No. 25-

IN THE

Supreme Court of the United States

ERIK BLECHER, *et al.*,

Petitioners,

v.

THE HOLY SEE,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1602 *et seq.*, provides that foreign states are presumptively immune from suit, subject to enumerated exceptions. The "noncommercial tort" exception removes immunity for personal injury occurring in the United States caused by the tortious act or omission of a foreign state or its employees within the scope of employment, but it expressly excludes "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." 28 U.S.C. § 1605(a)(5)(A).

The questions presented are:

Whether the FSIA's discretionary-function exclusion, 28 U.S.C. § 1605(a)(5)(A), denies federal subject matter jurisdiction for a tort claim that alleges a mandatory foreign government policy or regulation that involves no judgment or choice, but the tortious act or omission arose from an official or employee's compliance with that mandatory policy or regulation rather than its violation.

Whether a foreign state's mandatory policy or regulation that foreseeably enables and supports the sexual abuse of children may be susceptible to policy analysis or grounded in policy considerations such that it falls within the FSIA's discretionary function exclusion.

PARTIES TO THE PROCEEDING

PETITIONERS

- Erik Blecher, James Bruno, Robert Burns, Emmett Caldwell, Louis Castiglione, Kevin Cavanaugh, Brian Compasso, Wayne Compasso, Vincent Dillard, John Gillen, Stephen Hurn, Joseph Jockel, Marianne Agnello, Dianne Mondello, Vernon Allen Jones, Michael Leonard, John O'Connor, Thomas O'Connor, Daniel Rice, Joseph Russo, Tom Sparks, Peter Senatore, Matthew Sexton, Lawrence Smith, Jordan Taylor, Desiree Callender, Jacqueline Regan, Michael Gill, Neil M. Curtis, and Robert Lisiecki.

RESPONDENT

- The Holy See, aka, The Apostolic See.

DIRECTLY RELATED PROCEEDINGS

U.S. Court of Appeals for the Second Circuit

- *Erik Blecher, James Bruno, Robert Burns, Emmett Caldwell, Louis Castiglione, Kevin Cavanaugh, Brian Compasso, Wayne Compasso, Vincent Dillard, John Gillen, Stephen Hurn, Joseph Jockel, Marianne Agnello, Dianne Mondello, Vernon Allen Jones, Michael Leonard, John O'Connor, Thomas O'Connor, Daniel Rice, Joseph Russo, Tom Sparks, Peter Senatore, Matthew Sexton, Lawrence Smith, Jordan Taylor, Desiree Callender, Jacqueline Regan, Michael Gill, Neil M. Curtis, and Robert Lisiecki, and all persons similarly situated v. The Holy See, aka The Apostolic See*, No. 22-2840, Affirming Judgment of District Court, entered July 24, 2025.

U.S. District Court, Southern District of New York

- *Erik Blecher, et al. v. The Holy See*; Case No. 1:20-cv-03545-JPO; Judgment entered September 29, 2022.

U.S. District Court, Eastern District of New York

- *James Bruno, Robert Burns, Louis Castiglione, Kevin Cavanaugh, Brian Compasso, Wayne Compasso, John Gillen, Joseph Jockel, Marianne Agnello, Dianne Mondello, Vernon Allen Jones, John O'Connor, Thomas O'Connor, Joseph Russo, Peter Senatore, Matthew Sexton, Lawrence Smith, Philip F. Fahey, Enzo Rivers, Carlief Vozzo, Carlo*

Ciliberti, Glenn A. Sobecki, John K. Diffley, Kevin O'Connor, Christopher J. Edge, Robert Emmerich, Luis Mendoza, Sean A. O'Brien, Charles J. Hensel, Donna Nichols n/k/a Donna Sanders, and James Cruickshank, on behalf of themselves and all others similarly situated, v. The Holy See, aka The Apostolic See, No. 1:21-cv-04559-HG-JAM; Pending, no Judgment entered.

U.S. District Court, Northern District of New York

- *Stephen Hurn, Tom Sparks, James Hamilton, Michael E. Peters, And Mary Winne f/k/a Mary Ruggeri, on behalf of themselves and all others similarly situated, v. The Holy See, aka The Apostolic See*, No. 1:21-cv-00913 (TJM/DJS); Pending, no Judgment entered.

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OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 146 F.4th 206 (2d Cir. 2025) and reproduced in the Appendix at pages 1a–42a. The opinion and order of the United States District Court for the Southern District of New York granting Respondent's motion to dismiss for lack of subject matter jurisdiction is reported at 631 F. Supp. 3d 163 (S.D.N.Y. 2022) and reproduced in the Appendix at pages 43a–60a.

JURISDICTION

The opinion and order of the Second Circuit Court of Appeals affirming the Judgment of the District Court was filed on July 24, 2025. Petitioners' Motion for Rehearing and Rehearing En Banc was denied by order entered on September 4, 2025) and reproduced in the Appendix at pages 61a–62a. This Petition is filed within 90 days of the date of the denial of rehearing, in accordance with S. Ct. R. 13(3). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1605(a)(5)(A):

> (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) . . . 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[.]

PRELIMINARY STATEMENT

This case arises from the longstanding pattern of grievous childhood sexual abuse alleged against Catholic clergy, and the Bishops' response to reports of such abuse in their capacity as employees of Respondent, the Holy See. Petitioners are survivors of clergy sexual abuse who allege that the Holy See—a "foreign state" as defined under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1602 *et seq.*—enabled child sexual abuse through a mandatory secrecy policy for the handling of clergy sexual abuse allegations, including the instruction titled *Crimen Sollicitationis* ("*Crimen*") issued by the Pope in 1922 and reissued in 1962. *Crimen* is alleged to have required strict secrecy, on penalty of excommunication, forbidding disclosure to civil authorities or warnings to parishioners and their families. The Bishops, acting under the Pope's plenary control, implemented the Holy See's mandatory policy set forth in *Crimen*. The secrecy cloaking the acts of sexual abuse under this policy emboldened and perpetuated the clergy abusers' heinous acts against children.

This Court has not previously had occasion to address the issue raised in this appeal, which concerns the statutory construction and application of the FSIA's discretionary function exclusion, 28 U.S.C. § 1605(a)(5)(A). The text of the discretionary function exclusion under the FSIA is similar to a provision in the Federal Tort Claims Act (FTCA) providing discretionary function immunity for certain claims against the United States—but not identical. The difference in language is critical because, while under the FTCA a *violation* of a mandatory statute or regulation is necessary for liability, the FSIA says nothing about whether the tortious conduct needs to be in violation of or may be in *compliance* with a foreign state's mandatory policy or directive. The sole issue for purposes of the FSIA's discretionary function exclusion is whether the act or omission at issue involved an element of judgment or choice. As a matter of policy, a tort claim for personal injuries against a foreign state based on nondiscretionary conduct in accordance with the foreign state's mandatory directive or regulation should be allowed under § 1605(a)(5), particularly where, as here, that directive or regulation is issued and maintained in strict secrecy. The Second Circuit in this case, however, held that the FSIA's discretionary function exclusion, like the FTCA's discretionary function exception, is avoided only by an alleged violation of a mandatory policy or regulation. This holding misapprehends the text of the FSIA and the important differences between claims against the United States and claims against foreign states. It invites inconsistency among the federal courts and results in an unwarranted narrowing of tort liability against a foreign state contrary to Congress's intent and design.

The Sixth Circuit Court of Appeals previously held, in a case alleging substantially the same facts concerning clergy sexual abuse of children, that *Crimen* cannot be deemed discretionary and can serve as the basis for tort claims under the noncommercial tort exception of the FSIA, 28 U.S.C. § 1605(a)(5), not subject to the discretionary function exclusion in subpart (A). *O'Bryan v. Holy See*, 556 F.3d 361, 387 (6th Cir. 2009). The decision of the Second Circuit in this case is in conflict with *O'Bryan*.

Additionally, this case raises another question not previously addressed by this Court: at what point is the mandatory policy or directive of a foreign state imposed upon its employees in the United States so repugnant and potentially injurious that it cannot be said that the policy is one that the discretionary function exclusion was designed to shield? Here, the Holy See's *Crimen* policy, requiring "strict secrecy" for all concerned in reports of clergy sexual abuse, on penalty of excommunication, enabled sexual predators and empowered them to commit horrific acts of abuse with impunity. This mandatory policy is simply not susceptible to policy analysis and should be held by this Court to be of the type that the FSIA's discretionary function exclusion was not intended to shield.

STATEMENT OF THE CASE

A. Basis for Federal Jurisdiction

This action was originally brought in the United States District Court for the Southern District of New York against The Holy See a/k/a The Apostolic See (the

"Holy See"), which is a "foreign state" as defined in 28 U.S.C. § 1603(a). The Plaintiffs allege that they were victims of child sexual abuse by Catholic clergy in New York State, and bring a negligence claim against the Holy See arising from this abuse. Subject matter jurisdiction is based on 28 U.S.C. § 1330(a), which provides that the district courts shall have original jurisdiction "of any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-07 of [Title 28] or under any applicable international agreement."

B. Facts Material to Consideration of the Questions Presented

Petitioners are thirty survivors of childhood sexual abuse by Catholic clergy in New York who seek damages for negligence from the Holy See under a vicarious liability theory. Petitioners' Amended Complaint asserts a tort claim for negligence seeking money damages against the Holy See based on its mandatory policy of strict secrecy for reports of clergy sexual abuse:

> [The Holy See] mandat[ed] a policy for its Bishops and Dioceses of secrecy and concealment in response to allegations and reports of child sexual abuse by Catholic clergy. This mandatory secrecy policy, imposed on threat of excommunication, bound Bishops and Dioceses for decades if not centuries. As a result of this policy, child sexual abuse by Catholic clergy developed and continued as a pervasive and systemic problem in the Catholic Church, in

> which perpetrators were protected and victims were silenced.

(A 19-20, ¶2).[1]

The Amended Complaint sets forth specific facts concerning the structure and operation of the Holy See, under the leadership of the Pope. (A 31-35). These allegations state facts demonstrating that the Bishops within this structure were employees of the Holy See, subject to the Pope's plenary and absolute right of control.[2] (*Id.*) The Bishops were designated by the Holy See as the direct supervisors of the clergy assigned within their respective territories, subject to the directives of the Holy See. (*Id.*) The Amended Complaint alleges that "[t]he Pope is the direct and immediate supervisor of Bishops in the Church hierarchy. Only the Pope has the authority to select, consecrate or ordain a Bishop, assign a Bishop to a Diocese, transfer a Bishop, remove a Bishop from office, allow a Bishop to retire, or accept a Bishop's resignation, among other things." (A 34, ¶ 54). While the Bishop acts under the supervision and direction of the

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1. Citations to the record are to the Appellants' Appendix filed in the Court of Appeals at ECF document no. 36, and are cited herein as "(A X-Y)", with "A" meaning Appellants' Appendix and "X-Y" meaning the page numbers in the Appendix where the cited material is located.

2. The Amended Complaint states that "Archbishops and bishops, also known as Ordinaries, have authority to conduct the activities of the Catholic Church within their respective territories under the direction and complete, plenary control of the Holy See." (A 32, ¶ 46). The term "Bishops" for purposes of the Amended Complaint is defined to include the Archbishop of New York and the Bishops of the other Dioceses located in New York State.

Pope, the Bishop "is the superior of all Priests and other clergy assigned to work within his Diocese." (A 35, ¶ 58).

The Holy See's authority encompasses the Bishops' investigation and response to allegations or reports of clergy-on-child sexual abuse. (A 35-36, ¶¶ 59-60). The Holy See has known for centuries that Catholic clergymen were using their positions and roles in Catholic parishes and schools to sexually molest children. (A 36, 40, ¶¶ 61, 74). Their response in the 20th century was to issue secret documents setting forth specific procedures for the Bishops to follow in handling allegations of child sexual abuse, including the *Crimen* directives issued in 1922 and 1962. (A 37, ¶ 65). These documents set forth a mandatory instruction to maintain allegations or reports of child sexual abuse in strict secrecy. (A 37-39, ¶¶ 64-72). The Amended Complaint alleges:

> Crimen Sollicitationis reflected a specific procedure and policy that Bishops were required to follow without material discretion, on penalty of excommunication. Compliance with this secrecy policy mandated, among other things, that Bishops (i) not disclose allegations of clergy sexual abuse to law enforcement; (ii) direct victims and their families to not report incidents of clergy sexual abuse to law enforcement; and (iii) provide no warning or disclosure that may protect other Catholic parishioners and students from sexual abuse. The Holy See's secrecy policy mandated that the Bishop follow a specific course of action in response to an allegation of child sexual abuse.

(A 38, ¶ 68). Violation of this policy was subject to harsh consequences from the Holy See, including the penalty of excommunication. (A 38, ¶ 67). The Bishops were without discretion in adhering to the secrecy policy of the Holy See. (A 40-42, ¶¶ 75-79).

The Holy See's mandatory secrecy policy "enabled and emboldened child sexual predators among clergy working in the Dioceses, creating an environment and system in which they could engage in child sexual abuse with impunity. As a result, children encountering clergy within the Bishops' territories were placed at foreseeable risk of child sexual abuse by clergy sexual predators." (A 41-42, ¶ 79). The Bishops performed in accordance with this mandatory duty and maintained the strict secrecy of allegations or reports of clergy-on-child sexual abuse. (A 41, ¶ 77). As a result, the mandatory policy set forth in *Crimen* was a substantial factor in causing clergymen to sexually abuse Petitioners when they were children. (A 46, ¶ 97).

The Holy See's strict secrecy policy thus facilitated and enabled clergymen who were serial child sex abusers from committing heinous acts of abuse upon children:

> The priests who were serial child sex abusers, some of whom were eventually placed on Dioceses' published lists of priests credibly accused of child sexual abuse . . . , represent a phenomenon that was well known to the Holy See. These priest-perpetrators were enabled and emboldened by the mandatory secrecy policy in committing acts of child sexual abuse in their Dioceses, especially in connection

with the Church's youth-related functions and activities.

(A 20-29, 41-42, 49-50).

C. Proceedings Below

Petitioners negligence claims were brought under the FSIA and New York law against the Holy See pursuant to the FSIA's noncommercial tort exception, 28 U.S.C. § 1605(a)(5). The District Court held that claims premised on the bishops' conduct satisfied the tort exception's scope-of-employment and situs requirements,[3] but dismissed for lack of subject matter jurisdiction under the FSIA's discretionary function exclusion, § 1605(a)(5)(A). (57a–59a). The District Court applied to the FSIA's discretionary function exclusion the two-prong test derived from cases decided under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2680, which bars the exercise of jurisdiction over a claim where: (1) the challenged act or omission is discretionary, meaning that it involves an element of judgment or choice; and (2) the judgment or choice in question is grounded in considerations of public policy or is susceptible to policy analysis. *See Berkovitz v. United States*, 486 U.S. 531 (1988), and *United States v. Gaubert,* 499 U.S. 315 (1991). The District Court held,

3. The District Court determined that Petitioners' claims were based on the allegedly tortious conduct of the individual Bishops who administered the New York Dioceses. It ruled that the Bishops could be employees of the Holy See under New York law; that in reporting or failing to report the accusations, the bishops were acting within the scope of their employment; and that the Holy See could therefore, as a general matter, be held vicariously liable for the bishops' alleged acts or omissions. (52a–55a).

under the first prong of this test, that "'if a regulation mandates particular conduct, and the employee obeys the direction, the Government will be protected. . . .'" (58a [quoting *Gaubert*, 499 U.S. at 324]). The District Court further noted that "common sense dictates" that individual bishops "have some discretion in how to deal with priests under their supervision." *Id.* (internal quotation, citation omitted). Finally, the District Court held that the decision whether to warn of a priest's sexual proclivities for children is susceptible to policy analysis. (59a).

The District Court's dismissal was appealed and the Second Circuit affirmed. Like the District Court, the Second Circuit applied the FTCA's two-prong *Berkovitz/ Gaubert* test. The Court found that "Plaintiffs' theory of causation, as alleged in the [Amended] Complaint, depends on discretionary action by bishops."(19a). Such discretionary action was based on the bishops' "assignment authority" over priests. *Id.* The Court then relied upon case authorities decided under the FTCA to hold that the discretionary function exclusion under the FSIA, in the same manner as the FTCA, "bars the exercise of jurisdiction over claims stemming from employee conduct in compliance with a mandatory policy." (22a–35a). Given this determination that compliance with a mandatory policy was insufficient, the Court held that the first prong was satisfied because there was no allegation in the Amended Complaint that the New York bishops violated a mandatory policy of the Holy See. *Id.* The Court rejected Petitioners' arguments that the FSIA's text differs materially from the FTCA, and that the separation-of-powers concern that forecloses examination of a U.S. agency's policy or regulation does not apply to the mandatory policy or regulation of a foreign state. (30a-35a).

