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

SUPPLEMENTAL BRIEF FOR RESPONDENT

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SUPPLEMENTAL BRIEF FOR RESPONDENT

Pursuant to Sup. Ct. R. 15.8, Respondent submits this brief in response to the Solicitor General's Brief for the United States as Amicus Curiae ("Gov't Br."). The government's brief correctly asserts that this case has none of the elements that would justify a grant of certiorari in this case, and so the petition should be denied.

The government's brief, however, misguidedly recommends that, in the alternative, this Court should grant certiorari in order to vacate the decision of the United States Court of Appeals for the Ninth Circuit for the purpose of re-visiting state law. The government's suggestion rests on a misguided reading of Oregon state law, and is derived from mere dictum in an intermediate appellate Oregon court case. The government's reasoning would mean that the Oregon Supreme Court should have reached an opposite result in its on-point and controlling case, *Fearing v. Bucher*, 997 P.2d 1163, 1166 (Or. 1999). The Petition should be denied.

ARGUMENT

I. The Definition of "Scope of Employment" Is Governed by State Law, and, in this Case, by the Oregon Supreme Court, Which Has Held It Is a Jury Question, Not a Question of Law

It is settled precedent in the Ninth Circuit – and every other circuit to directly address the issue – that state law governs whether acts are "within the scope of employment" under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(5). *Randolph v. Budget Rent-a-Car*, 97 F.3d 319, 325 (9th Cir. 1996). *See also O'Bryan v. Holy See*, 556 F.3d 361, 383 (6th Cir. 2009); *Robinson v. Gov't of Malay.*, 269 F.3d 133, 142-145 (2d Cir. 2001); *Moran v. Kingdom of Saudi Arabia*, 27 F.3d 169, 173 (5th Cir. 1994). It is difficult to believe that there is any alternative plausible interpretation given that "scope of employment" is a long-established term under state tort law, and tort law is almost exclusively a matter for the states. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938). If Congress intended "scope of employment" to be a term of legal art with a distinctive federal meaning, it would have been required to provide such a meaning. *Neder v. United States*, 527 U.S. 1, 21 (1999). It did not. Therefore, the only relevant question before this Court at this time is the most reasonable and

plausible interpretation of Oregon state law governing "scope of employment."[1]

A. The Government Has Misread State Law Governing "Scope of Employment"

The government has twisted Oregon state law almost to the point of being unrecognizable. First, the government treats the question whether sexual abuse can be within the scope of employment for superior respondeat liability as a matter of law. According to the government, "the alleged sexual abuse in this case did not fall within the scope of employment as a matter of Oregon law." Gov't Br. at 13. This is, in fact, a mischaracterization of the Oregon Supreme Court's precedents.

The most plausible and reasonable reading of Oregon Supreme Court cases is that whether an employee has acted within the "scope of employment" in cases involving sex abuse is a question of fact for the jury – not a question of law. While sexual assault or abuse *by itself* may not be within the scope of employment, sexual assault arising out of and interrelated with the employee's duties, actions, and

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[1] As the government correctly states, there are two additional reasons that this issue is not debatable: (1) Petitioner did not challenge this aspect of the decision below, and (2) the Supreme Court has followed the same interpretation with respect to the same language in the Federal Tort Claims Act. Gov't Br. at 9, n.5 (citing to *Williams v. United States*, 350 U.S. 857 (1955) (per curiam)).

intent to serve the master may well fall within the scope of employment. *Chesterman v. Barmon*, 753 P.2d 404, 406 (Or. 1988). If acts clearly within the scope of employment are interrelated with and necessarily cause the abuse, the abuse can be considered by the jury as occurring within the scope of employment (along with all the other relevant acts taken in the scope of employment) for purposes of determining respondeat superior liability. *Fearing*, 997 P.2d at 1166.[2] The Oregon test does not permit employer liability simply because the employment relationship brings the employee and the victim together. To the contrary, the abuse must necessarily be linked to the employee's role, obligations, and service to the employer in such a way that a jury can infer that the acts of abuse are inseparable from the sexual aggressor's role as an employee. In that circumstance, the abuse can be one of the facts that satisfies the core element of proof that the employee was acting "within the scope of employment" in that case and, therefore, the employer is liable for those acts. *Minnis v. Oregon Mut. Ins. Co.*, 986 P.2d 77, 83

