No. 09-1

# 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*

## PETITIONER'S SUPPLEMENTAL BRIEF

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## INTRODUCTION

As the amicus brief of the United States makes clear, the Ninth Circuit erred in denying immunity in the decision below. The consequences of that error are stark. Absent this Court's intervention, a foreign sovereign clearly entitled to immunity will be subjected to the burdens of litigation in a district court lacking subject matter jurisdiction.

Based upon the clear merits of the Holy See's petition and the implications of the Ninth Circuit's decision, the Court should grant plenary review. In the alternative, this Court should, consistent with the United States' recommendation, enter a summary disposition granting petitioner relief. But in all events, given the Executive Branch's recognition that the Ninth Circuit incorrectly denied immunity to the Holy See, it would be unthinkable to let that decision stand and impose the very burdens upon a foreign sovereign that the FSIA is intended to avoid.

### I. The United States and the Holy See Agree on the Merits of the Holy See's Petition and the Implications of the Ninth Circuit's Decision

On November 16, 2009, this Court invited the Solicitor General to express the views of the United States with regard to the Holy See's petition for writ of certiorari. The response is clear: the United States is in agreement with the merits of the Holy See's petition and the implications of the Ninth Circuit's decision.

In particular, the United States and the Holy See agree that:

- The Ninth Circuit committed clear legal error. (Brief for the United States as Amicus Curiae ("SG Br.") 20; Pet., *passim*).

- The Ninth Circuit's decision violated the FSIA's plain text. (SG Br. 19, 20; Pet. 11-15, 17).

- The Ninth Circuit's decision is in tension with this Court's FSIA precedent "instructing that courts should not expand the FSIA's exceptions . . . beyond the boundaries set by Congress." (SG Br. 18-19; Pet. 18-21).

- The Ninth Circuit's disregard for the FSIA's plain language raises foreign relations and reciprocity concerns. (SG Br. 20; Pet. 16-17, 26 n.7; Reply Br. 9-10).

- The Ninth Circuit's decision is contrary to FTCA precedent, including *Primeaux v. United States*, 181 F.3d 876 (8th Cir. 1999) (en banc). (SG Br. 16; Pet. 26-27).

- The Ninth Circuit's decision directly conflicts with holdings of the Oregon Supreme Court and the Oregon Court of Appeals. (SG Br. 10-13; Pet. 13 n.4).

- The Holy See is immune from respondent's vicarious liability claim. (SG Br. 13, 16-17; Pet. 1, 15).

- The district court lacks subject matter jurisdiction over respondent's vicarious liability claim. (SG Br. 7, 13; Pet. 1, 15).

As set forth below, all of these factors weigh heavily in favor of relief for the Holy See.

## II. Based Upon the Errors in the Ninth Circuit's Analysis Identified by the Holy See and the United States, this Court Should Grant Plenary Review

After detailing the Ninth Circuit's errors, SG Br. 8-17, the Solicitor General suggests that the Holy See's petition does not satisfy this Court's criteria for plenary review. With all due respect, the Solicitor General is applying a standard that is contrary to this Court's practice and that undervalues the interests of a foreign sovereign wrongly denied immunity. Given the errors identified in the Petition and in the Solicitor General's brief, the standard for plenary review is plainly met.

### A. Plenary Review Should be Granted Because the Ninth Circuit's Decision Violated the FSIA's Plain Text and is in Tension with this Court's FSIA Precedent

It is the common view of the United States and the Holy See that the Ninth Circuit's decision permits "jurisdiction over a claim that falls outside the bounds established by the [FSIA tort] exception's *plain text*: a claim based on tortious conduct that was not committed within the scope of employment." SG Br. 19 (emphasis added); *see also id.* at 20. The United States also agrees that the Ninth Circuit's decision "might be

regarded as in tension with this Court's decisions instructing that courts should not expand the FSIA's exceptions to foreign sovereign immunity beyond the boundaries set by Congress." *Id.* at 18-19.