The Court next held that the second prong of the *Berkovitz/Gaubert* test was satisfied because the tortious conduct alleged in the Amended Complaint was "susceptible to policy analysis." (35a–41a). The Court rejected Plaintiff's position that "there can be no plausible policy justification for maintaining the strict secrecy of illegal conduct, *i.e.*, cleric sexual abuse of children." (40a). It determined that there were legitimate, competing interests that could be balanced against the enablement of child sexual abuse. *Id.*

REASONS FOR GRANTING THE WRIT

I. THE SECOND CIRCUIT'S DECISION CONFLICTS WITH THE SIXTH CIRCUIT'S DECISION IN *O'BRYAN v. HOLY SEE*

The Second Circuit's holding on the application of the FSIA's discretionary function exclusion is squarely in conflict with the Sixth Circuit's decision in a similar case against the Holy See, *O'Bryan v. Holy See*, 556 F.3d 361 (6th Cir. 2009). In that case, the Court denied in part the Holy See's motion to dismiss, holding, *inter alia*, that the discretionary function exclusion did not apply to causes of action alleging clergy sexual abuse of children based on the mandatory policy of *Crimen*. *Id.* at 370. The factual allegations relating to *Crimen* in *O'Bryan* are substantially the same as in the instant case. The plaintiffs in *O'Bryan* alleged that they sought to hold the Holy See liable for the acts of "bishops and archbishops, who following the directives of the [Holy See], permitted child sexual abuse to occur." *Id.* at 386 n. 11. The Court in *O'Bryan* determined that the discretionary function

exclusion did not apply "because the terms of the [Holy See's] supervision was not discretionary":

> According to the allegations in plaintiffs' complaint, theories of liability premised upon the supervision of the allegedly abusive clergy do not implicate the discretionary function exception to the tortious act exception because the terms of the supervision were not discretionary. According to the complaint, the 1962 Policy [*Crimen*] "impose[d] the highest level of secrecy on the handling of clergy sexual abuse matters." Plaintiffs contend that this required secrecy prohibited Holy See personnel from, among other things, reporting childhood sexual abuse to government authorities. *Id.* Thus, following the 1962 Policy cannot, on the pleadings in plaintiffs' complaint, be deemed discretionary.

Id. at 387. Given this determination that compliance with *Crimen* was not discretionary, the Sixth Circuit held that tortious conduct based on *Crimen* did not fall within the discretionary function exclusion and could therefore be actionable under the noncommercial tort exception of 28 U.S.C. § 1605(a)(5).[4] *Id.* & n. 11. This holding is squarely

4. The Ninth Circuit in *Doe v. Holy See*, 557 F.3d 1066 (9th Cir. 2009), ruled consistently with *O'Bryan* on application of the discretionary function exception, and is thus also in conflict with the Second Circuit's Opinion. In *Doe*, however, dismissal was granted on this issue because the complaint was vague and did not plead particular facts regarding the mandatory secrecy policy in *Crimen*. *Id.* at 1084. The Court nonetheless reasoned that, if the pleading were sufficient, compliance with a mandatory policy

in conflict with the Second Circuit's holding in this case that the allegations of compliance with *Crimen*—not violation—do not take the tortious acts and omissions outside of the discretionary function exclusion. (*See* 24a–25a).

II. THE STATUTORY CONSTRUCTION OF THE FSIA'S DISCRETIONARY FUNCTION EXCLUSION HAS IMPORTANT IMPLICATIONS FOR TORT CLAIMS AGAINST FOREIGN STATES THAT SHOULD BE ADDRESSED BY THIS COURT

The issue of the FSIA's statutory construction presented here concerns not just clergy abuse claims against the Holy See, but tort claims generally where compliance with the foreign state's mandatory policy or regulation constitutes tortious conduct actionable under the non-commercial tort exception, 28 U.S.C. § 1605(a)(5).[5] Because the Second Circuit's decision "shuts the

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foreclosing judgment or choice was sufficient to take the claim out of the discretionary function exclusion. *Id.*

5. Under the FSIA, 28 U.S.C. § 1604, "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 and 1607 of this chapter." One of the exceptions to foreign state immunity set forth in section 1605, subdivision (a)(5), known as the noncommercial tort exception, "provides jurisdiction over claims 'in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property,' but only where the relevant conduct 'occurr[ed] in the United States.'" *Federal Republic of Germany v. Philipp*, 592 U.S. 169, 183-184 (2021) (quoting § 1605(a)(5)). This jurisdiction encompasses tortious acts occurring in the United States and caused by "the tortious act or omission of . . . any official or employee of that foreign state while

courthouse door" to victims with potentially meritorious claims for relief against foreign states engaging in tortious acts in the United States, it takes on substantial importance.

The FSIA is the "sole basis" for jurisdiction over foreign sovereigns in U.S. courts. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434, 439-440 (1989) (construing the noncommercial tort exception of the FSIA to require tortious conduct in the United States "for which liability is imposed under domestic tort law"). This Court has yet to interpret the discretionary function exclusion of the FSIA. The proper scope of subpart (A) to § 1605(a)(5) is thus a weighty matter of federal law appropriately addressed by this Court.

In interpreting the FSIA, federal court decisions "draw heavily" from cases deciding questions of immunity under the FTCA. *USAA Cas. Ins. Co. v. Permanent Mission of the Repub. of Namibia*, 681 F.3d 103, 112 n. 43 (2d Cir. 2012). This reliance on FTCA precedent takes on particular significance for the FSIA's discretionary function exclusion, which has statutory language in common with the FTCA's discretionary function exclusion. *See Usoyan v. Republic of Turkey*, 6 F.4th 31, 38 (D.C. Cir. 2021) (noting that "FTCA precedent provides 'guidance'

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acting within the scope of his office or employment." 28 U.S.C. § 1605(a)(5). Accordingly, the first question arising under this provision concerns the activities alleged, which must be tortious under the laws of the state where they occurred, in this case New York. *See Robinson v. Government of Malaysia,* 269 F.3d 133, 142 (2d Cir. 2001). If tortious acts under state law are alleged, then the question becomes whether those acts are "non-discretionary" under 28 U.S.C. §1605(a)(5)(A). *Id.* at 142-143.

in FSIA cases" (citation omitted)). The courts, however, should be wary of the trap encountered in assuming "guidance" from FTCA case law to be conclusive when the language of the two statutes are not identical and have material differences.

A. This Court's Holdings in *Berkovitz* and *Gaubert* on the Scope of the FTCA's Discretionary Function Exclusion Focused on Whether the Challenged Decision Was the Product of Judgment or Choice

The seminal cases from this Court construing FTCA § 2680(a) are *Berkovitz* and *Gaubert*.[6] In *Berkovitz*, this Court "restat[ed] and clarify[ied] the scope of the discretionary function exception." 486 U.S. at 538. Congress's purpose in enacting the FTCA's discretionary function exception was "to prevent '[j]udicial intervention in . . . the political, social, and economic judgments' of governmental—including regulatory—agencies." *Id.* at 539 (quoting *United States v. Varig Airlines*, 467 U.S. 797, 820 (1984)). The Court noted that the determination of whether the discretionary function exception bars suit depends on the nature of the conduct rather than the status of the actor. *Id.* at 536. The rule thus set forth focuses on whether the government employee is performing duties in accordance with a specifically prescribed directive, on one hand, or is exercising judgment or choice, on the other:

> the discretionary function exception will not apply when a federal statute, regulation,

6. The two-prong *Berkovitz/Gaubert* test for application of the discretionary function exception is set forth *supra* p. 8.

> or policy specifically prescribes a course of action for an employee to follow. In this event, the employee has no rightful option but to adhere to the directive. And if the employee's conduct cannot appropriately be the product of judgment or choice, then there is no discretion in the conduct for the discretionary function exception to protect.

Id. at 536.[7]

In *Gaubert*, this Court revisited the scope of the discretionary function exclusion under the FTCA. This Court held that the day to day management and supervision of a bank's affairs by federal regulators were protected under the discretionary function exclusion of § 2680(a). 499 U.S. at 323-325. The *Gaubert* opinion notes that "the actions of Government agents involving the necessary element of choice and grounded in the social, economic, or political goals of the statute and regulations are protected." *Id.* at 323. This Court rejected the argument that the discretionary function exception "does not reach decisions made at the operational or management level of the bank involved in this case." *Id.* at 325. The inquiry in *Gaubert* was thus directed to "whether the challenged actions were discretionary, or whether they were instead controlled by mandatory statutes or regulations." *Id.* at 328. The Court noted that "neither party has identified formal regulations governing the conduct in question."

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7. Assuming that the employee's conduct involves judgment or choice, there remains a second part to the inquiry, which determines whether the judgment is "of the kind that the discretionary function exception was designed to shield." *Berkovitz*, 486 U.S. at 536-537; *see* § III, *infra*.

Id. at 329. "The relevant statutory provisions were not mandatory, but left to the judgment of the agency the decision of when to institute proceedings against a financial institution and which mechanism to use. . . . The agencies here were not bound to act in a particular way; the exercise of their authority involved a great 'element of judgment or choice.'" Id. (quoting *Berkovitz*, 486 U.S. at 536).

Because in *Gaubert* "each of the challenged actions involved the exercise of choice and judgment," the discretionary function exception applied to deny subject matter jurisdiction for the plaintiff's claims. The issue for application of the discretionary function exclusion addressed in *Gaubert*—whether the challenged acts or omissions allowed for the exercise of choice or judgment—is the issue that should be addressed in application of the FSIA's discretionary function exclusion. Unlike the plaintiffs in *Gaubert*, however, here Petitioners point to a particular, mandatory Holy See policy that compelled certain acts and omissions of the Bishops, which constitutes the alleged tortious conduct. In *O'Bryan, supra*, the Court held that this same mandatory policy could not be deemed discretionary. *See* 556 F.3d at 383-386 (applying *Berkovitz* and *Gaubert*).

B. The Discretionary Function Exclusion in the FTCA and the Discretionary Function Exclusion in the FSIA Have Significant Textual Differences

Initially, it is helpful to compare the relevant statutory language in the FTCA with that in the FSIA:

FTCA, 28 U.S.C. § 2680(a):

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

FSIA, 28 U.S.C. § 1605(a)(5(A):

> [A]ny claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, . . .

The overlapping, substantially similar language in these statutory texts consists of the clause, "based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused." The language in the FTCA that has no corollary in the FSIA refers to an "act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid." 28 U.S.C. § 2680(a). This first portion of Section 2680(a)'s text does not appear in § 1605(a)(5)(A).

The language appearing in the FTCA's discretionary function exclusion but absent from the FSIA was

discussed and construed in *Dalehite v. United States*, 346 U.S. 15 (1953). In *Dalehite,* this Court recognized in Section 2680(a) "two phrases" protecting distinct types of government acts:

> It will be noted from the form of the section . . . that there are two phrases describing the excepted acts of government employees. The first deals with acts or omissions of government employees, exercising due care in carrying out statutes or regulations whether valid or not. It bars tests by tort action of the legality of statutes and regulations. The second . . . excepts acts of discretion in the performance of governmental functions or duty "whether or not the discretion involved be abused." Not only agencies of government are covered but all employees exercising discretion.

Id. at 32-33 (citation omitted). This Court thus set forth a distinctly two-part inquiry for applying tort immunity to the United States under the FTCA. The first part of the inquiry examined whether government employees were "carrying out" statutes or regulations with "due care." *Id.* The legislative history behind this first part demonstrates an intent to preclude a suit for damages "growing out of an authorized activity," which was intended to "test the validity" of a federal statute or regulation. *Id.* at 29. "This exception is part of the statutory scheme which is intended to assure that 'the legality of a rule or regulation should [not] be tested through the medium of a damage suit for tort.'" *Myers & Myers, Inc. v. United States Postal Service*, 527 F.2d 1252, 1261 (2d Cir. 1975) (quoting legislative history for § 2680(a)).

In *Dalehite*, this Court noted that the two parts of the FTCA's discretionary function exclusion are complementary. The exclusion protects the discretionary acts of "executives or administrators in establishing plans, specifications or schedules of operations," from which it "necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable." *Id.* at 36. In *Gaubert*, the Court reiterated this point, noting that, "[u]nder the applicable precedents, . . . if a regulation mandates particular conduct, and the employee obeys the direction, the Government will be protected because the action will be deemed in furtherance of the policies which led to the promulgation of the regulation." 499 U.S. at 324 (citing *Dalehite*, 346 U.S. at 36).

It should be recognized, however, that the "two phrases" of Section 2680(a) are critical to this analysis. By means of the first phrase, an employee's acts in compliance with a mandatory statute or regulation will be protected under the plain meaning of the FTCA's text. *Dalehite*, 342 U.S. at 32-33. This portion of FTCA § 2680(a) is referred to as the "due care" exception. See *Watson v. United States,* 179 F. Supp. 3d 251, 270-71 (E.D.N.Y. 2016), *rev'd on other grounds*, 865 F.3d 123 (2d Cir. 2017); *see also Myers & Myers*, 527 F.2d at 1261 (describing this provision as "another jurisdictional exception in 28 U.S.C. § 2680(a)"). It applies under FTCA § 2680(a) to the particular situation of a tort claim against the United States based on compliance with a mandatory regulation:

> In contrast to the discretionary function exception, . . . the due care exception applies to situations where a statute or regulation

> requires an action to be taken. In such a situation, where the government official acts in a reasonable way, i.e., not negligently, in carrying out the requirements of a statute or regulation, sovereign immunity lies.

Watson, 179 F. Supp. 3d at 270-71 (emphasis in original).

But the language of the "due care" exception in FTCA § 2680(a), which is the basis for this rule applicable to compliance with a mandatory regulation, is entirely absent from FSIA § 1605(a)(5)(A). Interpreting Section 1605(a)(5)(A) as if it contained the language in the first phrase of Section 2680(a), when it does not, violates basic tenets of statutory construction. "It is generally presumed that Congress acts intentionally and purposefully when it includes particular language in one section of a statute but omits it in another." *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994) (internal quotations, citation omitted). It is a "fundamental interpretive canon" that "a statute should be construed so that effect is given to all of its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009). Moreover, "[i]t is a basic principle of statutory interpretation that, where Congress 'explicitly enumerates certain exceptions' within a statute, 'additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.'" *Mei Xing Yu v. Hasaki Rest., Inc.*, 944 F.3d 395, 417 (2d Cir. 2019) (citation omitted).

Applying the plain meaning rule in the statutory construction of Section 1605(a)(5)(A), the pertinent question is whether the acts of the foreign state's

employees at issue involved an element of judgment or choice. Whether these acts were in violation of or compliance with the foreign state's directive or regulation, applying the plain meaning of § 1605(a)(5)(A), is not part of the statutory inquiry and thus irrelevant. Put another way, it would be incorrect to imply an exception in § 1605(a)(5)(A) for the acts of a foreign state's employees in carrying out a mandatory regulation. In particular, the language of the FTCA's discretionary function exception reflects Congress's intent to "bar[] tests by tort action of the legality of [U.S.] statutes or regulations." *Dalehite*, 346 U.S. at 32-33. This language is absent from the FSIA, so it necessarily follows that the acts of foreign state in compliance with mandatory policies or regulations may be challenged, consistent with Congress's intent. There is no basis for importing language from the FTCA into the FSIA, which distorts or alters the FSIA's intent. While acts in compliance with a statute or regulation confer immunity from tort claims against the United States under the language of the FTCA, acts in compliance with a foreign directive or regulation are not immune from liability for claims against a foreign state under the plain meaning of the FSIA's discretionary function exclusion. This Court's review is warranted to restore fidelity to the FSIA's text and structure, and to clarify that judicial borrowing from FTCA case law should respect Congress's deliberate drafting choices.

The Second Circuit's decision in the instant case notes that there are two separate and distinct phrases in 28 U.S.C. § 2680(a)—the due care clause and the discretionary function clause—but overlooks *Gaubert*'s application of these provisions *in tandem* in reasoning that the Government is protected when the employee

complies with a mandatory regulation. *Gaubert*, 499 U.S. at 324. In this regard, it is significant that this Court in *Gaubert* refers to *the entirety* of § 2680(a), inclusive of both separate and distinct clauses, as the "'discretionary function exception" in embarking on its analysis and reaching its conclusion:

> The liability of the United States under the FTCA is subject to the various exceptions contained in § 2680, including the "discretionary function" exception at issue here. That exception provides that the Government is not liable for 'any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function. . . . 28 U.S.C. § 2680(a).'

Id. at 322.

Gaubert thus viewed the two clauses of § 2680(a) together, giving rise to a compliance-violation dichotomy dependent upon the first clause of § 2680(a). Under this approach, this Court in *Gaubert* stated the FTCA's "discretionary function" rule in terms of whether the subject regulation mandates particular conduct:

> Under the applicable [FTCA] precedents, therefore, if a regulation mandates particular conduct, and the employee obeys the direction, the Government will be protected because the

> action will be deemed in furtherance of the policies which led to the promulgation of the regulation. [Citing *Dalehite*,—:U.S. at 36]. If the employee violates the mandatory regulation, there will be no shelter from liability because there is no room for choice and the action will be contrary to policy. On the other hand, if a regulation allows the employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations.