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[2] Oregon is not alone in treating "scope of employment" as a question of fact for the jury. *See Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, 989 F.Supp. 110, 118 (D. Conn. 1997); *Garriepy v. Ballou & Nagle*, 157 A. 535, 537 (Conn. 1931); *Alma W. v. Oakland Unified School Dist.*, 176 Cal. Rptr. 287, 289 (Cal. Ct. App. 1981); *Tall ex rel. Tall v. Board of Sch. Comm'rs*, 706 A.2d 659, 668 (Md. Ct. Spec. App. 1998); *Fahrendorff ex rel. Fahrendorff v. North Homes, Inc.*, 597 N.W.2d 905, 910 (Minn. 1999); *Doe v. Bruton Parish Church*, 42 Va. Cir. 467, 477 (Va. Cir. Ct. 1997); *Gilliam v. DSHS*, 950 P.2d 20, 28 (Wash. Ct. App. 1998).

(Or. Ct. App. 1999). If the government were correct, *Fearing* would have been decided differently.

Second, the government manufactures new Oregon law by trying to extract "scope of employment" from a theory of respondeat superior liability. There is no such thing. "Respondeat superior" means, literally, "let the superior make answer," Black's Law Dictionary 1313 (7th ed. 1999), or, that the employer is liable for harm to the victim, *because* the employee's actions occurred under the umbrella of the employer.

According to the government, Oregon has created a "new tort" of vicarious liability for which the triggering acts need not be in the scope of employment. Gov't Br. at 15-16. This reading cannot be supported by the discussion in *Fearing* or its outcome. Moreover, under long-settled tort law, it would be nonsensical to consider respondeat superior liability without proof of acts within the scope of employment, so the government's attempt to sever the two is absurd.

Even if the government's reading were correct that the sex act itself is *never* within the scope of employment, the government's conclusion that the defendant employer would then be absolved of liability for sexual abuse because there are no tortious acts within the scope of employment that can trigger liability is patently wrong.

The Oregon Supreme Court's obvious reasoning is that acts necessarily leading up to the abuse are

part of the set of facts establishing that the employee committed a tort within the "scope of employment." Therefore, the employer is vicariously liable for the abuse. *See, e.g.*, *Fearing*, 997 P.2d at 1168; *Minnis*, 986 P.2d at 83. In other words, the grooming and the attempts to gain the trust of the child and family, using the position created by the employer, are sufficient tortious acts "within the scope of employment" to create vicarious liability for sex abuse.[3]

This means that the plaintiff is permitted to go forward in a sex abuse case under Oregon law based on acts other than the sex act within the scope of employment. There is no question that the Amended Complaint describes those acts. Am. Compl. ¶¶ 13-14.

Third, the government rests its recommendation to grant certiorari for the purpose of vacating the court of appeals' decision on the slender reed of a state intermediate appellate decision. According to the government, this lower court opinion holds that, as a matter of law, sexual abuse may never be within the scope of employment. However, this is not what the Oregon Supreme Court has held, and "the State's highest court is the best authority on its own law." *C.I.R. v. Bosch's Estate*, 387 U.S. 456, 465 (1967).

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[3] The government apparently believes that the tort of sexual abuse is a one-event tort. That would be contrary to the copious studies and the views of the experts on the subject. *See*, Kenneth V. Lanning, Former Supervisory Special Agent, FBI, *Child Molesters: A Behavioral Analysis* 37 (4th ed. 2001) *available at* http://www.cybertipline.com/en_US/publications/NC70.pdf.

