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Victory for Clergy Sexual Abuse Victims: The Ninth Circuit Strips the Holy See of Foreign Sovereign Immunity in *Doe v. Holy See*

I. INTRODUCTION

In *Doe v. Holy See*,¹ the Ninth Circuit narrowly upheld the district court's refusal to grant a motion to dismiss by the Holy See, which claimed sovereign immunity under the Foreign Sovereign Immunities Act ("FSIA").² At issue was whether an exception to sovereign immunity permitted an alleged victim of sexual abuse by a Roman Catholic priest to bring suit against the Holy See, otherwise known as the Vatican.³ As part of its inquiry, the Ninth Circuit examined the pleadings to determine whether the alleged activities of the Holy See fit one of the statutory exceptions to sovereign immunity—in this case, either the commercial activity exception or the tortious exception.⁴ Additionally, the court examined the basis for holding the Holy See vicariously liable for the actions of its affiliated U.S. corporations. The court ultimately refused to address the commercial activity exception on jurisdictional grounds,⁵ but it addressed the remaining issues of the tortious exception and vicarious liability.⁶ The court held that the tortious exception applied, but only for a single respondeat superior claim against the Holy See.⁷ The court also held that the Holy See could not be held

1. 557 F.3d 1066 (9th Cir. 2009) (per curiam).

2. 28 U.S.C. §§ 1602–11 (2006).

3. *Doe*, 557 F.3d at 1069. Although in common parlance the "Holy See" and the "Vatican" are synonymous, they are, in fact, "separate entities The Holy See itself is not a state, but it is the entity that is recognized as a sovereign." Lucian C. Martinez, Jr., *Sovereign Impunity: Does the Foreign Sovereign Immunities Act Bar Lawsuits Against the Holy See in Clerical Sexual Abuse Cases?*, 44 TEX. INT'L L.J. 123, 139 (2008) (footnote omitted).

4. *Doe*, 557 F.3d at 1074, 1081–85. For an explanation of these statutory exceptions, see *infra* Part III.

5. *Doe*, 557 F.3d at 1074.

6. *Id.* at 1077–85.

7. *Id.* at 1069.

vicariously liable for the behavior of its affiliated U.S. corporations because the plaintiff had not sufficiently alleged “day-to-day control” over these corporations or an abuse of the corporate form.⁸

This Note argues that, although the Ninth Circuit’s decision in *Doe v. Holy See* was correct, the court’s rationale for denying a review of the commercial activity exception is suspect because the majority demonstrated an apparently willful misunderstanding of the applicable legal standards. Additionally, this Note argues that the Ninth Circuit’s decision will have a lasting impact on future clergy sexual abuse litigation because (1) plaintiffs throughout the country will have a drafting guide to more carefully plead their claims; and (2) many more states may consider adopting Oregon’s expansive view of respondeat superior liability as a civil means of vindicating victims of clergy sexual abuse.

II. FACTS AND PROCEDURAL HISTORY

John V. Doe alleged that in approximately 1965, when he was fifteen or sixteen years old, he was sexually abused multiple times by Father Andrew Ronan, a parish priest at St. Albert’s Church in Portland, Oregon.⁹ For these injuries, Doe not only brought claims against the Archdiocese of Portland and other affiliated organizations¹⁰ in the United States, but also against the Holy See,¹¹ which is the head of the worldwide Roman Catholic Church.¹² The claims against the Holy See included (1) vicarious liability for the acts of its instrumentalities and domestic corporations, (2) respondeat superior for the actions of Ronan as an alleged employee of the Holy See, and (3) direct liability based on the Holy See’s own negligence in retention and supervision of Ronan, and its failure to warn of his harmful propensities.¹³ In response, the Holy See claimed sovereign immunity from suit under the FSIA and moved the court to dismiss the case.¹⁴

8. *Id.* at 1079–80.

9. *Id.* at 1070.

10. Doe also named the Chicago Bishop and the Order of the Friar Servants, of which Ronan was a member, as defendants. *Id.* at 1070.