Id. at 324.

Accordingly, under the FTCA, when the employee's challenged act is "in furtherance of the policies that led to the promulgation of the [United States] regulation," then the act is protected. *Id.* But under the FSIA, there is no language referring to a foreign state employee's act or omission in "execution of a statute or regulation." *Compare* FTCA § 2680(a) *with* FSIA § 1605(a)(5)(A). When *Gaubert* discussed the "discretionary function exception" it plainly and purposely included the entirety of § 2680(a), particularly the language missing from FSIA § 1605(a)(5)(A). *Id.* at 322. The Second Circuit's reasoning and conclusion that *Gaubert* "was about the FTCA's *discretionary function exception,* not the due care exception," thus misapprehends *Gaubert* and misconstrues the statutory language. (22a).

The allegations in this case, which are plausible and should be accepted as true at the pleadings

stage, demonstrate a mandatory policy, *Crimen*, that compelled strict secrecy for allegations of abuse, required nondisclosure to law enforcement, and forbade warnings to parishioners with children participating in the Dioceses' youth-serving activities, all on penalty of excommunication. There was no "judgment or choice" involved. Given these alleged facts, the discretionary function exclusion of Section 1605(a)(5)(A) cannot be invoked to definitively deny jurisdiction to hear the claim. This Court's interpretation of the discretionary function exclusion in the FSIA is necessary to advance the textual integrity of the statute and to guide the federal courts in this important area of law.

C. The Policy Concern Reflected in Separation of Powers, Which Supports a "Violation Requirement" Under the FTCA, Is Not Relevant to the FSIA

The policy to be advanced by the requirement of a "violation" of a mandatory regulation concerns the principle of separation of powers. This principle has plain and obvious application to the acts and conduct of a U.S. government employee in adhering to a regulation in the course of his or her duties, as protecting these acts and conduct "will be deemed in furtherance of the policies which led to promulgation of the regulation." *Gaubert*, 499 U.S. at 324. The FTCA seeks to protect such acts and conduct "based on the purposes that the regulatory regime seeks to accomplish." *Id*. at 325, n. 7. There is no corollary interest in protecting the policies of a foreign state when it is engaging in activities in the United States that may be considered tortious and inconsistent with domestic interests or policies. *See* Sienho Yee, Note, *The*

Discretionary Function Exception Under the Foreign Sovereign Immunities Act: When in America, Do the Romans Do as the Romans Wish?, 93 Colum. L. Rev. 744, 745 (1993) 3 ("[t]he purpose of the discretionary function exception under the FTCA—to protect public policy making—has no corresponding application to foreign officials acting in the United States, because these foreign officials act as representatives of their own governments and do not make public policy within the United States").

The FSIA does not seek to further the purposes of the foreign state's "regulatory regime"; rather, it seeks to provide a remedy for tortious acts committed by a foreign state in the United States. *Id*. at 745 (noting the "critical purpose of the FSIA: to provide mechanisms for aggrieved parties to obtain relief in U.S. courts for wrongs that foreign sovereigns commit in the United States"). A foreign state should not be given license to engage in activities in the United States with impunity that are foreseeably harmful or tortious. The notion that, in construing the discretionary function exception under the FSIA, courts should seek guidance in decisions construing the discretionary function exception under the FTCA, should not be taken so far as to ignore the differences in the statutory provisions and the policies that support them. Given the textual differences in the two discretionary function exceptions and the relevant policies under which each was enacted, there is no reason for a blanket rule that these provisions must be construed the same. "[T]he legislative history of the FSIA states that the exceptions to noncommercial tort liability . . . were designed to correspond to 'many of the claims' against which the U.S. Government retains immunity under the FTCA." Yee, *supra*, 93 Colum. L.

Rev. at 749-50 & n. 35 (quoting H.R. Rep. No. 1487, 94th Cong., 2d Sess. 1 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6620). By implication, they do not fully overlap with the FTCA, and where the statutory language and the policies behind immunity differ they do not warrant the same construction. The separation of powers concern that drives the "violation" requirement as this Court held in *Dalehite* is inapplicable to the FSIA. A violation of a mandatory policy or regulation is therefore unnecessary to effectuate the purposes of the FSIA, and imposing it serves to needlessly deny an aggrieved party relief from the tortious conduct of a foreign state actor.[8]

8. Similarly, the interests of comity do not, as the Second Circuit held, justify the protection of mandatory policies of foreign states that support tortious conduct resulting in injuries in the United States. (See 30a–32a). For one thing, comity does not warrant expanding the plain meaning of the FSIA's discretionary function exception. The FSIA codifies the "principle of restraint" for sovereign party comity, which shields foreign states from suit except as provided in the FSIA. *Usoyan v. Republic of Turkey*, 6 F.4th 31, 48-49 (D.C. Cir. 2021) (citing *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488-489 (1983)). The interest of comity is furthered by the enactment of the FSIA, which confers sovereign immunity on foreign states in accordance with its terms. *Verlinden B.V.*, 461 U.S. at 488. Comity, however, does not dictate that foreign states always be treated the same as the United States for purposes of sovereign immunity. The Second Circuit asserts that, "[i]f Congress was reluctant to encourage judicial second-guessing of the federal government's policymaking judgments, we doubt that it was more eager to empower courts to scrutinize the policy decisions of foreign sovereigns." (29a–30a). This statement overlooks the lack of justification or support for a foreign state's immunity where its mandatory policy binding its employees in the United States prompts tortious acts and to be committed here with resulting injuries. Absent separation-of-powers considerations, there is no reason to confer deference on policies of a foreign state, such as the mandatory secrecy policy in *Crimen*, that essentially

D. The Second Circuit's Reliance on Bishops' Discretionary Assignment Authority is Misplaced and Cannot Sustain Application of the Discretionary Function Exclusion

The Second Circuit also finds the alleged tortious acts and omissions to be discretionary based on the nature of the Bishops' position and role. (19a–22a). In so doing, the Court makes a critical assumption: that the harms Petitioners allege "hinge on the discretionary acts of bishops in assigning clergy to positions within the dioceses that enabled abuse." (21a–22a). Yet there is nothing in the language of the Amended Complaint, nor anything that may reasonably inferred therefrom, which would support the assumption that one parish position may be more conducive for abuser priests than any other.

The Catholic Church is a youth-serving organization in which *any* parish position will involve access to and involvement with children. The underlying premise of the Second Circuit's position—that Bishops enabled child sexual abuse by assigning abuser-priests to one parish as opposed to another—is incorrect. (*See* A 40 ¶ 74 ["[t]hese priest-perpetrators were enabled and emboldened by the mandatory secrecy policy in committing acts of child sexual abuse in their Dioceses, especially in connection with the Church's youth-related functions and activities"). Indeed, it rests on a reframing and mischaracterization of the Amended Complaint, which alleges specifically and plausibly a policy that

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compel tortious conduct to be committed in the United States. A foreign state's employee should not have carte blanche to commit tortious acts in the United States through compliance with the foreign state-employer's mandatory policy or regulation.

mandated certain acts and omissions, not subject to the Bishop's judgment or choice. The presence of some discretionary acts in the broader factual matrix does not transform a claim "based upon" compelled nondisclosure and secrecy (as set forth in *Crimen*) into a claim "based upon" the Bishop's discretionary clergy assignment to a particular parish. Accordingly, the Amended Complaint's detailed allegations describing the Holy See's mandatory policy in *Crimen* were sufficient to satisfy the "initial [pleading] burden to state a claim that is not barred by the [discretionary function exclusion]." *Molchatsky v. U.S.*, 713 F.3d 159, 162 (2d Cir. 2013).

III. THIS COURT SHOULD ADDRESS THE KIND OF JUDGMENT OR CHOICE THAT THE FSIA'S DISCRETIONARY FUNCTION EXCLUSION WAS DESIGNED TO SHIELD

Applying the discretionary function test under the FTCA, the two parts of the *Berkovitz/Gaubert* test must both be satisfied for subject matter jurisdiction to be denied. The second prong examines whether the judgment or choice at issue is "of the kind that the discretionary function exception was designed to shield":

> [A]ssuming the challenged conduct involves an element of judgment, a court must determine whether that judgment is of the kind that the discretionary function exception was designed to shield. The basis for the discretionary function exception was Congress' desire to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the

> medium of an action in tort." *United States v. Varig Airlines*, [467 U.S. at 814]. The exception, properly construed, therefore protects only governmental actions and decisions based on considerations of public policy. *See Dalehite v. United States*, [346 U.S. at 36] ("Where there is room for policy judgment and decision there is discretion"). In sum, the discretionary function exception insulates the Government from liability if the action challenged in the case involves the permissible exercise of policy judgment.

Berkovitz, 486 U.S. at 536-537. This Court has never considered the question whether the discretionary function exclusion, either under the FTCA or the FSIA, was "designed to shield" acts that knowingly enable and facilitate the sexual abuse of children. If the line to be drawn for the "permissible exercise of policy judgment" is to have any meaning, then such an atrocious, shocking policy as reflected in *Crimen,* with horrific implications for children in the United States, must be deemed to fall outside that line.

The "focus of the inquiry" under the second prong is "on the nature of the actions taken and whether they are susceptible to policy analysis." *Gaubert*, 499 U.S. at 325. The answer to this question "hinges . . . on whether some plausible policy justification could have undergirded the challenged conduct." *Shansky v. United States*, 164 F.3d 688, 692 (1st Cir. 1999). The discretionary function exclusion will not apply to alleged "negligence unrelated to any plausible policy objective." *Coulthurst v. United States*, 214 F.3d 106, 111 (2d Cir. 2000). A policy or directive that

is designed to avoid scandal to the Church and the Holy See, protecting sexual predators and condoning clergy-on-child sexual abuse, simply does not have a plausible policy justification.

In *Tonelli v. United States*, 60 F.3d 492 (8th Cir. 1995)), the Court held that the post office's failure to act when it received notice that a postal employee was tampering with mail containing adult materials did not satisfy the second prong of the discretionary function test. *Id.* at 496. The Court noted that, while "issues of employee supervision and retention generally involve the permissible exercise of policy judgment and fall within the discretionary function exception," where the allegation concerns a failure to act in response to notice of illegal behavior, there is no choice involved based on plausible policy considerations." *Id*. Applying this principle, here the alleged tortious conduct concerns the Bishops' response to notice of conduct constituting criminal sexual offenses under state law. There is no plausible policy justification for maintaining the strict secrecy of such illegal conduct, which includes failing to report as may be required pursuant to law, and concealing such acts from law enforcement, school and parish personnel, the community, and the public. (*See* A 38, ¶ 68).

Appellate decisions, including the Second Circuit's decision here, have held that acts to conceal child sexual abuse by clergy are susceptible to policy analysis. *Doe v. Holy See*, 557 F.3d 1066, 1084-85 (9th Cir. 2009); *Croyle v. United States*, 908 F.3d 377, 381-82 (8th Cir. 2018). The Second Circuit found that the mandatory secrecy policy "could have been the product of weighing various policy considerations," including "the church's reputation,

'pastoral stability,' 'low ordination rates,' or 'staffing shortages.'" (38a [quoting *Doe v. Holy See*, 557 F.3d at 1085]). It is submitted that these incredulous policy justifications are simply wrong. If such dangerous and concerning acts and omissions reflected in the Bishops' adherence to *Crimen* can be justified on policy grounds, then it would seem that the notion of "policy judgment" has no fair and reasonable bounds. No matter how policy considerations may be spun, there simply is no justification for a policy that foreseeably enables the sexual abuse of children. Common sense and basic moral values dictate that such reasons for implementing a policy that knowingly places children in danger of suffering sexual abuse are inadequate. The discretionary function exception was not designed to shield a party's plan or scheme to avoid scandal and accountability by concealing criminal conduct causing grievous harm to children.

The D.C. Circuit's decision in *Usoyan v. Republic of Turkey*, 6 F.4th 31, 38 (D.C. Cir. 2021), provides an example of how the concept of "policy judgment" should be applied in the context of the discretionary function exclusion. There, an action was brought under the FSIA arising from the physical assaults of protesters by Turkish security forces in front of the Turkish ambassador's residence in Washington, D.C. 6 F.4th at 35-36. The Court held that, while the "Turkish security detail's protective mission was discretionary as a general matter," the decisions by the security detail resulting in the assaults and giving rise to the lawsuit were not sufficiently susceptible to policy analysis. *Id.* at 46-47. Under the Court's analysis, a mandatory policy that prompted assaultive behaviors was not protected:

> Determining which discretionary actions qualify is 'admittedly difficult'- after all, 'nearly every government action is, at least to some extent, subject to 'policy analysis.' . . . But we have resisted invitations to shield actions implicating only "the faintest hint of policy concern." . . . Moreover, blatantly careless or malicious conduct cannot be recast in the language of cost benefit analysis.

Id. at 45 (citations omitted). The Court in *Usoyan* thus held that the policy resulting in assaults by the Turkish security detail did not satisfy the second prong of the *Berkovitz/Gaubert* test. Likewise, the mandatory secrecy policy enabling sexual assaults of children by priests are not susceptible to policy analysis.

CONCLUSION

The petition for a writ of certiorari should be granted. This Court should reverse and hold that the FSIA's discretionary-function exclusion does not bar jurisdiction over claims premised on conduct compelled by a foreign state's mandatory directive, and, in any event, that compelled nondisclosure and non-reporting of criminal child sexual abuse is not susceptible to the kind of policy analysis the exclusion protects.

Dated: New York, NY
December 3, 2025

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED JULY 24, 2025

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 22-2840

ERIK BLECHER, JAMES BRUNO, ROBERT BURNS, EMMETT CALDWELL, LOUIS CASTIGLIONE, KEVIN CAVANAUGH, BRIAN COMPASSO, WAYNE COMPASSO, VINCENT DILLARD, JOHN GILLEN, STEPHEN HURN, JOSEPH JOCKEL, MARIANNE AGNELLO, DIANNE MONDELLO, VERNON ALLEN JONES, MICHAEL LEONARD, JOHN O'CONNOR, THOMAS O'CONNOR, DANIEL RICE, JOSEPH RUSSO, TOM SPARKS, PETER SENATORE, MATTHEW SEXTON, LAWRENCE SMITH, JORDAN TAYLOR, DESIREE CALLENDER, JACQUELINE REGAN, MICHAEL GILL, NEIL M. CURTIS, AND ROBERT LISIECKI, ON BEHALF OF THEMSELVES AND ALL PERSONS SIMILARLY SITUATED,

Plaintiffs-Appellants,

v.

THE HOLY SEE, aka THE APOSTOLIC SEE,

*Defendant-Appellee.**

* The Clerk of Court is directed to amend the official caption as set forth above.

Appendix A

August Term, 2023

(Argued: September 13, 2023 Decided: July 24, 2025)

Before: RAGGI, LOHIER, and CARNEY, *Circuit Judges*.

The question presented in this case is whether the discretionary function exclusion from the tortious activity exception of the Foreign Sovereign Immunities Act ("FSIA") precludes federal courts from exercising jurisdiction over claims against the Holy See concerning child sexual abuse perpetrated by clerics in the United States. Plaintiffs-Appellants are thirty survivors of childhood sexual abuse who seek damages for negligence from Defendant-Appellee the Holy See under a vicarious liability theory. They allege that the Holy See promulgated a mandatory policy of secrecy that governed how its dioceses and bishops handled reports of sexual abuse by clerics. In adhering to this policy, Plaintiffs allege, bishops in New York—the Holy See's employees—failed to warn children and parents of the dangers posed by the accused clerics and failed to report suspected abuse to law enforcement, thus emboldening abusers and exposing children to a foreseeable risk of harm. The District Court (Oetken, *J.*) granted the Holy See's motion to dismiss for lack of subject matter jurisdiction under the FSIA, concluding that the discretionary function exclusion from the FSIA's tortious activity exception barred Plaintiffs' claims. On *de novo* review, we agree with the District Court. Accordingly, we AFFIRM the District Court's judgment dismissing the action for lack of jurisdiction.