As discussed above, the *Fearing* case treats the question of whether the acts of abuse are within the scope of employment as a fact question for the jury, not a question of law. *Fearing*, 977 P.2d at 1168. The governing question under Oregon law is whether the abuse is directly tied into the employee's actions and intent to serve the employer. *Fearing*, 997 P.2d at 1166. If that question can be answered in the affirmative, a jury can find that those acts, along with the employee's other relevant acts, are within the scope of employment and, therefore, vicarious liability attaches for sexual abuse.

Archdiocese of Portland, 180 P.3d 160 (Or. Ct. App. 2008), *rev'd on other grounds*, *Schmidt v. Mt. Angel Abbey*, 223 P.3d 399 (Or. 2009), on which the government relies, also provides a particularly weak justification for vacating the Court of Appeals, because the Oregon Supreme Court reversed *Schmidt* on other grounds and did not take up the *Schmidt* court's reasoning with respect to "scope of employment." In fact, the Oregon Supreme Court expressly refused to reach the "scope of employment" issue: "We limited our review of the Court of Appeals decision to the statute of limitations issue, *ORAP 9.20(2)*, and therefore express no opinion as to the respondeat superior issue." *Schmidt*, 223 P.3d 399, 402 n.1 (Or. 2009).

In any event, the meaning of state law is determined by state supreme court precedent, not by intermediate courts. *C.I.R. v. Bosch's Estate*, 387 U.S. at 465. And when the state law is fairly disputed by the parties, the state supreme court is the only

appropriate body to clarify the issue. *Employment Div. v. Smith*, 485 U.S. 660 (1988) (remanding case to Oregon Supreme Court for clarification of law, where interpretation was disputed by the parties). That means the controlling decision is *Fearing*, as the Court of Appeals for the Ninth Circuit correctly held.

II. The Government's Reasoning Is Inconsistent with Other Provisions and the Legislative History of the FSIA

The FSIA was intended to de-politicize these cases and to take the State Department out of the calculus. Congress could not have been more explicit that it is inappropriate for the executive branch to attempt to alter governing law in order to reach a particular end in tort or commercial cases. Accordingly, the exceptions in FSIA were intended to shield victims from both the vagaries of politics and pressure from foreign sovereigns. The government's far-fetched reading of Oregon law appears to cross that line.[4]

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[4] The executive branch could be more appropriately involved with these issues if it were to take efforts to protect the interests of United States children by initiating investigations, following the lead of Ireland and Germany. *See* Commission to Inquire into Child Abuse, Commission Report (2009), http://www.childabusecommission.com/rpt/; Yvonne Murphy, et al., Commission of Investigation: Report into The Catholic Archdiocese of Dublin (2009), http://www.dacoi.ie/; Francis D. Murphy, et al., The Ferns Report (2005), http://www.bishop-accountability.org/ferns/; Verena Schmitt-Roschmann, *Pope's Former Diocese*

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Section 1606 states that "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 (2009). Yet, under the government's reasoning, a private organization that creates an employment environment that induces child sex abuse in Oregon is liable for the sex abuse of the child, while a sovereign that engages in identical behavior and causes the same harm is not. This is contrary to Congress's intent.

The legislative history states that the FSIA was enacted to protect American citizens from harm generated by the acts of sovereign employees, officials, and agents in the United States. FSIA also was supposed to end the practice of having sovereigns pressure the State Department to avoid accountability to American citizens for torts and commercial obligations. It is axiomatic that under the FSIA, American citizens like John V. Doe, who are harmed by the employment practices of sovereigns, like the Holy See, should be permitted to go into United States courts in order to obtain redress for the harm done to them.

As the House Report explained, under the law before FSIA:

Faces 'Tsunami' Of Abuse Allegations, HUFF. POST, Mar. 19, 2010, http://www.huffingtonpost.com/2010/03/19/germany-abuse-munich-dioc_n_505601.html (discussing government task force addressing abuse by Catholic clergy).

> A private party who deals with a foreign government entity cannot be certain that his legal dispute with a foreign state will not be decided on the basis of non-legal considerations through the foreign government's intercession with the Department of State.