This Court's FSIA precedent underscores a fundamental principle: the FSIA's exceptions should not be expanded by courts beyond the boundaries set by the political branches. Pet. 18-21; SG Br. 18-19.[1] Now that the Executive Branch has confirmed that the Ninth Circuit expanded the tort exception beyond its text, there is no basis to allow that decision to stand. As this Court's grant of certiorari in *Amerada Hess* demonstrates, plenary review is appropriate where a court of appeals' decision disregards the FSIA's plain language, even in the absence of a circuit split. Such an approach reflects the reality that the improper denial of immunity to a foreign sovereign is no small matter, but rather is just the kind of "compelling reason" for plenary review that Rule 10 describes. *See* Supreme Court Rule 10; *see also* Eugene Gressman et al., *Supreme Court Practice* 270 (9th ed. 2007) ("Gressman") ("Significant federal statutory questions implicating foreign affairs may give rise to review on certiorari.").[2]

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[1] Given that the FSIA raises sensitive foreign relations issues, adherence to the terms prescribed by the political branches is critical. *Cf.* Weber, *The Foreign Sovereign Immunities Act of 1976: Its Origin, Meaning and Effect*, 3 YALE STUDIES IN WORLD PUBLIC ORDER 1, 8 (1976) (stating that this Court's pre-FSIA precedent "firmly settled" the "plenary power of the political branches to prescribe national standards against which claims to immunity would be judged").

[2] This Court has in other contexts granted certiorari where a petition raises a significant issue of federal statutory interpretation. See, *e.g.*, *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 56-58 (2004). And contrary to the United States'

The Ninth Circuit's disregard of the FSIA's plain text and of this Court's precedent requiring strict adherence to the FSIA's language are reasons enough for the Court to grant plenary review. However, in this case, there is also a split in the Circuits on nearly identical facts.

### B. Plenary Review Should be Granted Because the Ninth Circuit's Decision Conflicts with the Sixth Circuit's *O'Bryan* Decision

There is a clear conflict in results between the Ninth Circuit's decision and the Sixth Circuit's decision in *O'Bryan v. Holy See*. *See* Reply Br. 7.

Under the tort exception, the tortious act itself must be within the scope of employment. 28 U.S.C. 1605(a)(5); SG Br. 14-15. Sexual abuse of a minor by a priest is outside the scope of employment under both Oregon and Kentucky law. SG Br. 10-13, 17. Accordingly, when properly applying federal and state law, neither the Ninth Circuit nor the Sixth Circuit should have found jurisdiction – and yet the Ninth Circuit did and the Sixth Circuit did not. That conflict in circuit cases, involving the same sovereign and identical facts, merits the Court's review. Pet. 29; Reply Br. 5-8.

To the extent that the difference in result may have been the product of the Ninth Circuit's errors in

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argument (SG Br. 19), tension with this Court's precedent on an important issue is a sufficient basis to grant plenary review. *Rainey v. Chever*, 527 U.S. 1044, 119 S. Ct. 2411, 2414 (1999) (Thomas, J., dissenting).

construing *both* state and federal law, that hardly lessens the case for plenary review. The Ninth Circuit's mistaken interpretation of the FSIA – a purely federal question – was a but-for cause of its error and the difference in result from the Sixth Circuit's decision in *O'Bryan*. The Court recently granted certiorari in analogous circumstances in a commercial context. *See AT&T Mobility LLC v. Concepcion*, No. 09-893 (*cert. granted* May 24, 2010). Certainly, plenary review is even more appropriate in the context of a mistaken rejection of a foreign state's sovereign immunity.

### C. Plenary Review Should be Granted Because the Ninth Circuit's Decision is Contrary to FTCA Precedent

Under the FTCA, a state vicarious liability rule cannot be used to expand jurisdiction over the United States where the wrongful act itself is not within the scope of employment. SG Br. 16 (citing *Primeaux*, 181 F.3d at 878); *see also* Pet. 26-28; Reply Br. 4-5. Although the Ninth Circuit's decision is directly contrary to the Eighth Circuit's en banc decision in *Primeaux* and other FTCA precedent, the United States argues that plenary review is unwarranted "[b]ecause the decision below concerns only the FSIA" and therefore "does not squarely conflict with any decision on the FTCA." SG Br. 18 n.11.