Appendix A

CARNEY, *Circuit Judge*:

The question presented in this case is whether the discretionary function exclusion from the tortious activity exception of the Foreign Sovereign Immunities Act ("FSIA") precludes federal courts from exercising jurisdiction over claims against the Holy See concerning child sexual abuse perpetrated by clerics. Plaintiffs-Appellants are thirty survivors of childhood sexual abuse who seek damages for negligence from Defendant-Appellee the Holy See under a vicarious liability theory. They allege that the Holy See promulgated a mandatory policy of secrecy that governed how its dioceses and bishops handled reports of sexual abuse by clerics. In adhering to this policy, Plaintiffs allege, bishops in the Archdiocese of New York, the Diocese of Brooklyn, the Diocese of Rockville Centre, the Diocese of Albany, the Diocese of Syracuse, and the Diocese of Ogdensburg (together, the "New York dioceses") failed to warn children and parents of the dangers posed by the accused clerics and failed to report suspected abuse to law enforcement, thus emboldening abusers and enabling abuse to continue for years. The District Court (Oetken, *J.*) granted the Holy See's motion to dismiss for lack of subject matter jurisdiction under the FSIA, concluding that the discretionary function exclusion from the FSIA's tortious activity exception barred Plaintiffs' claims. Because we agree with the District Court that the discretionary function exclusion applies and precludes Plaintiffs' claims, we AFFIRM its judgment dismissing the action for lack of jurisdiction.

Appendix A

BACKGROUND

I. Overview of the FSIA

Before the FSIA was enacted in 1976, "[f]or more than a century and a half, the United States generally granted foreign sovereigns complete immunity from suit in the courts of this country." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983). As the Supreme Court has observed, "foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution." *Id.* The Court therefore tended to defer to the decisions of the Executive Branch on whether to exercise jurisdiction over actions against foreign sovereigns. *See id.*

But in 1952, the State Department issued the "Tate Letter." *See* Ltr. from Jack B. Tate, Acting Legal Adviser, Dep't of State, to Acting Att'y Gen. Philip B. Perlman (May 19, 1952), *reprinted in* 26 Dep't State Bull. 984-85 (1952). The Tate Letter was "a landmark policy statement expressing the Executive Branch's adoption of a more nuanced, 'restrictive theory' of sovereign immunity, under which sovereigns would enjoy immunity as to their public acts, but not as to their private or commercial activities outside of their territories." *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, 863 F.3d 96, 103 (2d Cir. 2017). Despite this lucid statement, the State Department continued to make immunity determinations on a case-by-case basis, "suggest[ing] . . . immunity in cases where immunity would not have been available under the restrictive theory," *Verlinden*, 461 U.S. at 487,

103 S.Ct. 1962, and contributing to a "patchwork quilt of immunity decisions," *Mobil Cerro Negro*, 863 F.3d at 103.

In response to the growing disarray, in 1976 Congress passed the FSIA. *See* 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-1611. The FSIA codified the restrictive theory of foreign sovereign immunity and "vested responsibility for immunity determinations in the federal judiciary." *Mobil Cerro Negro*, 863 F.3d at 104 (citing *Verlinden*, 461 U.S. at 488-89, 103 S.Ct. 1962). The FSIA provides the "sole basis" for the exercise of jurisdiction over a foreign sovereign in U.S. courts. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989). Under the FSIA, a "foreign state" is presumptively immune from the jurisdiction of courts in this country unless an express exception to immunity found in the FSIA applies. 28 U.S.C. § 1604.[1] *See Republic of Hungary v. Simon*, 604 U.S. 115, 145 S. Ct. 480, 488, 221 L.Ed.2d 1 (2025); *Saudi Arabia v. Nelson*, 507 U.S. 349, 355, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993).

One of the statutory exceptions to immunity established by the FSIA is the tortious activity exception. 28 U.S.C. § 1605(a)(5). It permits courts to exercise jurisdiction over claims against foreign sovereigns "in which money damages are sought against a foreign state for personal

1. Section 1604 provides: "Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." 28 U.S.C. § 1604.

injury or death, . . . occurring in the United States and caused by the tortious act or omission of [the] foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment." *Id.* To satisfy the exception's situs requirement, "the 'entire tort' must be committed in the United States." *In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 109, 115 (2d Cir. 2013).

The statute also provides an "exception to the exception," however: this is the "discretionary function exclusion" from the tortious activity exception, which is set forth in 28 U.S.C. § 1605(a)(5)(A). *USAA Cas. Ins. Co. v. Permanent Mission of Republic of Namibia*, 681 F.3d 103, 111 (2d Cir. 2012). The discretionary function exclusion "preserves the immunity of a sovereign nation when it would otherwise be abrogated by the tortious activity exception." *Id.* It holds that the tortious activity exception does not apply to "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." 28 U.S.C. § 1605(a)(5)(A).[2] Thus, the FSIA generally excepts a sovereign's tortious acts in the United States from jurisdictional immunity in the courts, but reinstates the immunity where the claim turns on the sovereign's discretionary act—the "exclusion" from the "exception."

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2. For completeness: The FSIA contains a separate jurisdictional exclusion from the tortious activity exception for "any claim arising out of out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U.S.C. § 1605(a)(5)(B).

Appendix A

The Supreme Court has yet to interpret the discretionary function exclusion of the FSIA, but it has evaluated the corresponding exception in the Federal Tort Claims Act ("FTCA").[3] Because the language of the FSIA exclusion is "closely replicated" in the FTCA, we regularly consult FTCA caselaw when analyzing the exclusion in the FSIA context. *Swarna v. Al-Awadi*, 622 F.3d 123, 145 (2d Cir. 2010); *see also USAA*, 681 F.3d at 112 n.43 (looking to FTCA caselaw in FSIA case). Indeed, in its discussion of the exclusion, the 1976 House Report

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3. The corresponding language in the FTCA, 28 U.S.C. §§ 1346(b), 2671 *et seq.*, waives the sovereign immunity of the federal government from suits for negligent or wrongful acts of its employees (subject to many exceptions). It further provides that the FTCA's waiver of immunity does not apply to:

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or *based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.*

Id. § 2680(a) (emphasis added). The first half of this provision sets forth the FTCA's "due care exception," which is designed to "bar[] tests by tort action of the legality of statutes and regulations." *Dalehite v. United States*, 346 U.S. 15, 33, 73 S.Ct. 956, 97 L.Ed. 1427 (1953). The due care exception does not appear in the corresponding general provision of the FSIA, 28 U.S.C. § 1605(a)(5), and is not at issue here. The second half of section 2680(a) sets forth the FTCA's discretionary function exception. As observed above, it contains language virtually identical to that contained in the FSIA's discretionary function exclusion.

accompanying the FSIA expressly refers to the FTCA. *See* H.R. Rep. No. 94-1487, at 21 (1976) ("The exception[] provided in subparagraph[] (A) . . . of section 1605(a)(5) correspond[s] to many of the claims with respect to which the U.S. Government retains immunity under the Federal Tort Claims Act, 28 U.S.C. [§] 2680(a). . . .").

The Supreme Court has established a two-pronged framework known as the "*Berkovitz/Gaubert* test" for determining whether the discretionary function exception applies in the FTCA context. *See Berkovitz v. United States*, 486 U.S. 531, 536-37, 108 S.Ct. 1954, 100 L.Ed.2d 531 (1988); *United States v. Gaubert*, 499 U.S. 315, 322-23, 111 S.Ct. 1267, 113 L.Ed.2d 335 (1991). Under this test, the FTCA discretionary function exception bars the exercise of jurisdiction over a claim where (1) the challenged act or omission is "discretionary," meaning that it "involves an element of judgment or choice," *Berkovitz*, 486 U.S. at 536, 108 S.Ct. 1954; and (2) the judgment or choice in question is grounded in "considerations of public policy" or is "susceptible to policy analysis," *Gaubert*, 499 U.S. at 323, 325, 111 S.Ct. 1267 (internal quotation marks omitted).[4] Put differently, the FTCA's discretionary

4. In explaining the interrelationship between the first and second prongs of the *Berkovitz/Gaubert* test, the Supreme Court summarized:

> [I]f a regulation mandates particular conduct, and the employee obeys the direction, the Government will be protected because the action will be deemed in furtherance of the policies which led to the promulgation of the regulation. If the employee violates the mandatory regulation, there will be no

function exception permits the exercise of jurisdiction if a plaintiff can show: "*either* (1) the United States' allegedly tortious act (or failure to act) was inconsistent with a 'specific mandatory directive'—*i.e.*, a 'federal statute, regulation, or policy that specifically prescribes a course of action for the federal government to follow,' . . . *or* (2) the allegedly tortious 'judgment or choice in question' is not 'grounded in considerations of public policy or susceptible to policy analysis.'" *Cangemi v. United States*, 13 F.4th 115, 130 (2d Cir. 2021) (emphases in original) (alterations adopted) (quoting *Berkovitz*, 486 U.S. at 536, 544, 108 S.Ct. 1954, and *Coulthurst v. United States*, 214 F.3d 106, 109 (2d Cir. 2000)).

"Plaintiffs bear the initial burden to state a claim that is not barred by the [FTCA discretionary function exception]." *Molchatsky v. United States*, 713 F.3d 159, 162 (2d Cir. 2013); *City of New York v. Permanent Mission of India to the United Nations*, 446 F.3d 365, 369 (2d Cir. 2006) ("The party seeking to establish jurisdiction bears the burden of producing evidence establishing that a specific exception to immunity applies, but the foreign state then bears the ultimate burden of persuasion on this

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> shelter from liability because there is no room for choice and the action will be contrary to policy. On the other hand, if a regulation allows the employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations.

Gaubert, 499 U.S. at 324 (citation omitted).

question."), *aff'd and remanded*, 551 U.S. 193, 127 S.Ct. 2352, 168 L.Ed.2d 85 (2007).

We have applied the *Berkovitz/Gaubert* test in the FSIA context. *See, e.g.*, *USAA*, 681 F.3d at 111-12 (setting out test in FSIA case). With these principles in mind, we turn to Plaintiffs' contentions.[5]

5. We recognize that the subtle distinction in terms between the FTCA's "discretionary function *exception*" and the FSIA's "discretionary function *exclusion*" may appear confusing to a casual reader. In short, these differing terms reflect the fact that the FTCA and FSIA operate from different baselines. The FTCA generally waives the sovereign immunity of the United States federal government from suits for negligent or wrongful acts of its employees (subject to many *exceptions*, including the discretionary function exception). The FSIA, by contrast, establishes the foreign sovereign's immunity from suit, unless an FSIA statutory exception, like the "tortious activity exception," applies. 28 U.S.C. § 1605(a)(5). The FSIA's discretionary function exclusion is an exception to the tortious activity exception to the foreign sovereign's presumptive immunity: if the discretionary function exclusion applies, the foreign government's immunity is preserved "when it would otherwise be abrogated by the tortious activity exception." *USAA*, 681 F.3d at 111. Accordingly, we use "exclusion" when referring to the FSIA's discretionary function exclusion and "exception" when referring to the FTCA's discretionary function exception. When correctly applied, the exclusion and exception each bar the exercise of jurisdiction over an action against the relevant sovereign.

II. Factual Background[6]

Plaintiffs allege that they were abused in the 1960s through 1990s by named clerics of the New York dioceses. Asserting negligence claims under a vicarious liability theory, they seek damages from the Holy See for the physical and psychological injuries they allegedly sustained from the abuse.

The Holy See directs the activities of the organizations, agents, and employees of the Catholic Church worldwide.[7] The Church divides itself into geographic territories comprising dioceses and archdioceses (in effect, a large diocese). Bishops operate dioceses; an archdiocese is a "primary diocese" in a region, governed by an archbishop. Am. Compl. ¶ 46, Plaintiffs' App'x ("App'x") at 32. An archbishop enjoys a "position of honor" among bishops, but operates in parallel to—that is, exercises no direct authority over—bishops. *Id.* Bishops and archbishops (together, "bishops") conduct the Church's activities at

6. Unless otherwise noted, the allegations set forth below are drawn from Plaintiffs' amended complaint (the "Complaint").

7. The Holy See is the "universal government of the Catholic Church and operates from Vatican City State, a sovereign, independent territory." *See* U.S. Dep't of State, *U.S. Embassy, The Vatican*, https://diplomacy.state.gov/encyclopedia/u-s-embassy-the-vatican [https://perma.cc/Y2N79JUF] (last accessed July 21, 2025). Courts treat the Holy See as a "foreign state" for FSIA purposes. *See*, *e.g.*, *O'Bryan v. Holy See*, 556 F.3d 361, 372-74 (6th Cir. 2009). The parties do not dispute that the Holy See is a "foreign state" within the meaning of the FSIA, and we proceed on that understanding.

a local level, supervising priests and all other clerics assigned to work within their respective dioceses and archdioceses. The bishops perform these duties "under the direction and complete, plenary control of the Holy See." *Id.* The Complaint alleges that bishops in the U.S. are employees of the Holy See.

Central to Plaintiffs' theory of the case is the mandatory secrecy policy allegedly established by the Holy See about one hundred years ago in a confidential document titled "Instruction on the Manner of Proceeding in Cases of Solicitation" or "*Crimen Sollicitationis*" ("the Policy"). *Id.* ¶ 65, App'x at 37. Initially promulgated in 1922 and reiterated in documents issued in 1962, 2001, and 2010, the Policy established, as pertinent here, specific internal procedures for investigating and responding to allegations and reports of child sexual abuse within the Catholic Church. *Id.* ¶¶ 65, 69, App'x at 37-39. It imposed a requirement of "strict secrecy" outside of these specified processes, under penalty of excommunication. *Id.* ¶ 64, App'x at 37. In particular, as alleged here, the Policy mandated that bishops: not disclose allegations of abuse to law enforcement; instruct victims and their families not to report incidents of abuse to law enforcement; and provide no warning or disclosure, such as might otherwise help protect parishioners from abuse. According to Plaintiffs, the Policy "emboldened sexual predators among [the] clergy," created an environment in which predators "could engage in child sexual abuse with impunity," and placed children in the dioceses at foreseeable risk of harm. *Id.* ¶ 79, App'x at 41-42.

III. Procedural History

Plaintiffs filed this putative class action against the Holy See in May 2020. In July 2021, the Holy See moved to dismiss the action for lack of subject matter jurisdiction, lack of personal jurisdiction, improper venue, and failure to state a claim. Plaintiffs then filed an amended complaint—the complaint at issue here. The Holy See again moved to dismiss for, among other things, lack of subject matter jurisdiction. And in September 2022, the District Court granted the Holy See's motion, concluding that the District Court lacked subject matter jurisdiction under the FSIA over Plaintiffs' suit. It reasoned as follows.

As to Plaintiffs' claims based on the allegedly tortious conduct of the New York dioceses, the District Court concluded that the dioceses, which are New York corporations organized under New York law, each have a separate juridical status from that of the foreign sovereign, the Holy See. *See Blecher v. Holy See*, 631 F. Supp. 3d 163, 168-70 (S.D.N.Y. 2022). It determined that Plaintiffs failed to allege facts sufficient to overcome the "strong presumption" established by the Supreme Court in *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba* ("*Bancec*"), 462 U.S. 611 103 S.Ct. 2591, 77 L.Ed.2d 46 (1983), that, as an instrumentality of a foreign state, the Holy See has a status independent from that of the foreign state itself. *Blecher*, 631 F. Supp. 3d at 169-70 (quoting *Gater Assets Ltd. v. AO Moldovagaz*, 2 F.4th 42, 56 (2d Cir. 2021)). This conclusion in effect made the Holy See the wrong defendant on Plaintiffs' claims based on the dioceses' and bishops' actions.

The District Court then rejected Plaintiffs' argument in the alternative that common-law agency principles should apply to overcome the *Bancec* presumption. Even if the New York dioceses could be considered "agents" of the Holy See, it explained, the tortious activity exception's "plain language extends only to tortious conduct either by the 'foreign state' or its 'official or employee,'" not to agents of the foreign state. *Id.* at 170 (quoting 28 U.S.C. § 1605(a)(5)). It thus determined that, under the FSIA, the Holy See could not be held vicariously liable for the dioceses' allegedly tortious conduct. *See id.* at 168-70.

The District Court then turned to Plaintiffs' claims based on the allegedly tortious conduct of the individual bishops who administered the New York dioceses. It ruled that the bishops were employees of the Holy See under New York law; that in reporting or failing to report the accusations, the bishops were acting within the scope of their employment; and that the Holy See could therefore, as a general matter, be held vicariously liable for the bishops' (as opposed to the dioceses') alleged conduct. *See id.* at 170-72. Next, the court concluded that Plaintiffs satisfied the "entire tort" requirement of the FSIA's tortious activity exception,[8] reasoning that Plaintiffs' core theory of the case was premised on the bishops' *local* implementation of the Holy See's secrecy policy—that is, the bishops' conduct in allegedly failing to warn parishioners about and to report suspected or actual abuse by clerics in

8. Recall that the "entire tort" must be committed in the United States to be covered by the tortious activity exception. 28 U.S.C. § 1605(a)(5); *In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d at 115.

their dioceses in the United States. *See id.* at 172. It then found that the Complaint "contain[ed] ample well-pleaded allegations of alleged sexual abuse traceable to the alleged negligence of supervising clergy and the Archbishop." *Id.* Accordingly, the District Court concluded, the tortious activity exception covered Plaintiffs' claims with respect to the bishops. *See id.*

But the District Court then decided that the court's exercise of jurisdiction over Plaintiffs' claims based on the bishops' alleged conduct was nonetheless barred by the discretionary function exclusion from the tortious activity exception. *Id.* at 172-74. In so concluding, it first determined that the bishops' challenged conduct was discretionary, saying that "the Supreme Court has been clear that promulgation of a policy or regulation by employees is *discretionary in nature*." *Id.* at 173 (emphasis in original) (citing *Gaubert*, 499 U.S. at 323, 111 S.Ct. 1267). It relied in part on the Supreme Court's instruction, in the analogous FTCA context, that "if a regulation mandates particular conduct, and the employee obeys the direction, the Government will be protected because the action will be deemed in furtherance of the policies which led to the promulgation of the regulation." *Id.* (quoting *Gaubert*, 499 U.S. at 324, 111 S.Ct. 1267). It also explained: "[C]ommon sense dictates that there are many ways to minister to parishes and to run a diocese," and "within that mosaic, the individual bishops . . . appear to have some discretion in how to deal with priests under their supervision. . . ." *Id.* (internal quotation marks omitted).