(H.R. Rep. No. 94-1487, pt. 9, at 1 (1976)). The FSIA was intended to change the balance so that American victims could obtain justice when sovereigns harmed them:

> A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process. The Department of State would be freed from pressures from foreign governments to recognize their immunity from suit and from any adverse consequences resulting from an unwillingness of the Department to support that immunity. As was brought out in the hearings on the bill, U.S. immunity practice would conform to the practice in virtually every other country – where sovereign immunity decisions are made exclusively by the courts and not by a foreign affairs agency.

Id., pt. 7 at 5. Accordingly, John V. Doe asks for nothing more than the rule of law pursuant to a fair reading of governing state law.

III. The Government's Reasoning Appears to Suffer from a Deficient Understanding of the Phenomenon of Child Sex Abuse within Organizations

Child sex abuse by an employee may be wholly independent of employment in some, and even most, circumstances, but there are times when an employer or organization can operate in a way that makes the abuse virtually inevitable. The Centers for Disease Control and Prevention have studied the issue. Janet Saul, Ph.D. & Natalie Audage, M.P.H., *Preventing Child Sex Abuse within Youth Organizations: Getting Started on Policies and Procedures*, Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, U.S. Dep't of H.H.S. at 18 (2007), *available at* http://www.cdc.gov/ncipc/dvp/preventingchildsexualabuse.pdf. Prosecutors have as well. Report of the Grand Jury of the Court of Common Pleas First Judicial District of Pennsylvania, Criminal Trial Division, Phil. Grand Jury Rep. Misc. No. 03-00-239, § 1, at 1 (2003), *available at* http://www.philadelphiadistrictattorney.com/images/Grand_Jury_Report.pdf.

Courts in Oregon are intended to provide redress to children harmed in organizations as a result of the organization's policy failures. *See, e.g.,* Special Verdict, *Lewis v. Boy Scouts of America, et al.*, No. 0710-11294 (Or. 4th Dist. Cir. Ct., Apr. 13, 2010) (jury awards punitive damages against Boy Scouts organization for mishandling child sex abuse claims for decades).

The *Fearing* rule speaks to the reality of organizational mishandling of child safety. *Fearing v. Bucher*, 997 P.2d 1163, 1166 (Or. 1999). By failing to pay adequate attention to the facts of this case, the government elides this essential element of the case. Here are the facts, which the government's brief glosses over: Father Andrew Ronan used his priestly position to abuse children in a parish in Benburb, Ireland (Am. Compl. ¶ 11); he admitted to abusing the children (Am. Compl. ¶ 11); he was transferred to Chicago and placed in a school, where he also admitted to abusing children and wondered aloud why the Church kept putting him in assignments with access to children (Am. Compl. ¶ 12); and then he was transferred to Oregon and placed in a parish where, once again, dealing with children was integral to his employment. That is where he abused John V. Doe (Am. Compl. ¶¶ 13-15). Under Oregon law, there is no question that a jury should be permitted to hear this evidence and to decide whether, as a matter of fact, the abuse was part and parcel of Ronan's acts within the "scope of employment" for the Holy See.

The Oregon rule that treats "scope of employment" in abuse cases as a question of fact for the jury reflects the compelling interest in protecting children from child sex abuse. Although, generally, sexual abuse is not likely to be "within the scope of employment," the Oregon Supreme Court recognizes such a possibility. Like all good tort rules involving children, it is a deterrent to harm and an incentive to protect. Without it, organizations can ignore the

needs of children and escape accountability when they do not. There is no legitimate reason to distort Oregon Supreme Court cases and the FSIA to make an exception for any sovereign that endangers United States children.[5]

CONCLUSION

The government is correct that there is no reason for this Court to take this case on the merits. The government's novel and strained interpretation of Oregon cases is untenable and unreasonable. Therefore, its suggestion to grant certiorari for the purpose of vacating the decision below is unsound.

[5] As the government notes, the question of jurisdiction under the commercial activity exception is not before this Court at this time and remains pending in the courts below. Gov't Br. 6 n.3.

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

Respectfully submitted,

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