11. *Id.*

12. *Id.* at 1091 (Berzon, J., dissenting) (noting the “Holy See’s dual role as not only a sovereign government but also the head of a worldwide church”).

13. *Id.* at 1069 (per curiam).

14. *Id.* at 1071.

The district court denied the motion to dismiss in part, and held that nearly all of Doe’s tort claims (even the vicarious liability claims) could proceed against the Holy See by way of the tortious exception in the FSIA.¹⁵ The court determined that the Holy See could not take advantage of an exception to the tortious exception (the discretionary function exclusion) because the Holy See’s behavior was not a “policy-based” decision susceptible to the “balancing of competing interests.”¹⁶ The court also found that even though the acts of the Holy See could be otherwise considered “commercial activity,”¹⁷ the commercial activity exception could not apply because Doe’s claims “sound[ed] in tort.”¹⁸

III. SIGNIFICANT LEGAL BACKGROUND

To better understand why the district court and the Ninth Circuit struggled with the application of the FSIA in this case, it is helpful to trace the relevant legal history. For a period of over 140 years, the United States has granted immunity to foreign sovereigns from being subject to lawsuits in the United States as a “matter of grace and comity[,] . . . not a restriction imposed by the Constitution.”¹⁹ However, starting in 1952, the State Department announced a new approach, called the “restrictive” theory of foreign sovereign immunity, where immunity would only extend to the “public acts” of a foreign sovereign.²⁰ Nevertheless, this new approach proved to be too burdensome to implement and too susceptible to “diplomatic pressures.”²¹ Thus, in 1976, Congress passed the FSIA, which largely codified the “restrictive” theory of sovereign immunity,²² and states as its purpose to “serve the interests of justice and . . . protect the rights of both foreign states and litigants in the United States courts.”²³

15. *Id.* (noting that the district court did grant the Holy See’s motion as to Doe’s fraud claim).

16. *Doe v. Holy See*, 434 F. Supp. 2d 925, 956 (D. Or. 2006).

17. *See id.* at 940–41.

18. *Id.* at 942.

19. *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 486 (1983).

20. *Id.* at 486–87.

21. *Id.* at 488.

22. *Id.*

23. 28 U.S.C. § 1602 (2006).

The FSIA is now the only means of obtaining jurisdiction over a foreign state,²⁴ and foreign sovereigns have immunity as a general rule, unless one of the exceptions in the statute applies, such as the commercial activity exception²⁵ or the tortious exception.²⁶

A. Commercial Activity Exception

As an exception to the general rule, the FSIA states that foreign sovereign immunity does not apply to an action “based upon a commercial activity . . . by the foreign state.”²⁷ Even though the FSIA defines “commercial activity,” the definition is somewhat circular: “either a regular course of commercial conduct or a particular commercial transaction or act.”²⁸ The FSIA never directly defines “commercial,”²⁹ leaving its interpretation to the courts.³⁰ In *Republic of Argentina v. Weltover, Inc.*, the Supreme Court unanimously determined that “[a] foreign state engaging in ‘commercial’ activities ‘do[es] not exercise powers peculiar to sovereigns’; rather, it ‘exercise[s] only those powers that can also be exercised by private citizens.’”³¹

Even if a foreign sovereign has engaged in “commercial activity,” this activity or the act connected to the commercial activity must also form the basis of the plaintiff’s action.³² In *Saudi Arabia v. Nelson*, a

24. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989).

25. 28 U.S.C. § 1605(a)(2) (2006).

26. *Id.* § 1605(a)(5).

27. *Id.* § 1605(a)(2).

28. *Id.* § 1603(d).

29. *Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607, 612 (1992).

30. *Saudi Arabia v. Nelson*, 507 U.S. 349, 359 (1993) (“[C]ongressional diffidence necessarily results in judicial responsibility to determine what a ‘commercial activity’ is for purposes of the Act.”).