The FSIA's tort exception was modeled on the FTCA (SG Br. 2 n.1; Reply Br. 8-9), and the FTCA's "scope of employment" language is identical to that found in the FSIA. *Compare* 28 U.S.C. 1346(b)(1) *with* 28 U.S.C. 1605(a)(5). This Court has repeatedly granted certiorari to resolve conflicting interpretations

of different but related statutory schemes. *See*, *e.g.*, *Gutierrez v. Ada*, 528 U.S. 250, 254 (2000) (certiorari granted "to resolve a split between the Ninth Circuit's interpretation of the Organic Act of Guam and the Third Circuit's reading of identical language in the Revised Organic Act of the Virgin Islands"); *see also* Gressman 242 ("[C]ourts of appeals may have construed related but not identical statutes differently. If sufficiently clear, such conflicts may move the Court to grant certiorari, especially if the case is otherwise important.").

The United States' belief that conflict with FTCA precedent is insufficient is also inconsistent with comity, reciprocity and equality principles. *Republic of Philippines v. Pimentel*, 553 U.S. 851, 128 S. Ct. 2180, 2190 (2008); Reply Br. 8-11. When the United States faced FTCA panel decisions in *Primeaux* that diminished its immunity through reasoning directly analogous to the Ninth Circuit's FSIA decision below, the United States argued forcefully in its petition for en banc review that the issue was of "exceptional importance" and clearly merited further review. The United States contended that "[i]f left unreviewed, the [*Primeaux*] panel decisions . . . could cause plaintiffs nationwide to challenge the significance, or even the existence, of the 'scope' requirement in 28 U.S.C. 1346(b)(1)." The United States also argued that "[i]f allowed to stand, this decision will, in all likelihood, cause a cloud of uncertainty to envelop a previously clear statutory requirement, with [far-reaching] ramifications." What was true of the FTCA and the United States' sovereign immunity in *Primeaux* is equally true of the FSIA and the interests of foreign sovereigns. There is no reason to allow the decision below to cloud the previously clear immunity

provisions of the FSIA. Given the close relationship between the two statutes, and principles of comity, reciprocity and equality, the arguments the United States made in *Primeaux* support review here. Pet. 26 n.7; Reply Br. 8-9.

## III. If this Court Does Not Grant Plenary Review, the Court Should Summarily Dispose of the Case to Vindicate the Immunity of a Foreign Sovereign

In the view of the United States, this Court should grant the Holy See's certiorari petition, vacate the court of appeals' judgment, and remand for further consideration ("GVR"). SG Br. 19-21. The United States believes that the GVR should correct the Ninth Circuit's mistaken interpretation of the FSIA and make clear "that Section 1605(a)(5) authorizes suit against a foreign state for a tort by the state's employee only if the tort itself was committed by the employee while acting within the scope of his office or employment." SG Br. 21. The United States recommends that the matter should be remanded "in light of that ruling on the interpretation of the FSIA and also in light of the decision of the Oregon Court of Appeals in *Schmidt* concluding (based on *Fearing*) that sexual abuse is not within the scope of a priest's employment." *Id.*

While the Holy See appreciates what the United States is seeking to accomplish through its GVR recommendation, a summary reversal may be more

