislative history counsels that the [tort] exception should be narrowly construed so as not to encompass the farthest reaches of common law."); *Asociacion de Reclamantes*, 735 F.2d at 1521 (stating that "[o]ur job . . . is not to give the term [rights in immovable property under 28 U.S.C. 1605(a)(4)] the most expansive reading possible").

d. Permitting jurisdiction under the tort exception pursuant to a "necessary precursor"/"direct outgrowth" theory – when such an approach has no basis in the tort exception's language – fails to comply with this established principle of narrow construction. Instead, contrary to this Court's precedent, the Ninth Circuit's reliance on Oregon's "necessary precursor"/"direct outgrowth" approach constitutes a vast and unwarranted expansion of FSIA jurisdiction by judicial decree. *See Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 128 S. Ct. 761, 773 (2008), *quoting American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 17 (1951) ("'[t]he jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation'") (brackets in original); *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994) ("Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree.") (citations omitted).

III. The Ninth Circuit's Adoption of Oregon's Vicarious Liability Rule for Jurisdictional Purposes Violates Section 1606, Conflicts in Principle with this Court's Precedent Under the FTCA, and Undermines the Principle of Uniformity Underlying the FSIA

a. Jurisdiction also cannot be premised on the basis that the tort exception's scope of employment provision "'essentially requires a finding that the doctrine of respondeat superior applies to the tortious acts of individuals.'" Pet. App. 31a-32a (panel decision) (quoting *Joseph*, 830 F.2d at 1025). Section 1606 explicitly provides that a foreign state is liable to the same extent as individuals only after a court has determined that an exception to immunity applies. *See* 28 U.S.C. 1606 ("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") (emphasis added); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488-89 (1983) (quoting 28 U.S.C. 1606) ("*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'") (emphasis added); *Price v. Socialist People's Libyan Arab Jamahiriya*, 384 F. Supp. 2d 120, 132 (D.D.C. 2005) (quoting 28 U.S.C. 1606) ("Once a foreign state's immunity has been lifted under section 1605 and jurisdiction is proper, section 1606 provides that 'the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances.'"); *see also* H.R. REP. NO.

94-1487, at 22 ("Section 1606 *makes clear that if the foreign state . . . is not entitled to immunity from jurisdiction*, liability exists as it would for a private party under like circumstances") (emphasis added). By providing that a foreign state is not immune merely because liability would attach, the approach adopted by the district court and the Ninth Circuit conflicts with section 1606 and impermissibly collapses the federal jurisdictional scope-of-employment inquiry entirely into one of state liability law. Had Congress wanted to turn the tort exception inquiry into one of mere liability under state law, it easily could have done so – as its use of the term "liable" in other portions of the FSIA demonstrates. *See* 28 U.S.C. 1606; 1605A(c); *see also 62 Cases of Jam v. United States*, 340 U.S. 593, 596 (1951) ("Congress expresses its purpose by words. It is for us to ascertain – neither to add nor to subtract, neither to delete nor to distort.").

This conclusion is consistent with this Court's prior *dictum* regarding liability rules in suits involving foreign states. *See Bancec*, 462 U.S. at 622 n.11 (after concluding that instrumentality was not entitled to immunity, stating that "where state law provides a rule of liability governing private individuals, the FSIA requires the application of that rule to foreign states in like circumstances"); *Amerada Hess*, 488 U.S. at 439-40 (citing H.R. REP. NO. 94-1487, at 14, 20-21) ("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."). The *Bancec* Court's statement was in the context of a liability determination; the Court had already concluded earlier in the opinion that the foreign state instrumentality lacked immunity under section 1607(c). *See Bancec*, 462 U.S. at 620-21