31. *Weltover*, 504 U.S. at 614 (quoting *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 704 (1976)) (alternations in original). Profit motivation is largely immaterial to the analysis. *Id.*; *Joseph v. Office of the Consulate Gen. of Nig.*, 830 F.2d 1018, 1024 (9th Cir. 1987) (“[T]here is no indication that Congress intended the presence of a profit motive . . . to be a *threshold requirement* for applying the commercial activity exception.”); *cf.* H.R. REP. NO. 94-1487, at 16 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6615 (“[I]f an activity is customarily carried on for profit, its commercial nature could readily be assumed.”).

32. *See* 28 U.S.C. § 1605(a)(2) (2006).

divided³³ Supreme Court held that the act of arresting and torturing an American by the Saudi government did not meet the requirements of the commercial exception.³⁴ Specifically, although the plaintiff alleged that his recruitment in the United States and his employment in Saudi Arabia (arguably commercial activities) were the bases of his injuries, the Court determined that his complaint was actually “based upon” personal injuries committed in Saudi Arabia.³⁵

B. Tortious Exception

In addition to the commercial exception, the FSIA also declares that foreign sovereign immunity does not apply to non-commercial torts

in which money damages are sought against a foreign state for personal injury . . . 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 . . . 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.³⁶

Although the exact relationship between the commercial exception and the tortious exception is unclear,³⁷ the latter clearly authorizes suits based not only on the foreign state’s own torts, but also the torts of its employees.³⁸ In order to apply the tortious exception to the acts of the foreign state’s employees, the plaintiff must allege an employment relationship and that the tortious act fell within the

33. Although almost all the members of the Court agreed as to the judgment, there were four different opinions disagreeing with the majority opinion’s analysis.

34. *Nelson*, 507 U.S. at 361–62.

35. *Id.* at 358.

36. 28 U.S.C. § 1605(a)(5) (2006).

37. Judge Berzon argued that “[n]othing in the FSIA suggests that the commercial activity exception and the tortious act exception are mutually exclusive and cannot possibly apply to the same conduct. Nor does *Nelson*, or any other controlling case, authorize reading such a requirement into the statute.” *Doe v. Holy See*, 557 F.3d 1066, 1094 (9th Cir. 2009) (Berzon, J., dissenting).

38. 28 U.S.C. § 1605(a)(5)(A) (2006).

scope of that employment.³⁹ Since the FSIA doesn't define "employment" or "scope of employment," state law governs their meaning.⁴⁰

Although a foreign state may be liable for certain torts, it will preserve its sovereign immunity if it can invoke the two-part "discretionary function" exclusion.⁴¹ First, the challenged action or omission must "involve an element of judgment or choice."⁴² An action is not discretionary if law or policy "specifically prescribes a course of action."⁴³ Second, even if the action involves discretion, it must be determined "whether that judgment is of the kind that the discretionary function exception was designed to shield."⁴⁴ This exclusion is designed to protect decisions "grounded in social, economic, and political policy."⁴⁵

IV. THE COURT'S DECISION

In the present case, a three-member panel of the Ninth Circuit issued a per curiam opinion reversing the district court's decision to remove the Holy See's sovereign immunity. However, the Ninth Circuit did affirm the district court's decision to allow a respondeat superior claim to proceed against the Holy See.

A. Vicarious Liability

The Holy See argued that it should not be held liable for the acts or omissions of its U.S. corporations because "Doe has not alleged facts that would overcome the presumption of separate juridical

39. *Id.*

40. O'Bryan v. Holy See, 471 F. Supp. 2d 784, 790 (W.D. Ky. 2007) ("The FSIA provides no definition of 'official' or 'employee.' Whether . . . clergy are employees of the Holy See would appear to be a question of . . . state law."); Doe v. Holy See, 434 F. Supp. 2d 925, 948 (D. Or. 2006) (determining whether someone was an "employee" is governed by state law (citing Randolph v. Budget Rent-A-Car, 97 F.3d 319, 325 (9th Cir. 1996))).