The District Court next found that the bishops' decision "whether to warn about an individual's dangerous proclivities is the type of discretionary judgment that the exclusion was designed to protect." *Id.* (internal quotation marks omitted and alterations adopted). Accordingly, it concluded, any alleged decision by the Holy See's employees—the bishops—about whether to warn or report was susceptible to policy analysis and therefore covered by the discretionary function exclusion. *See id.* at 173-74.

The District Court entered judgment granting the Holy See's motion to dismiss for lack of subject matter jurisdiction under the FSIA. Plaintiffs timely appealed.

DISCUSSION

We review *de novo* the District Court's legal conclusions "regarding jurisdiction under the FSIA." *USAA*, 681 F.3d at 107 (internal quotation marks omitted). When considering a motion to dismiss for lack of subject matter jurisdiction, "we must accept as true all material factual allegations in the complaint," but we may not draw any jurisdictional inferences in favor of the plaintiff. *J.S. ex rel. N.S. v. Attica Cent. Sch.*, 386 F.3d 107, 110 (2d Cir. 2004); *Shipping Fin. Servs. Corp. v. Drakos*, 140 F.3d 129, 131 (2d Cir. 1998) ("[J]urisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it.").

"[T]o determine whether one of the exceptions to the FSIA's general exclusion of jurisdiction over foreign sovereigns applies," the court "must review the pleadings and any evidence before it." *Robinson v. Gov't of Malaysia*, 269 F.3d 133, 140 (2d Cir. 2001) (internal quotation marks and citation omitted); *id.* at 141 n.6 ("A district court may consult evidence to decide a Rule 12(b)(1) motion . . . [and] must do so if resolution of a proffered factual issue may result in the dismissal of the complaint for want of jurisdiction." (internal quotation marks omitted)); *J.S. ex rel. N.S.*, 386 F.3d at 110 ("We may consider affidavits and other materials beyond the pleadings to resolve the jurisdictional issue, but we may not rely on conclusory or hearsay statements contained in the affidavits."). In particular, "under the FSIA, the district court may examine the defendant's activities to determine whether they confer subject matter jurisdiction on the federal courts." *Robinson*, 269 F.3d at 141-42.

I. Jurisdiction over Plaintiffs' claims against the Holy See is barred by the discretionary function exclusion from the tortious activity exception in the FSIA.

On appeal, Plaintiffs submit that the District Court erred in concluding that their claims—alleging that the bishops engaged in tortious conduct when they carried out the Holy See's mandatory secrecy policy—fall within the discretionary function exclusion from the FSIA's tortious activity exception.[9] We disagree.

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9. On appeal, Plaintiffs do not challenge the District Court's ruling that, under the FSIA, the Holy See could not be held

A. The bishops' challenged conduct involved discretionary acts, and Plaintiffs fail to allege that the bishops' conduct violated a mandatory policy, so *Berkovitz/Gaubert prong* one is satisfied.

According to Plaintiffs, the District Court improperly applied the discretionary function exclusion because, they assert, the Complaint plausibly alleges tortious conduct that involved no discretion by the bishops. Moreover, because the bishops' conduct was purportedly compelled by the Holy See's mandatory secrecy policy, Plaintiffs argue that their claims necessarily fall outside the ambit of the exclusion for the purposes of *Berkovitz/Gaubert* prong one.[10] Plaintiffs' arguments fall short. We address each in turn.

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vicariously liable for the New York dioceses' allegedly tortious conduct. Plaintiffs' Br. at 10 n.9; *see Blecher*, 631 F. Supp. 3d at 168-70.

10. On appeal, the Holy See argues that the District Court erred in concluding that the tortious activity exception applied in the first place. Specifically, it challenges the District Court's conclusions that Plaintiffs' allegations met the "entire tort" requirement, and that the Complaint sufficiently alleged a causal link between the employees' challenged conduct and the harm suffered by Plaintiffs. Holy See Br. at 47-57; *see Blecher*, 631 F. Supp. 3d at 172. Because we affirm the judgment of the District Court on the ground that the discretionary function exclusion from the tortious activity exception precludes the exercise of jurisdiction, we do not reach these arguments.

Appendix A

1. The bishops' challenged conduct involved discretionary acts.

Despite Plaintiffs' conclusory allegations that the bishops' compliance with the Policy left them with no room for discretion, Plaintiffs' theory of causation, as alleged in the Complaint, depends on discretionary actions by bishops. Plaintiffs allege that they were all abused by priests or deacons who were "assigned" to Plaintiffs' respective parishes, churches, or schools. Am. Compl. ¶¶ 4-12, 14-28, 30-36, App'x at 20-29. This assignment authority is crucial to Plaintiffs' theory of causation. The alleged harm flows not merely from failing to warn about known dangers but also from the decisions to assign clergy to positions where they could access potential victims while maintaining the alleged secrecy about past misconduct. As Plaintiffs have repeatedly clarified in their submissions to the Court (but outside the four corners of their Complaint), these priests and deacons were all "assigned by an Archbishop or Bishop to the respective parishes where they abused children." Plaintiffs' Reply Br. at 24 (citing Am. Compl. ¶¶ 34-36, App'x at 30); Plaintiffs' Mem. in Opp'n to Mot. to Dismiss, Dist. Ct. Dkt. No. 55 at 31 ("[T]he clergy perpetrators *assigned to the parishes by the bishops* were placed in particular positions that enabled them to groom and sexually abuse Plaintiffs." (citing Am. Compl. ¶¶ 4, 7, 12, 19, 22, 28-33, App'x at 20-29) (emphasis added)); *id.* at 22 ("These clergymen were each assigned by the Archbishop of New York to the parishes where they abused Plaintiffs." (citing Am. Compl. ¶ 34, App'x at 30)); *see also* Am. Compl. ¶ 58, App'x at 35 ("A Bishop is the superior of all Priests and other clergy

assigned to work within his Diocese."); Plaintiffs' Br. at 6 ("The Bishops were designated by the Holy See as the direct supervisors of the clergy assigned within their respective territories, subject to the directives of the Holy See."). At oral argument, Plaintiffs' counsel explained how, in their view, the Policy and the bishops' assignment authority combined enabled abuse, stating that a bishop's alleged silence "enabled this priest to molest again, or they moved him, as part of the silence, they moved him to another church where he then molests again." Oral Argument Tr. at 28:8-10.[11]

The bishops' "[d]ay-to-day management" decisions regarding how and where to assign clergy is a quintessentially discretionary act, "requir[ing] judgment as to which of a range of permissible courses is the wisest." *Gaubert*, 499 U.S. at 325, 111 S.Ct. 1267; *see Swarna*, 622 F.3d at 146 ("[Plaintiff's] claim that Kuwait failed to institute procedures or a system to monitor its employees implicates a discretionary function [under the FSIA]."); *Blaber v. United States*, 332 F.2d 629, 631 (2d Cir. 1964) (holding that decisions concerning extent of supervision

11. The Holy See submitted evidence to the District Court consistent with these assertions. *See*, *e.g.*, Decl. of Professor Andrea Bettetini (2022), Dist. Ct. Dkt. No. 63 ¶¶ 27, 41, 43, Supplemental App'x at 55-56, 66-67 (discussing authority of bishops); Decl. of Professor Andrea Bettetini (2021), Dist. Ct. Dkt. No. 47 ¶ 18, App'x at 64-65 (same); Dist. Ct. Dkt. No. 64-20, Supplemental App'x at 113 (testimony of Plaintiffs' expert, Rev. Doyle) ("[T]he bishop himself would decide . . . [whether] the individual was transferred to another assignment in the same diocese or in another country or another diocese where inevitably he would continue to offend.").

of private contractors fell within FTCA discretionary function exception); *M.D.C.G. v. United States*, 956 F.3d 762, 772 (5th Cir. 2020) (holding that supervision of subordinates involved element of choice and thus fell within FTCA discretionary function exception); *Suter v. United States*, 441 F.3d 306, 313 n.6 (4th Cir. 2006) ("Courts have repeatedly held that government employers' hiring and supervisory decisions are discretionary functions."); *Sharp ex rel. Est. of Sharp v. United States*, 401 F.3d 440, 447 (6th Cir. 2005) (holding that National Forest Service staffing allocation decisions fell within FTCA discretionary function exception); *Santana-Rosa v. United States*, 335 F.3d 39, 44 (1st Cir. 2003) (holding that staffing allocation fell within discretionary function exception to the FTCA); *Burkhart v. Washington Metro. Area Transit Auth.*, 112 F.3d 1207, 1217 (D.C. Cir. 1997) ("[D]ecisions concerning the hiring, training, and supervising of [Washington Metropolitan Area Transit Authority] employees are discretionary in nature.").

Taking Plaintiffs' allegations as true, the Policy left no room for discretion that would enable bishops to, *inter alia*, "disclos[e] or report[] to persons serving in the Catholic schools and parishes that a *clergyman assigned there* was known or suspected of child sexual abuse, or was at risk of engaging in such conduct." Am. Compl. ¶¶ 112, 121, 130, App'x at 49, 51, 52-53 (emphasis added). Yet, the alleged breach of the bishops' duty to "disclos[e] or report" is premised on the discretionary assignment of clergy within the bishops' territory. *Id.* Accordingly, the harms that Plaintiffs allege hinge on the discretionary acts of bishops in assigning clergy to positions within

the dioceses that enabled abuse.[12] Based on their own account, Plaintiffs would not have been harmed but for discretionary acts by bishops. Therefore, Plaintiffs fail to allege that the tortious acts at issue were *not* discretionary, and *Berkovitz/Gaubert* prong one is satisfied.

2. Plaintiffs fail to allege that the bishops' conduct violated a mandatory policy.

Plaintiffs argue that the discretionary function exclusion does not bar their claims on the ground that the tortious conduct they allege arose from the bishops' compliance with the Holy See's mandatory policy. Plaintiffs' Br. at 13 ("The fact that the tort claim is plausibly alleged to be based on a mandatory regulation or requirement of the foreign state forecloses application of the discretionary

12. The District Court remarked, in passing, that "common sense dictates that there are many ways to minister to parishes and to run a diocese," and that "within that mosaic, the individual bishops and cardinals appear to have some discretion in how to deal with priests under their supervision. . . . " *Blecher*, 631 F. Supp. 3d at 173 (internal quotation marks omitted). Likewise, the Holy See argues on appeal that "both [the Policy] and common sense show that bishops retained ample discretion in such cases [of clergy sex abuse]." Holy See Br. at 33. As discussed above, we need not rely on common sense nor must we interpret the contours of the Policy itself to identify discretionary acts here. We therefore decline to address the Holy See's contention further. Moreover, it is "well settled" that we "may affirm on any basis for which there is sufficient support in the record, including grounds not relied on by the district court." *Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 413 (2d Cir. 2014). (internal quotation marks omitted). That the district court's reasoning does not mirror ours thus does not prevent us from affirming the judgment.

function exception and ends the inquiry."). Plaintiffs do not assert that the bishops *violated* the mandatory secrecy policy set forth by the Holy See in any way. But, in light of the Supreme Court's pronouncements in the analogous FTCA context and the comity rationale underlying the FSIA, Plaintiffs' argument ultimately falls short.

In the FTCA context, the Supreme Court has instructed that "if a regulation mandates particular conduct, and the employee *obeys* the direction, the Government will be protected because the action will be deemed in furtherance of the policies which led to the promulgation of the regulation." *Gaubert*, 499 U.S. at 324, 111 S.Ct. 1267 (emphasis added). The Court presaged this rule in *Dalehite v. United States*, where it wrote, "[A]cts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable. If it were not so, the protection of [section] 2680(a) would fail at the time it would be needed, that is, when a subordinate performs or fails to perform a causal step, each action or nonaction being directed by the superior, exercising, perhaps abusing, discretion." 346 U.S. 15, 36, 73 S.Ct. 956, 97 L.Ed. 1427 (1953).

In contending that their claims against the Holy See based on the bishops' conduct are not barred by the discretionary function exclusion, Plaintiffs rely principally on the argument that "material language in the FTCA is missing from the FSIA," the omission signaling a substantive difference. Plaintiffs' Br. at 16 (capitalization altered). In particular, they argue that the FTCA's "due care exception"—the first phrase of section 2680(a), *see*

supra n.3, which preserves the government's immunity for "[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid," 28 U.S.C. § 2680(a)[13]—"has no corollary in the FSIA." Plaintiffs' Br. at 17. Plaintiffs posit that the rule articulated by the Supreme Court in *Gaubert*—that "if a regulation mandates particular conduct, and the employee obeys the direction, the Government will be protected," 499 U.S. at 324, 111 S.Ct. 1267—relied on the FTCA's due care exception and that because no equivalent appears in the FSIA, that rule does not apply in the FSIA context. Therefore, they maintain, the Holy See cannot avail itself of the discretionary function exclusion here.

The fatal flaw in Plaintiffs' argument is that *Gaubert* itself, like the cases it relied on, was about the FTCA's *discretionary function exception*, not the due care exception. *See id.* at 318-19, 111 S.Ct. 1267 ("The question before us is whether certain actions taken by [two agencies] are within the 'discretionary function' exception to the liability of the United States under the FTCA."). The *Gaubert* Court ruled that a government employee's conduct in complying with a mandatory directive "will be protected," *id.* at 324, 111 S.Ct. 1267, expanding on three

13. The "due care" exception to the FTCA's abrogation of sovereign immunity "deals with acts or omissions of government employees, exercising due care in carrying out statutes or regulations whether valid or not," and "bars tests by tort action of the legality of statutes and regulations." *Dalehite*, 346 U.S. at 33, 73 S.Ct. 956.

applicable precedents, all of which expressly turned on the discretionary function exception and not the due care exception. *See Dalehite*, 346 U.S. at 32-33, 73 S.Ct. 956 (observing that "there are two phrases [in section 2680(a)] describing the excepted acts of government employees," and that the first phrase is the due care exception, while "[t]he second [the discretionary function exception] *is applicable in this case*" (emphasis added)); *United States v. S.A. Empresa de Viacao Aerea Rio Grandense* ("*Varig Airlines*"), 467 U.S. 797, 820, 104 S.Ct. 2755, 81 L.Ed.2d 660 (1984) (concluding that acts of agency employees executing a program "in accordance with agency directives are protected by the *discretionary function exception*" (emphasis added)); *Berkovitz*, 486 U.S. at 535, 108 S.Ct. 1954 (discussing the discretionary function exception as "[t]he exception relevant to this case").

In particular, *Gaubert*'s reliance on *Dalehite* is instructive. *Dalehite* involved alleged negligence in the government's manufacture, packaging, and preparation of fertilizer for export, resulting in an explosion. The Supreme Court held that the manufacture of the fertilizer was done "in accordance with, and done under, specifications and directions as to how the [Fertilizer Grade Ammonium Nitrate] was produced at the plants," based on an agency plan "developed at a high level under a direct delegation of plan-making authority from the apex of the Executive Department." 346 U.S. at 38, 40, 73 S.Ct. 956. The government employees' actions in compliance with that plan were, therefore, the "product of an exercise of judgment, requiring consideration of a vast spectrum of factors, including some which touched directly the

feasibility of the fertilizer export program." *Id.* at 40, 73 S.Ct. 956. Accordingly, the allegedly tortious acts fell "within the exception for acts of discretion." *Id.* at 41, 73 S.Ct. 956. The Court concluded that "acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable." *Id.* at 36, 73 S.Ct. 956.[14]

Berkovitz involved FTCA claims alleging that the Division of Biologic Standards and the Bureau of Biologics of the Food and Drug Administration failed properly to approve and inspect polio vaccines, *in violation of federal law and policy.* 486 U.S. at 533, 108 S.Ct. 1954. The *Berkovitz* Court held that "the discretionary function exception does not apply" to a claim alleging "a failure on the part of the agency to perform its clear duty under federal law" because "failing to act in accord with a specific mandatory directive" is not a permissible exercise of discretion. *Id.* at 544, 108 S.Ct. 1954.