(discussing immunity); *compare id.* at 621-33 (addressing instrumentality's liability for foreign state's acts). The *Amerada Hess* Court, in turn, cited a portion of the FSIA legislative history that makes it clear that the tortious act itself must be within the scope of employment for purposes of the immunity inquiry. *See* H.R. REP. NO. 94-1487, at 21 (stating that the tort exception "denies immunity as to claims for personal injury . . . caused by the tortious act or omission of a foreign state or its officials or employees, acting within the scope of their authority"). Neither *Bancec* nor *Amerada Hess* ever suggests that a foreign sovereign should be stripped of immunity based on a state liability rule inconsistent with the FSIA's plain jurisdictional requirements. In fact, this Court has squarely held that courts making an immunity determination under the FSIA's exceptions "must apply the detailed *federal* law standards set forth in the act." *Verlinden*, 461 U.S. at 493-94 (emphasis added); *see also id.* at 498 (stating that "deciding whether statutory subject matter jurisdiction exists under the Foreign Sovereign Immunities Act entails an application of the substantive terms of the Act to determine whether one of the specified exceptions to immunity applies").

b. Any doubt regarding whether section 1606 precludes the wholesale incorporation of state liability laws into the tort exception is resolved by comparing the FSIA with section 1346(b) of the FTCA.[6] As stated above, the FSIA's tort exception provides for jurisdiction over claims based on the tortious act of a foreign state employee "acting within the scope of his

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[6] The FSIA's tort exception was based in part upon the FTCA. H.R. REP. NO. 94-1487, at 21.

. . . employment[.]" 28 U.S.C. 1605(a)(5). By contrast, the FTCA provides for jurisdiction over claims based on the "negligent or wrongful act" of a federal employee "while acting within the scope of his office or employment, *under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act . . . occurred.*" 28 U.S.C. 1346(b) (emphasis added). Whereas the FSIA provides for the application of liability rules only after the foreign state's lack of immunity is established, the FTCA explicitly provides for the use of such rules in the immunity determination itself.

And yet, notwithstanding the FTCA's "liab[ility]" language, this Court has held even under the FTCA that a state liability rule must give way to the FTCA's jurisdictional requirements. In *Dalehite v. United States*, 346 U.S. 15 (1953), the Court rejected application of a state absolute liability theory against the federal government because the FTCA "requires a negligent act." *Id.* at 45, *overruled on other grounds by Rayonier, Inc. v. United States*, 352 U.S. 315 (1957). Similarly, in *Laird v. Nelms*, 406 U.S. 797, 798-99 (1972), this Court rejected application of a state liability rule conflicting with the FTCA's jurisdictional requirements. Then-Justice Rehnquist's majority opinion held that the "necessary consequence of the Court's holding in *Dalehite* is that the [FTCA] statutory language 'negligent or wrongful act or omission of any employee of the Government,' is a uniform federal limitation on the types of acts committed by its employees for which the United States has consented to be sued." *Id.* at 799. The Court

held that the FTCA's language controlled "[r]egardless of state law characterization[.]" *Id.*[7]

This Court has also explained that the FTCA's "scope of employment" requirement is jurisdictional and constitutes one of the six "elements" that renders a claim "actionable" under the FTCA. *FDIC v. Meyer*, 510 U.S. 471, 477 (1994); *see also Sheridan v. United States*, 487 U.S. 392, 401 (1988) ("The tortious conduct of an off-duty serviceman, not acting within the scope of his office or employment, does not in itself give rise to Government liability whether that conduct is intentional or merely negligent."); *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 424 (1995) (holding the "'[s]cope of employment' sets the line" under 28 U.S.C. 2679(b)(1)). The settled rule is that the FTCA's scope of employment requirement limits the state liability theories that can be used to confer jurisdiction against the federal government. *See Primeaux v. United States*, 181 F.3d 876, 878 (8th Cir. 1999) (en banc) ("even if state law extends a private employer's vicarious liability to employee conduct not within the scope of employment, the government's FTCA liability remains limited to employee [tortious] conduct within the scope of employment, as defined by state law."); *Johnson v. United States*, 534 F.3d 958, 963 (8th Cir. 2008) ("FTCA claims are strictly limited

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[7] Under basic comity principles, settled precedent under the FTCA holding that federal statutory jurisdictional language controls against conflicting state liability rules should be applied under the FSIA. *See, e.g., Verlinden*, 461 U.S. at 486 (stating that foreign sovereign immunity "is a matter of grace and comity on the part of the United States"); *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 537 (5th Cir. 1992) ("It is unimaginable that FSIA would authorize broader exposure to suit of a foreign government instrumentality . . . than that of domestic governmental units.").