41. See 28 U.S.C. § 1605(a)(5)(A) (2006).

42. United States v. Gaubert, 499 U.S. 315, 322 (1991) (internal quotation marks and citation omitted) (applying the discretionary exception to the Federal Tort Claims Act). Even though the FSIA does not define "discretionary function," the "language of the discretionary function exclusion closely parallels the language of a similar exclusion in the Federal Tort Claims Act." *Doe*, 557 F.3d at 1083 (per curiam).

43. Berkovitz v. United States, 486 U.S. 531, 536 (1988).

44. *Gaubert*, 499 U.S. at 322–23 (internal quotation marks and citation omitted).

45. See United States v. Varig Airlines, 467 U.S. 797, 814 (1984).

status such that the acts of the latter could be attributed to the former.”⁴⁶ The Ninth Circuit agreed.⁴⁷ In particular, the court explained that Doe’s complaint did not allege a “day-to-day, routine involvement of the Holy See in the affairs of the [corporations].”⁴⁸ The court conceded that Doe’s complaint had alleged that the corporations were “agents” of the Holy See, but the court found that the mere use of the word “agent” was not sufficient.⁴⁹ Additionally, in regard to an equitable prong, the court found that Doe’s complaint failed to allege “that the Holy See ha[d] inappropriately used the separate status of the corporations . . . for the purpose of evading liability for its own wrongs.”⁵⁰

B. Tortious Exception

The Ninth Circuit determined that Doe had appropriately pleaded his respondeat superior claim against the Holy See, but that the Holy See qualified for the discretionary function exclusion.

1. Respondeat superior

The Holy See argued that Doe had failed to plead “sufficient facts to demonstrate that Ronan was an ‘employee’ of the Holy See . . . because the word ‘employee’ is a legal conclusion.”⁵¹ Although the court recognized that “employee” has a technical meaning, it was “highly skeptical of the notion that . . . use of the word ‘employee’ in a complaint is insufficient to establish an allegation of an employment relationship.”⁵² The court recognized that merely stating that Ronan was an “employee” was sufficient to put the Holy See on notice of the allegation because the

46. *Doe*, 557 F.3d at 1076.

47. *Id.* at 1079. There are two instances where the presumption of separate juridical status can be overcome: (1) “where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created,” and (2) where recognizing the separate juridical status “would work fraud or injustice.” *First Nat’l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 629 (1983) (internal quotation marks and citations omitted).

48. *Doe*, 557 F.3d at 1079 (citing *Flatow v. Islamic Republic of Iran*, 308 F.3d 1065, 1073 (9th Cir. 2002)).

49. *Id.* at 1080.

50. *Id.*

51. *Id.* at 1081.

52. *Id.*

commonplace meaning of “employee” was not “so complex or contentious . . . [as to] prevent a defendant from understanding the factual basis for the claim.”⁵³

In addition to the inquiry of whether Doe had sufficiently pled an employment relationship, the court inquired into whether Doe had pled that Ronan had been acting within his “scope of employment.”⁵⁴ Since the FSIA does not define this phrase, the court turned to Oregon law, under which an employer could be held liable as long as an employee’s authorized activities constituted a “necessary precursor” to committing unauthorized actions.⁵⁵ The court found that Doe had sufficiently met this test because he alleged that he had come “to know Ronan ‘as his priest, counselor and spiritual adviser,’” and that Ronan had used his “‘position of authority’ to ‘engage in harmful sexual contact upon’ Doe.”⁵⁶

2. *Discretionary function exclusion*

The Ninth Circuit held that the Holy See was not directly liable for its alleged negligence because its behavior was covered by the FSIA’s discretionary function exclusion, an exception to the tortious exception.⁵⁷ Specifically, the court determined that Doe had failed to allege that the Holy See had a “specific and mandatory” policy prescribing its conduct, and had failed to show that the Holy See’s actual judgment was not the kind that the exception was “designed to shield.”⁵⁸ Although Doe did allege that there had been “policies, practices, and procedures”⁵⁹ to avoid firing or warning others of abusive priests, the court held that this was insufficient to show that the Holy See effectively had no discretion in the matter.⁶⁰ As to whether the discretionary exclusion was “designed to shield”⁶¹ the Holy See’s judgments, the court determined, on its own, that the

53. *Id.* at 1081–82.