appropriate for several reasons.[3] First, the Ninth Circuit clearly erred on an important issue of FSIA interpretation. SG Br. 19-20. The option of summary reversal exists precisely to correct such clear errors, Gressman 251, and the United States' brief itself provides a roadmap for an opinion summarily reversing the decision below. Second, while the United States argues that the Court should GVR in light of *Schmidt*, the Ninth Circuit was apprised of *Schmidt* on rehearing – and it is therefore unclear whether *Schmidt* would make a difference in any further consideration of the case by the Ninth Circuit. Finally, the Solicitor General points to this Court's GVR in *Ministry of Def. v. Elahi*, 546 U.S. 450, 453 (2006), as precedent for a GVR here. While *Elahi* shows that the Court has authority to issue the kind of GVR the Solicitor General envisions, the GVR in *Elahi* did not prevent the Ninth Circuit from erring on remand or obviate the need for this Court ultimately to grant plenary review. *See Ministry of Def. v. Elahi*, No. 07-615 (*cert. granted* June 23, 2008). As the United States recognizes, a central purpose of foreign sovereign immunity is to avoid burdens of litigation. SG Br. 19-20. A summary reversal would avoid unnecessary proceedings in the Ninth Circuit, a fitting result where, as here, the Executive Branch recognizes that the sovereign is clearly immune from the sole remaining claim in this 8-year old case. SG Br. 13, 16-17.

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[3] It is worth noting that the Solicitor General's proposal – which calls for the Court to "correct" the errors of the Ninth Circuit (SG Br. 21) – already appears to resemble a summary reversal more than a GVR.

In light of the Ninth Circuit's clear error and the sovereign interests in play, this Court should summarily reverse the court of appeals' decision if plenary review is not granted.

## IV. Given that the Holy See is Immune From Respondent's Sole Remaining Claim and that the District Court Lacks Subject Matter Jurisdiction, Denial of the Petition is Not a Viable Option

The United States recognizes that the Holy See is immune from respondent's sole remaining claim and that the district court lacks subject matter jurisdiction. Given the United States' view, and in light of basic principles of comity, denial of the petition is not a viable option.

The "central purpose" of foreign sovereign immunity is to protect a sovereign from the burdens of litigation. SG Br. 19-20; *see also Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 849 (5th Cir. 2000). The Holy See faces extensive discovery if the case proceeds in the district court. SG Br. 20 n.12.[4] To compel the foreign sovereign "to engage in the burdens and costs of responding to discovery, especially when

[4] There is every indication that discovery litigation in this matter would be complex, expensive and burdensome. For example, before the matter was stayed by the district court pending proceedings in this Court, Plaintiff served the Holy See with wide-ranging discovery, including requests seeking, *inter alia*, documents and testimony "regarding the Holy See's, including the Pope's, authority over Roman Catholic Priests." While such requests are clearly subject to objections, litigation over the validity and scope of those objections is itself certain to impose significant burdens upon the sovereign.

the jurisdictional question . . . may be resolved simply by reference to the undisputed allegations in the complaint, would frustrate the significance and benefit of entitlement to immunity from suit under the FSIA." *Butler v. Sukhoi Co.*, 579 F.3d 1307, 1315 (11th Cir. 2009) (quotation marks omitted); *see also, e.g.*, *Siegert v. Gilley*, 500 U.S. 226, 232 (1991) ("[U]ntil this threshold immunity question is resolved, discovery should not be allowed."). Given the Holy See's clear immunity from respondent's sole remaining claim, as confirmed by the brief of the United States, the Court should grant relief to prevent proceedings that would unnecessarily undermine the protection afforded by the FSIA.

Denial of the petition would also effectively return this matter to a district court that lacks subject matter jurisdiction. SG Br. 13; 28 U.S.C. 1330(a). It is well-settled that "[w]ithout jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.'" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle*, 7 Wall. 506, 514 (1868)); *cf.* FED. R. CIV. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."). Because the district court is without subject matter jurisdiction over respondent's sole remaining claim, further litigation should not be permitted to proceed in that court.

## CONCLUSION

For the reasons set forth above and in the Holy See's petition, this Court should grant plenary review.

If the Court is not inclined to grant plenary review, the Court should enter a summary disposition granting petitioner relief. In any event, in light of the United States' agreement with the merits of the Holy See's petition, one disposition is clearly improper: the district court case against the Holy See should not be allowed to proceed when the sovereign is immune and the lower court is without jurisdiction.

Respectfully submitted,

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