Berkovitz did not involve any claim arising from *compliance* with the law. Yet, Plaintiffs rely on broad language from *Berkovitz* for the doubtful proposition that "[t]he discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow,"

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14. Similarly, the Supreme Court in *Dalehite* cited with approval a case applying the discretionary function exception to government blasting operations that were "conducted pursuant to detailed plans and specifications drawn by the Chief of Engineers." 346 U.S. at 36 n.32, 73 S.Ct. 956 (citing *Boyce v. United States*, 93 F. Supp. 866 (S.D. Iowa 1950)).

486 U.S. at 536, 108 S.Ct. 1954, regardless of whether the challenged acts or omissions allegedly comply with or deviate from a prescribed course of action. Plaintiffs' Br. at 20, 22-23. As Plaintiffs correctly note, this Court has previously suggested that *Berkovitz/Gaubert* prong one requires that "the acts alleged to be negligent . . . be discretionary, in that they involve an element of judgment or choice *and are not compelled by statute or regulation.*" *Coulthurst*, 214 F.3d at 109 (emphasis added) (internal quotation marks omitted); *accord USAA*, 681 F.3d at 111 (same, in FSIA context) (quoting *Coulthurst*, 214 F.3d at 109). But this Court has never held that a sovereign's immunity was abrogated by allegations of tortious acts purportedly "compelled by statute or regulation"—what Plaintiffs are asking us to conclude here. Rather, our decisions have consistently reflected the premise that to be "discretionary" for purposes of *Berkovitz/Gaubert* prong one, an act must be *not prohibited by* statute or regulation. *See*, *e.g.*, *Cangemi*, 13 F.4th at 130 (reasoning that acts are non-discretionary when "inconsistent with a 'specific mandatory directive'" (quoting *Berkovitz*, 486 U.S. at 544, 108 S.Ct. 1954)); *Fazi v. United States*, 935 F.2d 535, 538 (2d Cir. 1991) ("When the claim is that the injury was caused by a failure to comply with a regulation that 'specifically prescribes a course of action for an employee to follow,' the discretionary function exception does not bar the claim." (quoting *Berkovitz*, 486 U.S. at 536, 108 S.Ct. 1954)); *Myers & Myers, Inc. v. U.S. Postal Serv.*, 527 F.2d 1252, 1261 (2d Cir. 1975) (holding FTCA's discretionary function exception did not apply where plaintiffs alleged "Postal Service has acted in contravention of its own regulations," reasoning that "[i]t is, of course, a tautology

that a federal official cannot have discretion to behave unconstitutionally or outside the scope of his delegated authority"). Applying *Berkovitz* in the FSIA context, we have held that, where an alleged failure of the Permanent Mission of the Republic of Namibia to the United Nations to ensure the integrity of a wall constituted a *violation* of a mandatory regulation, "the Mission [could not] avail itself of the protection of the FSIA's discretionary function exception." *USAA*, 681 F.3d at 113.

The interpretation of *Berkovitz* urged by Plaintiffs—that the discretionary function exclusion cannot apply whenever a specific legal directive exists, regardless of whether that directive is followed—is contrary to the Supreme Court's unanimous ruling in *Gaubert*, reached just three years after *Berkovitz*. In *Gaubert*, the Supreme Court explained that the FTCA's discretionary function exception did not apply to bar Berkovitz's claims *not* because there existed a legally prescribed course of action, but because "the agency employees [in *Berkovitz*] had failed to follow the specific directions contained in the applicable regulations, *i.e.*, in those instances, there was no room for choice or judgment." 499 U.S. at 324, 111 S.Ct. 1267. It was in this context that the *Gaubert* Court articulated the rule that "if a regulation mandates particular conduct, and the employee obeys the direction, the Government will be protected[.]" *Id.*

Accordingly, we conclude that this rule—that the FTCA's discretionary function exception bars the exercise of jurisdiction over claims stemming from employee conduct in compliance with a mandatory policy—also

applies in the FSIA context to claims against a foreign sovereign. The discretionary function exclusion from the FSIA's tortious activity exception bars the exercise of jurisdiction over claims that challenge employees' compliance with a foreign sovereign's mandatory policy, at least for purposes of *Berkovitz/Gaubert* prong one.

Such a rule makes sense in light of the concerns animating Congress in crafting of the FTCA's discretionary function exception. As the Supreme Court has pointed out, "Congress wished to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Varig Airlines*, 467 U.S. at 814, 104 S.Ct. 2755; *see also id.* at 820, 104 S.Ct. 2755 ("Judicial intervention in [agency] decisionmaking through private tort suits would require the courts to `second-guess' the political, social, and economic judgments of an agency exercising its regulatory function. It was precisely this sort of judicial intervention in policymaking that the discretionary function exception was designed to prevent."). "By fashioning an exception for discretionary governmental functions," the Court added, "Congress took steps to protect the Government from liability that would seriously handicap efficient government operations." *Id.* at 814, 104 S.Ct. 2755 (internal quotation marks omitted). Because "[c]ases construing the discretionary function exc[lusion] in the FSIA draw heavily on case law interpreting a similar exception in the FTCA," *USAA*, 681 F.3d at 112 n.43, these same considerations have significant purchase in the FSIA context as well. If Congress was reluctant to encourage judicial second-guessing of the

federal government's policymaking judgments, we doubt that it was more eager to empower courts to scrutinize the policy decisions of foreign sovereigns.

True, the reasons stated by Congress for crafting the FSIA exclusion do not exactly mirror those expressed when it fashioned the FTCA exception. *See* Restatement (Fourth) of the Foreign Relations Law of the U.S. § 457 (Am. L. Inst. 2018) ("[T]he underlying rationale for the [FSIA discretionary function] exclusion (protecting the dignity of foreign states, respecting the sensitivity of foreign relations, and preserving the sovereign interests of the United States in reciprocal situations) is quite different from the separation-of-powers principle reflected in the FTCA."); *cf. Dole Food Co. v. Patrickson*, 538 U.S. 468, 479, 123 S.Ct. 1655, 155 L.Ed.2d 643 (2003) (explaining that foreign sovereign immunity was intended "to give foreign states . . . some protection from the inconvenience of suit as a gesture of comity between the United States and other sovereigns"). And, to be sure, some difficulties and ambiguities arise from too readily importing FTCA caselaw into the FSIA context. For example, courts have differed as to whether, in determining if a foreign sovereign's employee was afforded meaningful discretion, the court's proper reference point should be the foreign state's law, international law, domestic U.S. law, or some combination of these.[15] We need not resolve that question

15. Some courts have held that U.S. domestic law provides the correct reference point for this analysis. *See, e.g.*, *Doe v. Fed. Democratic Republic of Ethiopia*, 189 F. Supp. 3d 6, 26-28 (D.D.C. 2016) (rejecting "Ethiopia's contention that Ethiopian law should govern the scope of the FSIA's discretionary function exc[lusion],"

here, however, as Plaintiffs identify the Holy See as the relevant source of authority conferring or withholding discretion.[16]

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and concluding instead that U.S. criminal laws served as the appropriate reference point); *USAA*, 681 F.3d at 108-12 (looking to New York City Building Code to determine whether the Mission of Namibia to the U.N. had discretion to engage in challenged conduct). Other courts have referred to the foreign country's own law as the correct baseline. *See Liu v. Republic of China*, 892 F.2d 1419, 1431 (9th Cir. 1989) (explaining that employee "had no discretion, according to [the Republic of China's (`ROC')] courts, to violate the ROC law that prohibits murder"). Still other courts have examined a mix of the foreign state's law and international law, or a combination of domestic and international law. *See Broidy Cap. Mgmt., LLC v. State of Qatar*, 982 F.3d 582, 591-92 (9th Cir. 2020) ("[T]he policy discretion of a foreign sovereign is not evaluated by those same constraints [of U.S. law], but rather by the corresponding limitations that bind that sovereign, whether contained in its own domestic law or (we will assume) in applicable and established principles of international law." (emphasis omitted)); *Letelier v. Republic of Chile*, 488 F. Supp. 665, 673 (D.D.C. 1980) ("Whatever policy options may exist for a foreign country, it has no `discretion' to perpetrate conduct . . . that is clearly contrary to the precepts of humanity as recognized in both national and international law.").

16. Plaintiffs do not contend that domestic U.S. law should inform the *Berkovitz/Gaubert* prong one analysis. Although they suggest that the bishops "fail[ed] to report as may be required pursuant to [New York] law," Plaintiffs' Br. at 30, that bears on whether the bishops' alleged conduct was tortious (*i.e.*, whether the FSIA's tortious activity exception applies) but not on whether the bishops' actions involved an element of judgment or choice (*i.e.*, whether *Berkovitz/Gaubert* prong one is satisfied). Instead, Plaintiffs argue that, because alleged tortious acts were committed "pursuant to [the Holy See's] mandatory secrecy policy," the "first"

These differences in statutory context notwithstanding, Congress's rationale for creating the FSIA's discretionary function exclusion lends further support to our conclusion. In view of the comity considerations inherent in the FSIA context, construing the exclusion *not* to immunize a foreign sovereign when its employees obey a mandatory directive—as Plaintiffs urge—would lead to an odd result. While the federal government would be protected under the FTCA from liability stemming from an employee's adherence to a mandatory policy "because the action will be deemed in furtherance of the policies which led to the promulgation of the [policy]," *Gaubert*, 499 U.S. at 324, 111 S.Ct. 1267, under Plaintiffs' interpretation, a foreign sovereign would not be entitled to the same protection under the FSIA, even though its employee's conduct adhering to its mandatory policy would likewise further the considerations that led to its promulgation of the policy. Permitting this divergence between the rulings in FTCA and FSIA contexts would undermine the comity rationale motivating the FSIA's discretionary function exclusion and the FSIA more generally.[17]

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prong of the *Berkovitz/Gaubert* test" precludes "application of the discretionary function exc[lusion]." Plaintiffs' Reply Br. at 15. At this juncture, then, we do not—and need not—decide whether courts considering the applicability of the FSIA's discretionary function exclusion should always look to U.S. law (as in, *e.g.*, *USAA*, 681 F.3d at 108-12) or to foreign law (as in, *e.g.*, *Liu*, 892 F.2d at 1431). Accordingly, we proceed on the assumption that, in this case, the correct reference point for the *Berkovitz/Gaubert* analysis is the foreign state's law—the law of the Holy See.

17. *See generally* Restatement (Fourth) of the Foreign Relations Law of the U.S. § 457 (Am. L. Inst. 2018) (explaining that

To be clear, we do not decide that the mere fact that a foreign sovereign has a mandatory policy allegedly governing conduct challenged as tortious will be dispositive in *every* case involving the discretionary function exclusion. In assessing whether the exclusion applies to bar jurisdiction, courts should carefully consider the relationship between the tortious conduct alleged and the precise policy purportedly mandating or prohibiting the conduct. *See*, *e.g.*, *Usoyan v. Republic of Turkey*, 6 F.4th 31, 38-45 (D.C. Cir. 2021) (identifying sources of law either granting or limiting Turkish security detail's authority to use physical force in the United States); *cf. Gaubert*, 499 U.S. at 322, 111 S.Ct. 1267 ("[I]t is the nature of the conduct, rather than the status of the actor[,] that governs whether the exception applies." (internal quotation marks omitted)). In some cases, the alleged policy will be so general, or its relation to the challenged conduct so attenuated, that it makes little sense for its

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the discretionary function "exclusion was designed to place foreign states in the same position as the United States finds itself when sued under the [FTCA]"); Sienho Yee, Note, *The Discretionary Function Exception Under the Foreign Sovereign Immunities Act: When in America, Do the Romans Do as the Romans Wish?*, 93 Colum. L. Rev. 744, 770 (1993) ("This parity [between courts' interpretations of the discretionary function exception under the FTCA and the corresponding exclusion under the FSIA] fulfills the congressional desire to accord foreign sovereigns the same treatment that the U.S. government receives in U.S. courts."). Thus, a rule conferring immunity on a foreign sovereign for its employee's compliance with its mandatory policy would promote Congress's goals, in enacting the FSIA, of respecting the dignity of foreign states and preserving the United States' interests in reciprocal situations.

mere existence to be dispositive at *Berkovitz/Gaubert* prong one. *Cf. Usoyan*, 6 F.4th at 43-44 (observing that "[n]ot every law prescribes specific conduct," before concluding that "generally applicable laws prohibiting criminal assault did not give the Turkish security detail a sufficiently specific directive to strip Turkey of its immunity" for its employees' attacks on protestors outside the Turkish ambassador's residence in D.C. (internal quotation marks omitted)). Moreover, the discretionary function exclusion will not immunize acts that "cannot be said to be based on the purposes that the regulatory regime seeks to accomplish." *Gaubert*, 499 U.S. at 325 n.7, 111 S.Ct. 1267.

Here, however, the alleged policy is mandatory and specific, and the allegedly tortious conduct reflects a straightforward adherence to the policy. Plaintiffs' claims boil down to a challenge to the Holy See's considerations in deciding to promulgate the Policy. Thus, the bishops' actions in compliance with the Policy "will be deemed in furtherance of the policies which led to the promulgation of the [policy]." *Gaubert*, 499 U.S. at 324, 111 S.Ct. 1267. Moreover, as discussed above in Section I.A.1., the alleged torts hinged on discretionary acts by bishops. Thus, *Berkovitz/Gaubert* prong one is satisfied.

To summarize: where plaintiffs seeking to overcome the discretionary function exclusion allege, the existence of a mandatory policy that specifically governs the challenged conduct, to satisfy *Berkovitz/Gaubert* prong one, they must show that the allegedly tortious act "violate[d] the mandatory regulation." *Gaubert*, 499 U.S.

at 324, 111 S.Ct. 1267. This requirement is rooted in the Supreme Court's precedents interpreting the similar exception contained in the FTCA. It also comports with the comity considerations that animated Congress's enactment of the FSIA.

B. The bishops' challenged conduct was susceptible to policy analysis, so *Berkovitz*/*Gaubert* prong two is also satisfied.

As to the second *Berkovitz/Gaubert* criterion, the question is whether the bishops' allegedly tortious conduct was "susceptible to policy analysis." *Gaubert*, 499 U.S. at 325, 111 S.Ct. 1267; *see also Berkovitz*, 486 U.S. at 537, 108 S.Ct. 1954 (noting FTCA's discretionary function exception "protects only governmental actions and decisions based on considerations of public policy"). Plaintiffs bear the burden of alleging "facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime." *Gaubert*, 499 U.S. at 324-25, 111 S.Ct. 1267.

In *Gaubert*, the Supreme Court explained that some acts of government employees, while "obviously discretionary" and within the scope of their employment, do not come "within the discretionary function exception because these acts cannot be said to be based on the purposes that the regulatory regime seeks to accomplish." *Gaubert*, 499 U.S. at 325 n.7, 111 S.Ct. 1267. It offered as a quintessential example of such an act the case of a government employee who "drove an automobile on a

mission connected with his official duties and negligently collided with another car," reasoning that, "[a]lthough driving requires the constant exercise of discretion, the official's decisions in exercising that discretion can hardly be said to be grounded in regulatory policy." *Id.*

Our own cases offer additional examples of acts that do not involve the exercise of policy judgment. For instance, in *Coulthurst*, an FTCA case, we concluded that a government employee's "absent-minded or lazy" conduct did not "involve 'considerations of public policy.'" 214 F.3d at 111 (quoting *Gaubert*, 499 U.S. at 323, 111 S.Ct. 1267). The hypothetical examples we provided *in Coulthurst*—in which the plaintiff asserted claims arising from injuries caused by the government's alleged negligence in maintaining equipment in a prison gym—included a government employee's "decision (motivated simply by laziness) to take a smoke break rather than inspect the [gym] machines, or an absent-minded or lazy failure to notify the appropriate authorities upon noticing [a] damaged cable." *Id.* These actions, we explained, "d[id] not reflect the kind of considered judgment 'grounded in social, economic, and political policy' which the [discretionary function exception] is intended to shield from 'judicial second-guessing.'" *Id.* (quoting *Varig Airlines*, 467 U.S. at 814, 104 S.Ct. 2755). Likewise, in *USAA*, we observed that "the failure to protect a wall during a construction project is not a matter of policy analysis." 681 F.3d at 113 (internal quotation marks omitted).