54. *Id.* at 1082.

55. *Id.* (quoting *Fearing v. Bucher*, 977 P.2d 1163, 1167 (Or. 1999)); *see infra* notes 81–83 and accompanying text.

56. *Doe*, 557 F.3d at 1083.

57. *Id.* at 1069, 1083.

58. *Id.* at 1083–84.

59. *Id.* at 1084.

60. *See id.*

61. *Id.*

Holy See hypothetically might have had a legitimate policy rationale, such as a concern over reputation, staffing shortages, or other issues.⁶²

C. Commercial Activity Exception

Doe cross-appealed from the district court's decision to deny the application of the FSIA's commercial activity exception. However, the Holy See argued that the Ninth Circuit did not have jurisdiction over this cross-appeal because it was not "inextricably intertwined" with the collaterally appealable issue—the denial of foreign sovereign immunity.⁶³ Although the court recognized that it had the prudential and discretionary power to support a district court decision on alternative grounds, it refused the opportunity because it would have involved "a vast expansion of the issues in and complexity of the appeal."⁶⁴

D. Dissenting Opinion by Judge Berzon

In her dissenting opinion, Judge Berzon disagreed with the majority's refusal to consider the application of the commercial activity exception. She quoted Ninth Circuit case law describing how the court was fully entitled "to preserve the result that the district court reached, either by following the district court's reasoning or by a different rationale."⁶⁵ She disputed the majority's prudential concerns as nonexistent since the issue "was fully litigated below, the district court decided the question, and the issue has been fully briefed and argued here."⁶⁶

As to the application, Judge Berzon repeatedly described how the "commercial activity" test does not require any profit motive, but only that the activity is not "peculiar to sovereigns."⁶⁷ She argued that the Holy See's alleged activity is "commercial activity"

62. *Id.* at 1085. The court explained that "[t]he Holy See's failure to present any evidence that its actions were actually based on policy considerations is not relevant to whether the discretionary function exception applies." *Id.* According to the court, the sovereign's actions only need to be "susceptible" to a policy analysis. *Id.* (quoting *Kelly v. United States*, 241 F.3d 755, 764 n.5 (9th Cir. 2001)).

63. *Id.* at 1074.

64. *Id.* at 1076 n.5.

65. *Id.* at 1088 (Berzon, J., dissenting).

66. *Id.*

67. *Id.* at 1089–90.

because the employment relationship between the Holy See and Ronan was not of a “quintessentially sovereign” capacity.⁶⁸ Furthermore, she argued, Doe’s negligence claims were “based upon” this employment relationship and that even with an arguably “tortious essence,” there was no controlling authority that made the commercial activity exception inapplicable to Doe’s negligence claims.⁶⁹

E. Concurring Opinion by Judge Fernandez

In responding to the dissent, Judge Fernandez wrote a concurring opinion to dispute the “oxymoronic proposition that church functions are commercial.”⁷⁰ He described the idea of characterizing church functions as commercial as “the veriest cynicism about religion” and that “[n]ormal legal usage and common sense recoil” from such characterizations.⁷¹ Ultimately, he concluded that although the Holy See is an abnormal type of foreign sovereign, it is not a “merchant” or otherwise engaged in “trade and traffic or commerce.”⁷²

V. ANALYSIS

The Ninth Circuit’s decision in *Doe v. Holy See* is important because it is the second case this year where the Holy See has been thwarted trying to preserve its sovereign immunity.⁷³ The court correctly determined that Doe’s respondeat superior claim must proceed because the applicable state law essentially mandated that result. However, the court’s rationale for denying a review of the commercial activity exception is highly suspect since the majority apparently had a fundamental misunderstanding of the applicable legal standards.