to a scope of employment analysis, regardless of state law doctrines of respondeat superior and apparent authority."); *Craine v. United States*, 722 F.2d 1523, 1526 (11th Cir. 1984) ("absent a negligent act or omission on the part of a Government employee while in the scope of his employment, the United States cannot be held liable."); *Pierson v. United States*, 527 F.2d 459, 464 (9th Cir. 1975) (apparent authority insufficient to confer jurisdiction under the FTCA, which "imposes liability on the Government for the acts of its servants only when they are acting within the scope of their employment."); *Rodriguez v. United States*, 455 F.2d 940, 942 (1st Cir. 1972) (rejecting application of Puerto Rico permissive use statute to defeat U.S. government's immunity because "[t]hat the government employee who caused the particular injury was in the course of his employment is one of the basic requirements" of the FTCA); *Mider v. United States*, 322 F.2d 193, 196 (6th Cir. 1963) ("Under the Federal Tort Claims Act, the government would not be liable for personal injury or loss of property caused by the wrongful act of a member of the Armed Forces, while acting outside the scope of his authority, and in an unofficial capacity."). As the Sixth Circuit explained long ago:

> Reference must be had to the law of the state for the applicable law as to liability under that doctrine, but state law imposing liability regardless of whether the agent or servant was acting within the scope of his employment, or absolute liability under any circumstances, is inapplicable and irrelevant. The statute itself leaves little room for question on this issue, and any doubt that may have remained has been dispelled by decisions of the courts.

United States v. Taylor, 236 F.2d 649, 653 (6th Cir. 1956).[8]

In short, the district court and the Ninth Circuit's opinion that the "scope of employment" provision incorporates state liability rules – even when such rules are inconsistent with the federal jurisdictional requirement – violates section 1606 and conflicts in principle with *Laird*, *Dalehite*, and well-settled precedent under the FTCA.

c. The Ninth Circuit's reliance on Oregon's vicarious liability rule implicates unique concerns underlying the FSIA. *See, e.g.*, *Suter v. Munich Reinsurance Co.*, 223 F.3d 150, 164 (3d Cir. 2000) (Alito, J., dissenting) (discussing the "unique policy concerns" that are "implicated by the FSIA"). One of the central purposes of the FSIA was to create a uniform body of law regarding immunity determinations involving foreign sovereigns. *See Verlinden*, 461 U.S. at 489 (quoting H.R. REP. NO. 94-1487, at 32) (recognizing "'the importance of developing a uniform body of law in this area'"); *Bancec*, 462 U.S. at 622 n.11 (FSIA intended to develop "a uniform body of law concerning the amenability of a foreign sovereign to suit in United States courts"); *id.* (quoting *Banco Nacional de Cuba v. Sabbatino*, 376

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[8] Adherence to the scope of employment language under the FTCA is notwithstanding *Williams v. United States*, 350 U.S. 857 (1955), where this Court held that the FTCA's "line of duty" requirement is "controlled by the California doctrine of respondeat superior." *Id.*; *see also* 28 U.S.C. 2671. The general rule *is* that courts apply the doctrine of respondeat superior; the problem arises only when that doctrine, or another state liability rule, expands beyond the scope of employment. The cases cited above make clear that the federal jurisdictional language controls in the event of a conflict with a state rule of liability.

U.S. 398, 425 (1964)) (stating that "matters bearing on the nation's foreign relations 'should not be left to divergent and perhaps parochial state interpretations.'"); *Republic of Austria v. Altmann*, 541 U.S. 677, 699 (2004) (stating that one of the FSIA's "principal purposes" is to "clarify[] the rules that judges should apply in resolving sovereign immunity claims").

d. The Ninth Circuit's unbridled incorporation of state liability rules – without regard to the requirements set forth by the FSIA's plain language – conflicts with the principle of uniformity underlying the FSIA. By using state substantive law without regard for the statutory "within the scope of employment" requirement, the Ninth Circuit's approach turns the federal jurisdictional statute into a mere pass-through for state liability rules untethered from the language chosen by Congress. Such a result undermines the uniformity that is at the heart of the FSIA and raises the specter of forum-shopping against foreign sovereigns.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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