In contrast, judgments susceptible to policy analysis include, for example, decisions that require the government

"to establish priorities for the accomplishment of its policy objectives by balancing the objectives sought to be obtained against such practical considerations as staffing and funding." *Varig Airlines*, 467 U.S. at 820, 104 S.Ct. 2755. More concretely, the Supreme Court in *Varig Airlines* concluded that the FAA's establishment of a system of "spot-checking" airplanes for compliance with safety standards represented a policy determination about what would "best accommodate[] the goal of air transportation safety and the reality of finite agency resources." *Id.*

In this case, the District Court concluded that the second prong of the *Berkovitz/Gaubert* test was satisfied. *Blecher*, 631 F. Supp. 3d at 173. We agree. The bishops' discretionary acts in assigning clergy to particular parishes, churches, and schools are the kind of resource allocation decisions that courts have consistently held to be susceptible to policy analysis. *See*, *e.g.*, *Swarna*, 622 F.3d at 146 (applying the discretionary function exclusion on the ground that plaintiff's failure to supervise claims against Kuwait alleged a "failure that occurred at the planning level of government"); *Molchatsky*, 713 F.3d at 162 (holding that discretionary function exception barred FTCA claim because challenged "choices regarding allocation of agency time and resources" were "grounded in economic, social and policy considerations"); *Simmons v. United States*, 764 F. App'x 98, 100 (2d Cir. 2019) (summary order) (decision to staff and assign security guard "is susceptible to policy analysis," and thus FTCA discretionary function exception applied to bar claim); *Two Eagle v. United States*, 57 F.4th 616, 623 (8th Cir.

2023) (holding that discretionary function exception barred FTCA claim because "allocation of staff time" and resources implicated policy considerations); *Burkhart*, 112 F.3d at 1217 ("The hiring, training, and supervision choices that [Washington Metropolitan Area Transit Authority] faces are choices susceptible to policy judgment." (internal quotation marks omitted)).

Moreover, as explained above, we see no daylight between the Holy See's secrecy policy and the bishops' allegedly tortious conduct of failing to warn and failing to report. The Holy See's policy confining disclosures of alleged abuse to specified internal mechanisms and otherwise prohibiting the advising of parishioners and law enforcement of suspected or alleged abuse, and the bishops' continuing to assign clergy suspected of abuse to parishes could have been the product of weighing various policy considerations—not only of factors like "parishioners' well-being," but also of factors like the church's reputation, "pastoral stability," "low ordination rates," or "staffing shortages." *Doe v. Holy See*, 557 F.3d 1066, 1085 (9th Cir. 2009).[18] As the Ninth Circuit observed in a case involving similar claims against the Holy See, "the decision . . . whether to warn about [an employee's]

18. Whether the bishops' acts and omissions here were *in fact* grounded in the Holy See's policy considerations is of no moment. As our precedent makes clear, the discretionary function exclusion applies not only where the foreign sovereign "has *actually* undertaken a public policy analysis, but also where the decision at issue is merely `*susceptible* to policy analysis.'" *Cangemi*, 13 F.4th at 133 (quoting *Gaubert*, 499 U.S. at 325, 111 S.Ct. 1267) (emphases in original).

dangerous proclivities" is "the type of discretionary judgment[] that the exclusion was designed to protect." *Id.* at 1084.

Other courts have likewise found that "[b]alancing safety, reputational interests, and confidentiality is the kind of determination the discretionary function exc[lusion] was designed to shield.'" *Croyle v. United States*, 908 F.3d 377, 382 (8th Cir. 2018) (quoting *Berkovitz*, 486 U.S. at 536, 108 S.Ct. 1954). The plaintiff in *Croyle*, who alleged that he was sexually assaulted by a priest stationed at an Army hospital, sued the federal government under the FTCA for negligent supervision and failure to warn of the priest's history of sexual abuse. *Id.* at 380. As relevant here, Croyle contended that the government failed to satisfy *Berkovitz/Gaubert* prong two on the ground that "no conceivable policy choice would allow [the priest] access to children without a warning." *Id.* at 381. The Eighth Circuit rejected Croyle's argument, reasoning that the government, "in determining whether to warn families or take other protective action," could have balanced a number of considerations, including "public and child safety," "the need to protect [the priest]'s reputation and confidentiality," "staffing shortages," and the reputation of the hospital and other religious personnel at the hospital. *Id.* at 382. Although "there may be disagreements [about] how these interests should be balanced"—and although in some situations, as in *Croyle* and in this case, the balancing of these interests may produce appalling and tragic results—Congress did not intend to "empower judges to second guess such decisions via tort action." *Id.* at 382-83 (internal quotation marks omitted).

Plaintiffs urge that there can be no plausible policy justification for maintaining the strict secrecy of illegal conduct, *i.e.*, cleric sexual abuse of children. In support, they rely primarily on another FTCA case, *Tonelli v. United States*, 60 F.3d 492 (8th Cir. 1995), decided by the Eighth Circuit. But *Tonelli* is distinguishable, in our view, and has little application to the facts here. In *Tonelli*, the Eighth Circuit concluded that the post office's alleged failure to supervise its employees properly even after it was on notice of ongoing illegal action—a postal employee was tampering with mail, a federal crime—"d[id] not represent a choice based on plausible policy considerations." *Id.* at 496. As an initial matter, *Tonelli* involved negligent hiring and supervision claims, not failure-to-warn claims. *See id.* Further, the *Tonelli* plaintiffs' theory hinged on an asserted *violation* of a mandatory policy—unlike the alleged *compliance* with a mandatory policy at issue in this case. Accordingly, we find *Doe* and *Croyle* instructive for our purposes, and *Tonelli* much less so.

Ultimately, however ill-advised their judgment may have been, the bishops could well have decided that their challenged actions "best accommodate[d]" their competing policy goals and concerns, *Varig Airlines*, 467 U.S. at 820, 104 S.Ct. 2755, and thus their allegedly tortious conduct in complying with the mandated secrecy policy was "susceptible to policy analysis," *Gaubert*, 499 U.S. at 325, 111 S.Ct. 1267.[19]

19. Plaintiffs further allege that, in December 2019, Pope Francis issued a directive to bishops reversing the Holy See's dated mandatory secrecy policy. The 2019 directive provided,

We in no way condone the horrific abuse alleged by Plaintiffs and acknowledged by the Holy See. *See* Oral Argument Tr. at 10:9-14. But the question before us is whether the Holy See, a foreign sovereign, is immune under the FSIA from suit in the courts of this country for the bishops' alleged failures to warn and to report, not whether the secrecy policy or the bishops' actions were justifiable.

In sum, because Plaintiffs' allegations of harm hinge on discretionary actions by the bishops and Plaintiffs fail to allege that the bishops' conduct violated the Holy See's mandatory secrecy policy, *Berkovitz/Gaubert* prong one is satisfied. And because the challenged conduct was susceptible to policy analysis, *Berkovitz/Gaubert* prong two is met. Accordingly, the discretionary function exclusion from the tortious activity exception of the FSIA bars the court from exercising jurisdiction over Plaintiffs' claims against the Holy See.[20]

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they assert, that "those reporting the crime of child sexual abuse . . . shall not be bound by any obligation of silence." Am. Compl. ¶ 73, App'x at 40 (internal quotation marks omitted). This alleged reversal in the Holy See's policy regarding the handling of reported or suspected child sexual abuse underscores our point that the judgments involved here are susceptible to the balancing of policy considerations—judgments that are best reserved for foreign sovereigns, not courts.

20. The Holy See advances an alternative ground for affirming the District Court's judgment. It avers that the misrepresentation exclusion from the tortious activity exception,

CONCLUSION

For the reasons set forth above, the judgment of the District Court is **AFFIRMED**.

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28 U.S.C. § 1605(a)(5)(B), applies here and that the District Court therefore lacks jurisdiction under the FSIA over the Holy See for this reason as well. *See* Holy See Br. at 41-47. Because we affirm the District Court's judgment of dismissal on other grounds, we do not address the Holy See's alternative argument.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED SEPTEMBER 28, 2022

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

20-CV-3545 (JPO)

ERIK BLECHER, *et al.*,

Plaintiffs,

-v-

THE HOLY SEE,

Defendant.

Filed September 28, 2022

OPINION AND ORDER

J. PAUL OETKEN, District Judge:

Plaintiffs, thirty alleged victims of childhood clergy sexual abuse, bring a putative class action against Defendant the Holy See, seeking money damages for negligence on the ground that the Holy See mandated a policy of secrecy for its bishops and dioceses in response to allegations and reports of child sexual abuse by Roman Catholic clergy. The Holy See moves to dismiss the amended complaint for lack of subject matter jurisdiction

under the Foreign Sovereign Immunities Act ("FSIA"), for lack of standing, for failure to state a claim, and for improper venue as to the claims of 19 named plaintiffs. Because the Court concludes that it lacks jurisdiction under FSIA, the motion is granted.

I. Background

The following background comes from the allegations in the amended complaint, which "are assumed to be true." *Hamilton v. Westchester Cnty.*, 3 F.4th 86, 90-91 (2d Cir. 2021).

Plaintiffs allege abuse in the 1960s, 1970s, 1980s, and 1990s by local priests or deacons of the Archdiocese of New York, the Diocese of Brooklyn, the Diocese of Rockville Centre, the Diocese of Syracuse, and the Diocese of Ogdensburg. FAC ¶¶ 4-33. The Archdiocese of New York and the Dioceses of Brooklyn, Rockville Centre, Syracuse, and Ogdensburg (collectively "the New York Corporations") were all separate corporations organized and existing under New York law during the relevant time periods.

Plaintiffs allege that the Holy See had a "secrecy policy," set forth in a document titled *Crimen sollicitationis*, that "mandated that the Bishop follow a specific course of action in response to an allegation of child sexual abuse." FAC ¶¶ 64-68. Plaintiffs claim that the Holy See "knew or should have known that its strict secrecy policy would result in children in contact with Catholic clergy being sexually abused." FAC ¶ 111. Based on these allegations,

each Plaintiff advances a single negligence claim predicated on the failure to warn children and parents of the dangers generally posed by "Catholic clergy" and the failure to report sex abusers to law enforcement and others. FAC ¶¶ 107-33.

II. Legal Standard

In its motion to dismiss, the Holy See raises a facial attack against the amended complaint under Federal Rules of Civil Procedure 12(b)(1)-(3) and 12(b)(6). Def. Mem. at 1. To survive the Holy See's motion to dismiss, Plaintiffs' "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). In general, "a complaint does not need to contain detailed or elaborate factual allegations, but only allegations sufficient to raise an entitlement to relief above the speculative level." *Keiler v. Harlequin Enters. Ltd.*, 751 F.3d 64, 70 (2d Cir. 2014) (citation omitted). The Court accepts all factual allegations in the complaint as true and draws all reasonable inferences in the light most favorable to the plaintiff. *See Gibbons v. Malone*, 703 F.3d 595, 599 (2d Cir. 2013). Although the Court accepts factual allegations as true, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555).

"Supreme Court caselaw makes clear that district courts have broad discretion when determining how to

consider challenges to subject matter jurisdiction." *Harty v. West Point Realty, Inc.*, 28 F.4th 435, 441 (2d Cir. 2022). "A Rule 12(b)(1) motion challenging subject matter jurisdiction may be either facial," *i.e.*, based solely on the allegations of the complaint and exhibits attached to it, "or fact-based," *i.e.*, based on evidence beyond the pleadings. *Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 56 (2d Cir. 2016). But while the Court "may refer to evidence outside the pleadings" when resolving a 12(b)(1) motion, *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000); *Cortlandt St. Recovery Corp. v. Hellas Telecomms., S.À.R.L.*, 790 F.3d 411, 417 (2d Cir. 2015), it is not invariably required to consider such evidence, *see Carter*, 822 F.3d at 56-58. It is only where "jurisdictional facts are placed in dispute" that the court has the "obligation to decide issues of fact by reference to evidence outside the pleadings, such as affidavits." *Tandon v. Captain's Cove Marina of Bridgeport, Inc.*, 752 F.3d 239, 243 (2d Cir. 2014) (internal quotation marks omitted); *LeBlanc v. Cleveland*, 198 F.3d 353, 356 (2d Cir. 1999). When the extrinsic evidence submitted by the parties does not controvert the material allegations of the complaint, the Court may base its ruling solely on the allegations of the complaint. *See Carter*, 822 F.3d at 57.

III. Discussion

Foreign states are presumptively immune from the jurisdiction of United States courts. *See* 28 U.S.C. § 1330(a)-(b) (creating jurisdiction for claims "with respect to which the foreign state is not entitled to immunity"); *Robles v. Holy See*, No. 20-CV-2106 (VEC), 2021 U.S. Dist.

LEXIS 242562, 2021 WL 5999337, at *2 (S.D.N.Y. Dec. 20, 2021) ("*Robles*") ("There is a presumption in the FSIA that foreign states are immune from the jurisdiction of courts in the United States."); *Schoeps v. Bayern*, 27 F. Supp. 3d 540, 542 (S.D.N.Y. 2014) (noting that the FSIA "provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country") (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434, 109 S. Ct. 683, 102 L. Ed. 2d 818 (1989)). A foreign state is subject to the jurisdiction of a U.S. court only if one of the FSIA's enumerated exceptions applies. 28 U.S.C. § 1604; *Atlantica Holdings, Inc. v. Sovereign Wealth Fund Samruk-Kazyna JSC*, 813 F.3d 98, 106 (2d Cir. 2016); *see also* 28 U.S.C. § 1330(a) (providing original jurisdiction); *Robles*, 2021 U.S. Dist. LEXIS 242562, 2021 WL 5999337 at *2. Plaintiffs allege that 28 U.S.C. § 1605(a)(5) (the "Tortious Act Exception") applies. FAC ¶¶ 75-76; Pltfs. Mem. at 14. The Court concludes that the Tortious Act Exception applies, but that one of the exclusions to the Tortious Act Exception, 1605(a)(5)(A) (the "Discretionary Function Exclusion"), also applies, leaving the Court without jurisdiction over the Holy See.[1]

A. Applicability of the Tortious Act Exception to the Alleged Tortious Conduct of the New York Corporations

The Tortious Act Exception applies to claims "in which money damages are sought against a foreign state for

1. Courts have treated the Holy See, as State of the Vatican, as a foreign state for purposes of the FSIA. *See, e.g., O'Bryan v. Holy See*, 556 F.3d 361, 372-74 (6th Cir. 2009). The parties in this case do not dispute its status as a foreign state.

personal injury or death," for "the tortious act or omission of ... any official or employee of that foreign state while acting within the scope of his office or employment," if the act or omission and injury occurred in the United States. 28 U.S.C. § 1605(a)(5). There is, however, an exclusion to the Tortious Act Exception when the tortious act either (1) arose out of misrepresentation or deceit or (2) involved the exercise or performance of a discretionary function. *Id.* at 1605(a)(5)(A)-(B).

The Holy See first argues that the Tortious Act Exception does not apply because any tortious conduct was committed by the New York Corporations, which are separate legal entities, and it cannot apply to alleged tortious conduct by "agents" of the Holy See because the language of the exception refers only to "officials" and "employees," not to "agents." Def. Mem. at 8-12. Plaintiffs dispute that this case is premised on the tortious acts of independent corporations, and argue, in the alternative, that the amended complaint includes sufficient factual allegations to overcome the presumption set out by the Supreme Court in *First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 624-28, 103 S. Ct. 2591, 77 L. Ed. 2d 46 (1983) ("*Bancec*"), that instrumentalities of a foreign state have separate juridicial statuses. Pltfs. Mem. at 6, 8-14.

Under the FSIA, courts must treat corporate entities as presumptively separate from the foreign sovereign. *Gater Assets Ltd. v. AO Moldovagaz*, 2 F.4th 42, 56 (2d Cir. 2021) (applying the "strong presumption" of independent status under *Bancec*). That presumption can be overcome

(1) when "a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created," or (2) when recognizing the corporation as separate "would work fraud or injustice." *Bancec*, 462 U.S. at 629 (citations omitted). Plaintiffs do not argue that the second prong is applicable, so the Court focuses its analysis on the first.

The Second Circuit has held that the "touchstone inquiry for extensive control is whether the sovereign state exercise[s] significant and repeated control over the instrumentality's day-today operations." *Kirschenbaum v. Assa Corp.*, 934 F.3d 191, 197 (2d Cir. 2019). Additionally, five factors are relevant to the "extensive control" inquiry: whether the sovereign nation: (1) uses the instrumentality's property as its own; (2) ignores the instrumentality's separate status or ordinary corporate formalities; (3) deprives the instrumentality of the independence from close political control that is generally enjoyed by government agencies; (4) requires the instrumentality to obtain approvals for ordinary business decisions from a political actor; and (5) issues policies or directives that cause the instrumentality to act directly on behalf of the sovereign state. *Id.* at 198.