A. Basis for Respondeat Superior Decision

The Ninth Circuit correctly determined that Doe’s respondeat superior claim had satisfied the requirements of the tortious

68. *Id.* at 1089.

69. *Id.* at 1094, 1096.

70. *Id.* at 1097 (Fernandez, J., concurring).

71. *Id.*

72. *Id.* at 1098.

73. The other is *O’Byran v. Holy See*, 556 F.3d 361 (6th Cir. 2009).

exception, thereby removing the Holy See's sovereign immunity for that claim. This decision was easily supported by statute, case law, and policy considerations. The plain language of the FSIA's tortious exception allowed suit against sovereigns for a "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."⁷⁴ Since the FSIA does not define the key terms, "employee" and "scope of employee," the court then turned to Oregon case law.⁷⁵

Oregon case law has been on the frontier of expanding the reach of the respondeat superior doctrine and even has recent case law that specifically addresses respondeat superior claims arising from sexual abuse by Roman Catholic clergy.⁷⁶ As to the first issue, the definition of "employee" under Oregon law includes a list of factors, including, but not limited to, the "right to . . . control," and the "right to fire."⁷⁷ The district court found that Doe had satisfied this test because he alleged that the Holy See had the "right to control" Ronan, and demonstrated this control by actually "plac[ing] [him] in Portland, Oregon."⁷⁸ Interestingly enough, while the Ninth Circuit affirmed the district court on this issue, it did not even acknowledge this test or the district court's analysis at all.⁷⁹ Instead, the court primarily focused on the issue of whether Doe's bare allegation that Ronan was "employed" by Holy See was sufficient under modern notice pleading standards.⁸⁰ However puzzling, it is quite possible that the court didn't include the actual analysis under Oregon law because it thought that, since a bare allegation of

74. 28 U.S.C. § 1605(a)(5) (2006).

75. See *supra* note 40 and accompanying text.

76. Marci A. Hamilton, *The Waterloo for the So-Called Church Autonomy Theory: Widespread Clergy Abuse and Institutional Cover-Up*, 29 CARDOZO L. REV. 225, 241 (2007) (noting that Oregon is one state that has taken an "expansive approach to scope of employment"); see also Michael J. Sartor, *Respondeat Superior, Intentional Torts, and Clergy Sexual Misconduct: The Implications of Fearing v. Bucher*, 62 WASH. & LEE L. REV. 687, 690 (2005) ("[O]ne jurisdiction [Oregon] has recognized the validity of respondeat superior claims asserted against religious organizations in cases involving clergy sexual misconduct.").

77. Doe v. Holy See, 434 F. Supp. 2d 925, 948 (D. Or. 2006) (quoting Stamp v. Dep't of Consumer & Bus. Servs., 9 P.3d 729, 731 (Or. Ct. App. 2000)).

78. *Id.* at 949 (citation omitted).

79. See Doe v. Holy See, 557 F.3d 1066 (9th Cir. 2009) (per curiam).

80. *Id.* at 1165.

employment was sufficient under notice pleading, including the state law analysis would have been superfluous. In either case, the Ninth Circuit had adequate support to conclude that Doe had satisfied the employment requirement of the tortious exception.

As to the second issue, the Ninth Circuit cited an Oregon case, *Fearing v. Bucher*, that dealt with substantially the same underlying issue of whether the tortious acts of a priest could still be considered part of his “scope of employment.”⁸¹ In *Fearing*, the court held that an employer could be held liable under respondeat superior for the otherwise unauthorized actions of a priest who used his position as a priest, pastor, and spiritual mentor as a “necessary precursor” to the eventual molestation of a child.⁸² Doe’s complaint satisfied this test because the sexual abuse was necessarily preceded by Ronan’s relationship with Doe as “priest, counselor, and spiritual advisor,” and a “direct outgrowth” of Ronan’s “position of authority” over him.⁸³ Since the facts are so similar between *Fearing* and the instant case, the Ninth Circuit was not only effectively bound to follow the “necessary precursor” and “direct outgrowth” analysis from *Fearing*, but also reach the same conclusion.

Beyond the substantive law cited by the court, the Ninth Circuit’s decision to allow the respondeat superior claim to proceed against the Holy See is also strongly bolstered by the underlying policies behind respondeat superior liability. Most prominently, employers must realize that they are in the best position to carefully screen new employees and supervise existing ones so as to not only reduce the liability of the company, but also to reduce and avoid causing future injuries to the public.⁸⁴ Although the Holy See is obviously not directly involved in the hiring or supervision of all church workers throughout the world, it is still in the best position to make and enforce church-wide policy. There is no doubt that as the head of a rigidly hierarchical organization it had the unequivocal power to set and enforce rigorous hiring and supervision policies throughout all levels of the church with a goal of protecting the

81. 977 P.2d 1163, 1168 (Or. 1999).

82. *Id.*

83. *Doe*, 557 F.3d at 1083.

84. *See Sartor*, *supra* note 76, at 723–24.

public from the harmful actions of its servants.⁸⁵ Given that the Holy See was, almost certainly, in the best position to make and enforce employment policies to protect the public, the Ninth Circuit was justified in removing the Holy See's sovereign immunity in order to determine whether it should be held responsible for the harmful actions of its alleged employee.

An additional policy consideration that supports the Ninth Circuit's decision is that employers are usually in a better position to "spread losses equitably" and insure that victims are compensated, especially when the perpetrator is judgment proof.⁸⁶ During the past decade there has been a firestorm of clergy sexual abuse litigation. Even though this litigation has been effective at garnering large settlements and verdicts against local branches of the worldwide Roman Catholic Church,⁸⁷ some plaintiffs have encountered problems actually collecting damages from these organizations, especially when they later declare bankruptcy to protect church assets from judgment.⁸⁸ Furthermore, since many, if not most, members of the Roman Catholic clergy take a vow of poverty,⁸⁹ the actual perpetrators of sexual abuse are often judgment-proof, leaving victims without adequate compensation for their injuries. In contrast, the Holy See has extensive financial resources⁹⁰ with the ability to fairly compensate victims of sexual abuse, such as Doe, for the irreparable damage caused by its servants and instrumentalities.⁹¹ Given the tremendous physical, mental, and financial costs borne by victims, families, and society at large, the policy of insuring that

85. Cf. Martinez, *supra* note 3, at 143–44, 150–53 (“[I]n the most important matters, the Holy See is capable of using its considerable authority over the worldwide church in an attempt to bring about the desirable outcome.”).

86. See Sartor, *supra* note 76, at 724–25.

87. See, e.g., Maria L. La Ganga & Duke Helfand, *Etching Abuse in Church's Memory*, L.A. TIMES, Dec. 1, 2008, at A1 (“The Catholic Church in the U.S. has paid out more than \$2 billion in legal settlements.”).

88. See *id.* (“Six dioceses have filed for bankruptcy.”); Allison Walsh Smith, *Chapter 11 Bankruptcy: A New Battleground in the Ongoing Conflict Between Catholic Dioceses and Sex-Abuse Claimants*, 84 N.C. L. REV. 282, 315 (2005) (“[A]ny claimant who settled or won a claim against a diocese pre-petition [for bankruptcy] was prevented from collecting on that settlement or judgment.”).

89. See Sartor, *supra* note 76, at 724.

90. See, e.g., Lisa O'Connor, *Vatican Loses EUR9.1m*, SUNDAY MIRROR, July 13, 2008, at 24 (“Experts estimate that the Vatican's total wealth is in excess of EUR5 billion.”).

91. Cf. Martinez, *supra* note 3, at 143–44.

victims are compensated for their injuries certainly justifies the Holy See's loss of sovereign immunity for Doe's respondeat superior claim.