The Court is persuaded by the reasoning in *Doe* and *Robles*, two cases similar to this one, that Plaintiffs have not overcome the *Bancec* presumption. In *Doe*, the Ninth Circuit held that a complaint against the Holy See alleging sexual abuse by an American priest failed to allege the level of control necessary to overcome the *Bancec* presumption. *Doe*, 557 F.3d at 1079-80. There, the

"complaint [did] not allege day-to-day, routine involvement of the Holy See in the affairs of the" presumed separate entities. *Id.* at 1079. Plaintiffs attempt to distinguish *Doe* by arguing that the amended complaint makes factual allegations "significantly more developed and substantial than those in *Doe*," pointing to several paragraphs in the complaint. Pltfs. Mem. at 9-10; FAC ¶¶ 45-46, 53-57, 59.[2]

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2. Plaintiffs attempt to buttress the amended complaint's allegations with a declaration by a former priest, Thomas Doyle, filed in conjunction with their opposition to the Holy See's motion to dismiss. *See* Doc. 55-2. Given that the Holy See challenges Plaintiffs' amended complaint on its face, the Court has discretion to resolve jurisdictional issues by reviewing solely the amended complaint's well-pleaded facts together with information cognizable on a facial attack under established law. *See Harty*, 28 F.4th at 441 (district court did not abuse discretion by declining to consider affidavit submitted in opposition to defendant's facial attack on subject matter jurisdiction where affidavit was intended to enhance, not contradict, allegations in complaint); *O'Bryan v. Holy See*, 556 F.3d 361, 375-76 (6th Cir. 2009) ("A facial attack on the subject-matter jurisdiction alleged in the complaint questions merely the sufficiency of the pleading."); *Doe*, 557 F.3d 1066, 1073 (9th Cir. 2009) ("[I]n the foreign sovereign immunity context, [i]f the defendant challenges only the legal sufficiency of the plaintiff's jurisdictional allegations, then the district court should take the plaintiff's factual allegations as true and determine whether they bring the case within any of the exceptions to immunity invoked by the plaintiff."); *Koster v. Grafova*, 2019 U.S. Dist. LEXIS 81856, 2019 WL 2124532, at *7 (N.D. Ala. May 15, 2019) ("A court cannot consider extrinsic evidence for a Rule 12(b)(1) motion that presents a facial attack to subject matter jurisdiction."); *Integrity Soc. Work Servs.. v. Azar*, 2021 U.S. Dist. LEXIS 189334, 2021 WL 4502620, at *7 (E.D.N.Y. Oct. 1, 2021) ("A facial challenge is based solely on the allegations in the complaint"); *see also, e.g., Goldberg v. Quiros*,

The Court disagrees. As in *Robles*, the paragraphs to which Plaintiffs point contain only conclusory allegations that the Holy See exercised control over American bishops and their dioceses. *See, e.g.*, FAC ¶ 46 (alleging that "[t]he Holy See has substantial involvement in, and the unqualified right to, control the day-to-day business and operations of bishops in their dioceses, operating them as a single enterprise."). Such conclusory allegations are insufficient under the *Iqbal* standard. *De Quan Lu v. Red Koi, Inc.*, No. 17-CV-7291 (VEC), 2020 U.S. Dist. LEXIS 243588, 2020 WL 7711410, at *3 (S.D.N.Y. Dec. 29, 2020). Plaintiffs do not attempt to explain how the amended complaint's allegations satisfy the *Kirschenbaum* factors.

Alternatively, Plaintiffs argue that common law agency principles should apply to overcome *Bancec*, citing several out-of-Circuit cases. Pltfs. Mem. at 10-14. But, as the Holy See notes, the Tortious Act Exception's plain language extends only to tortious conduct either by the "foreign state" or its "official or employee." Def. Mem. at 12 (citing 28 U.S.C. § 1605(a)(5)). "Because the FSIA includes the actions of 'an agent' of a foreign state as the basis for jurisdiction over the foreign state, the Court must presume that Congress intentionally omitted 'agent' from

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No. 2:17-CV-00061, 2018 U.S. Dist. LEXIS 226067, 2018 WL 8370060, at *8 n.7 (D. Vt. Dec. 20, 2018) (holding that an affidavit "cannot be used" to amend a pleading by "asserting new facts or theories for the first time in opposition to a motion to dismiss").

In any event, given the Court's conclusion below that the Tortious Act Exception applies for other reasons, the Holy See's motion to strike at Docket Number 61 is denied as moot.

the section of the statute that establishes the Tortious Act Exception." *Robles*, 2021 U.S. Dist. LEXIS 242562, 2021 WL 5999337 at *6 (citing *Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983)). Plaintiffs fail to explain why the Court should hold to the contrary.

B. Whether Employees Fall Under the Tortious Act Exception

This is not the end of the inquiry. As discussed above, Plaintiffs contend that the amended complaint alleges that the bishops, within the structure of the Roman Catholic Church, are themselves employees or officials of the Holy See, committing tortious acts through mandatory duties imposed by the Holy See. In other words, Plaintiffs' theory is that the Holy See itself employed the bishops under the New York state law definition of an employee. *See* Pltfs. Mem. at 5, 14-19; FAC ¶¶ 43-54, 76-79. The Holy See disagrees, arguing that under the doctrine of limited liability, a bishop must be presumed to act on behalf of his diocese, not on behalf of the Holy See. Def. Mem. at 14. The Holy See also argues that federal common law applies and that under either federal common law or New York law, the amended complaint's employment allegations are insufficient as a matter of law. The Court concludes that the doctrine of limited liability does not categorically bar the bishops from being employees of the Holy See and that under New York law, the exception to the FSIA for tort liability based on the actions of an employee provides jurisdiction for claims of negligence against the Holy See at this stage of the analysis.

Appendix B

1. Doctrine of Limited Liability

The Holy See's argument that limited liability precludes jurisdiction under the exception is unpersuasive. The Holy See concedes that the amended complaint alleges that the bishops are employees of the Holy See, but directs the Court to *United States v. Bestfoods*, 524 U.S. 51, 118 S. Ct. 1876, 141 L. Ed. 2d 43 (1998), for the proposition that, with respect to conduct occurring within a diocese, a bishop must be presumed to act on behalf of his diocese, not on behalf of the Holy See. Def. Mem. at 14-15. *Bestfoods* addressed the definition of "operator" under the Comprehensive Environmental Response, Compensation, and Liability Act and involved a traditional parent-subsidiary relationship. 524 U.S. at 69-73. But here, "[t]he complex relationship between the central authority of the Roman Catholic Church and local church officials defies easy comparison to conventional conceptions of an employer-employee relationship." *Robles*, 2021 U.S. Dist. LEXIS 242562, 2021 WL 5999337 at *6. Moreover, the Sixth Circuit addressed this issue in an action similarly alleging that the Holy See's strict secrecy policy caused the sexual abuse of children by Catholic clergy. *O'Bryan*, 556 F.3d at 369 (applying Kentucky law to the elements of the Tortious Act Exception). Though a "close call," *Robles*, 2021 U.S. Dist. LEXIS 242562, 2021 WL 5999337 at *7, Plaintiffs have sufficiently alleged that the bishops are Holy See employees.

2. Whether Bishops Are Employees of the Holy See Under New York Law

The Holy See argues that the Court should apply federal common law to the definition of employment

because § 1605(a)(5) was drafted based on the Federal Tort Claims Act ("FTCA"), and the FTCA applies federal law to the question of who is a government employee. Def. Mem. at 15-16. The weight of authority, however, directs that state law applies to the definition of employment as used in the Tortious Act Exception. *See Robles*, 2021 U.S. Dist. LEXIS 242562, 2021 WL 5999337 at *7 (applying New York law to the elements of the Tortious Act Exception) *O'Bryan*, 556 F.3d at 369 (applying Kentucky law to the elements of the Tortious Act Exception); *Bancec*, 462 U.S. at 622 n.11 (holding that "where a state law provides a rule of liability governing private individuals, the FSIA requires the application of that rule to foreign states in like circumstances."); *Randolph v. Budget Rent-A-Car*, 97 F.3d 319, 325 (9th Cir. 1996) (defining "employee" under state law in FSIA tortious act case); *Doe v. Holy See*, No. CV 02-430-MO, 2011 U.S. Dist. LEXIS 43251, 2011 WL 1541275, at *4 (D. Or. Apr. 21, 2011) (on remand, applying state law to the same question). The Second Circuit has not addressed this issue, but notably treats the FSIA "as a pass-through to state law principles." *Pescatore v. Pan Am. World Airways, Inc.*, 97 F.3d 1, 12 (2d Cir. 1996).[3] The Court will therefore apply New York law.

In New York, whether an employment relationship exists depends on "the degree of control exercised by the purported employer over the results produced or the

3. For the reasons stated in Judge Caproni's *Robles* opinion, the question of who is an "employee" also favors Plaintiffs under federal common law, 2021 U.S. Dist. LEXIS 242562, 2021 WL 5999337 at *8, but the Court declines to engage in that analysis since it holds that New York law applies.

means used to achieve the results." *Bynog v. Cipriani Grp., Inc.*, 1 N.Y.3d 193, 198, 802 N.E.2d 1090, 770 N.Y.S.2d 692 (2003) (citation omitted). The analysis is fact-specific and relevant factors can include, but are not limited to, whether the individual (1) works at his own convenience; (2) may engage in other employment; (3) receives fringe benefits; (4) is on the employer's payroll; and (5) is on a fixed work schedule. *Id.* (citations omitted); *see also D. S. v. Positive Behav. Support Consulting & Psych. Res., P.C.*, 197 A.D.3d 518, 520-21, 151 N.Y.S.3d 690 (2d Dep't 2021).

The amended complaint alleges facts demonstrating a right of control consistent with New York law that are sufficient to satisfy the plausibility standard for pleading. *See, e.g.*, FAC ¶¶ 45-47, 52, 55, 57. Further, if a question of fact as to employment exists, dismissal at this stage is improper. *See, e.g., Murphy v. Guilford Mills, Inc.*, No. 02-CV-10105, 2005 U.S. Dist. LEXIS 7160, 2005 WL 957333, at *5 (S.D.N.Y. Apr. 22, 2005) (holding employment status of tortfeasor "is often a question of fact" and, in a diversity case applying New York law, may be resolved as matter of law only "where the evidence in the record is undisputed").

C. Elements of the Tortious Act Exception

"Section 1605(a)(5) is limited by its terms . . . to those cases in which the damage to or loss of property occurs in the United States." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434, 109 S. Ct. 683, 102 L. Ed. 2d 818 (1989). The elements of the Tortious Act Exception are: (i) a tort "occurring in the United

States"; (ii) caused by an act or omission; (iii) "of that foreign state or of any official or employee of that foreign state"; (iv) "while acting within the scope of his office or employment." 28 U.S.C. § 1605(a)(5); *O'Bryan*, 556 F.3d at 381. In addition to the employment requirement, discussed *supra*, the Holy See argues that Plaintiffs have not met their burden for the first two elements. The Court disagrees.

The Second Circuit requires that the "entire tort" meet the situs requirement. *In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 109, 115-16 (2d Cir. 2013). Relying principally on the Sixth Circuit's *O'Bryan* decision, the Holy See argues that the "entire tort" rule precludes application of this requirement because the Holy See's mandatory secrecy policy was promulgated in Rome, not the United States. Def. Mem. at 17-19. But in *O'Bryan*, the Sixth Circuit held that those portions of claims based on the bishops' local implementation of their employer's policy in supervising abusive priests satisfied the situs requirement. 556 F.3d at 386. Because Plaintiffs advance a similar theory giving rise to their tort claims, the Court concludes that the situs requirement is met here.

The Holy See also asserts that Plaintiffs fail to identify any causal link between the secrecy policy and their injuries. Def. Mem. at 19-20. The Court disagrees. The amended complaint contains ample well-pleaded allegations of alleged sexual abuse traceable to the alleged negligence of supervising clergy and the Archbishop. *See* FAC ¶¶ 4, 7, 12, 19, 22, 28-34.

Because the complaint adequately alleges that the bishops are Holy See employees acting within the scope of their employment, Plaintiffs have satisfied the elements of the Tortious Act Exception.

D. The Discretionary Function Exclusion to the Tortious Act Exception

The Tortious Act Exception excludes "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." 28 U.S.C. § 1605(a)(5)(A). It is at this stage of the analysis that Plaintiffs' claims for negligence based on the tortious acts of Holy See employees fail. Courts model their interpretation of the Discretionary Function Exclusion on the interpretation of an identical exclusion in the FTCA. *Doe*, 557 F.3d at 1083; *O'Bryan*, 556 F.3d at 383-84. "There is a two-part test: (1) whether the tortious act is discretionary in nature, meaning, it involves 'an element of judgment or choice' and (2) whether the conduct is of the nature that the exclusion was 'designed to shield.'" *Robles*, 2021 U.S. Dist. LEXIS 242562, 2021 WL 5999337 at *12 (quoting *United States v. Gaubert*, 499 U.S. 315, 322-23, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991)). The Discretionary Function Exclusion is intended to insulate from liability sovereign actions and decisions that involve an element of judgment or choice and that are based on public policy considerations. *Berkovitz by Berkovitz v. United States*, 486 U.S. 531, 538, 108 S. Ct. 1954, 100 L. Ed. 2d 531 (1988).

The first prong of the *Gaubert* test is met because the amended complaint fails to make any factual allegations

that the tortious acts of Holy See employees were not discretionary. Plaintiffs' theory is that the failure to warn, disclose, or report about sexual abuse accorded with the Holy See's norms. *See* FAC ¶¶ 77-78; *see also id.*, ¶¶ 64-68, 109, 112, 118, 121, 127, 130. But, as the Holy See correctly points out, the Supreme Court has been clear that promulgation of a policy or regulation by employees *is discretionary in nature. Gaubert*, 499 U.S. at 323 ("there is no doubt" that the "promulgation of regulations" is protected by the Discretionary Function Exclusion); *Dalehite v. United States*, 346 U.S. 15, 35-36, 73 S. Ct. 956, 97 L. Ed. 1427 (1953) (holding that the Discretionary Function Exclusion protects "determinations made by executives or administrators in establishing plans, specifications or schedules of operations" and that "*[i]t necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable.*"). In *Gaubert*, the Supreme Court made clear that "if a regulation mandates particular conduct, and the employee obeys the direction, the Government will be protected because the action will be deemed in furtherance of the policies which led to the promulgation of the regulation." 499 U.S. at 324. Moreover, common sense dictates that "there are many ways to minister to parishes and to run a diocese. And within that mosaic, the individual bishops and cardinals appear to have some discretion in how to deal with priests under their supervision, including, for example, keeping certain priests out of positions that involve contact with children." *Robles*, 2021 U.S. Dist. LEXIS 242562, 2021 WL 5999337.

The second prong of *Gaubert* is also met. Courts have repeatedly held that the decision as to "whether to warn about [an individual's] dangerous proclivities . . . [is] the type of discretionary judgment[] that the exclusion was designed to protect." *Doe*, 557 F.3d at 1084; *see also, e.g.*, *Croyle v. United States*, 908 F.3d 377, 381 (8th Cir. 2018) (relying on *Doe* and holding, in FTCA clergy sexual abuse case, that "[t]he decision whether to warn of [the priest's] sexual propensities or to take other action to restrict his contact with children is susceptible to policy analysis").

Accordingly, any alleged decision by Holy See employees regarding whether to warn or report falls within the Discretionary Function Exclusion. As a result, Section 1605(a)(5)(A) precludes subject matter jurisdiction under the Tortious Act Exception to the FSIA.[4]

IV. Conclusion

For the foregoing reasons, the motion to dismiss filed by the Holy See is GRANTED, and the amended complaint is dismissed for lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act.

The Clerk of Court is directed to terminate the motions at Docket Numbers 43 (granted) and 61 (denied as moot).

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4. Because subject matter jurisdiction is lacking, the Court declines to address the other arguments raised in the Holy See's motion to dismiss.

The Clerk is directed to enter final judgment in favor of the Holy See and to close this case.

SO ORDERED.

Dated: September 28, 2022
New York, New York

/s/ J. Paul Oetken
J. PAUL OETKEN
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED SEPTEMBER 4, 2025

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

Docket No: 22-2840

ERIK BLECHER, JAMES BRUNO, ROBERT BUMS, EMMETT CALDWELL, LOUIS CASTIGLIONE, KEVIN CAVANAUGH, BRIAN COMPASSO, WAYNE COMPASSO, VINCENT DILLARD, JOHN GILLEN, STEPHEN HUM, JOSEPH JOCKEL, MARIANNE AGNELLO, DIANNE MONDELLO, VERNON ALLEN JONES, MICHAEL LEONARD, JOHN O'CONNOR, THOMAS O'CONNOR, DANIEL RICE, JOSEPH RUSSO, TOM SPARKS, PETER SENATORE, MATTHEW SEXTON, LAWRENCE SMITH, JORDAN TAYLOR, DESIREE CALLENDER, JACQUELINE REGAN, MICHAEL GILL, NEIL M. CURTIS, AND ROBERT LISIECKI, ON BEHALF OF THEMSELVES AND ALL PERSONS SIMILARLY SITUATED,

Plaintiffs-Appellants,

v.

THE HOLY SEE, AKA THE APOSTOLIC SEE,

Defendant-Appellee.

Filed September 4, 2025

Appendix C

ORDER

Appellants filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

/s/ Catherine O'Hagan Wolf