B. Dodging the Commercial Activity Exception

The Ninth Circuit unreasonably avoided the issue of whether the commercial activity exception applied to the Holy See's alleged behavior. Taken on its face, the three-member panel had the power to reject Doe's cross appeal concerning the district court's refusal to apply the commercial activity exception. However, by analyzing the per-curiam opinion and the accompanying concurring opinion, the rationale of the two-to-one decision is suspect since the majority apparently had a fundamental misunderstanding of the applicable legal standards.

As to the per curiam opinion, the majority refused to address the commercial activity exception because it claimed that the issue "seeks to expand our inquiry into the arcane question of whether church functions are commercial activity because churches receive financial support from their parishioners."⁹² However, the court's paraphrase of the legal issue is incorrect. Although "commercial activity" might refer to trade and exchange in common parlance, in the context of the FSIA the phrase is a term of art⁹³ that concerns whether a foreign sovereign is exercising "powers peculiar to sovereigns."⁹⁴ Whether the Holy See receives financial support from parishioners is irrelevant to the real question of whether the employment relationship between the Holy See and Ronan was of a "quintessentially sovereign" capacity, such as "civil service, diplomatic, or military."⁹⁵

This misapprehension can, most likely, be explained by examining the concurring opinion of Judge Fernandez, who was part of the 2-1 per curiam decision. He said that it was an "oxymoronic proposition that church functions are commercial," and the idea of characterizing church functions as commercial is "the veriest cynicism about religion."⁹⁶ However, his legal support for these propositions is highly suspect. He quoted *Weltover*, which is the

92. *Doe v. Holy See*, 557 F.3d 1066, 1075 (9th Cir. 2009) (per curiam).

93. *Id.* at 1096 (Berzon, J., dissenting).

94. *See supra* note 31 and accompanying text.

95. *Doe*, 557 F.3d at 1089 (Berzon, J., dissenting).

96. *Id.* at 1097 (Fernandez, J., concurring).

principal Supreme Court case on the issue.⁹⁷ However, he conveniently minimized the Court's language stating, "the question is not whether the foreign government is acting with a profit motive,"⁹⁸ and he altogether omitted the Court's language stating that a foreign state engages in commercial activities when it does not "exercise powers peculiar to sovereigns."⁹⁹

Instead, Judge Fernandez focused on the Court's mention of "trade and traffic and commerce" as if to suggest that the meaning of "commercial activity" were entirely limited to profit-motivated activity.¹⁰⁰ But the Court in *Weltover* later mentions that "[e]ngaging in a commercial act does not require the receipt of fair value, or even compliance with the . . . requirements of consideration."¹⁰¹ Yet, Judge Fernandez appeared immovable, and simply could not get past his concern over the apparent contradiction of "religion" and "commerce." Instead of merely disagreeing with the applicable legal test, it appears that he crafted his own version to fit a desired result. Given this suspect reasoning and analysis, the rationale of the 2-1 majority also is suspect in its decision to deny a review of the commercial activity exception.

VI. CONCLUSION

The Ninth Circuit's decision in *Doe v. Holy See* opened the doors of justice for one alleged victim of sexual abuse by allowing him to bring suit against the Holy See. While the court correctly determined that the law must permit Doe's respondeat superior claim against the Holy See, its rationale for denying a review of the commercial activity exception is suspect because the majority misunderstood the applicable legal standards.

Aside from providing a landmark victory for victims of alleged clergy sexual abuse at St. Albert's Church in Portland, Oregon, this case will have a lasting impact on future clergy sexual abuse litigation throughout the country. First, plaintiffs throughout the country will have a drafting guide to carefully plead their claims so as to avoid the problems the Ninth Circuit found with Doe's complaint. In

97. *Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607 (1992).

98. *See Doe*, 557 F.3d at 1097 (Fernandez, J., concurring) (quoting *Weltover*, 504 U.S. at 614).

99. *Weltover*, 504 U.S. at 614.

100. *See Doe*, 557 F.3d at 1097-98.

101. *Weltover*, 504 U.S. at 616.

addition, many more states may consider adopting Oregon's expansive view of respondeat superior liability as a civil means of vindicating victims of clergy sexual abuse.

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