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A NEW CALL FOR REFORM: SEX ABUSE AND THE FOREIGN SOVEREIGN IMMUNITIES ACT

INTRODUCTION

In 2002, the Catholic Church became embroiled in what has been called “a crisis without precedent in our times.”¹ That year, more than 3,300 allegations of sexual abuse by clergy members surfaced in the United States.² At the time, that figure brought the total number of alleged victims since 1950 to 11,750 and contributed to an estimated \$840 million dollars spent by the Catholic Church in legal settlements and “other costs related to sex abuse.”³ For the most part, however, the Holy See has been insulated from the wave of litigation resulting from these astounding statistics as it has rarely been named a co-defendant in U.S. lawsuits.⁴

On June 7, 2006, the U.S. District Court of Oregon (“Oregon District Court”) rendered an unusual decision in the matter of *Doe v. Holy See* when it denied the Holy See’s motion to dismiss for lack of subject matter jurisdiction.⁵ The Holy See was named a co-defendant in the complaint, which arose from the alleged sex abuse committed by Father Andrew Ronan (“Ronan”) against the plaintiff, a minor, during the 1960s.⁶ The Oregon District Court found that the Holy See’s conduct fell within the tortious activity exception (“tort exception”) of the Foreign Sovereign Immunities Act of 1976 (“FSIA”)⁷ and that the Holy See was therefore subject to jurisdiction despite its presumed immunity.⁸

1. UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, CHARTER FOR THE PROTECTION OF CHILDREN AND YOUNG PEOPLE (2005), <http://www.usccb.org/ocyp/charter.shtml> [hereinafter CHARTER].

2. Alan Cooperman, *In 2004, 1000 Alleged Abuse By Priests*, WASH. POST, Feb. 19, 2005, at A02, available at <http://www.washingtonpost.com/wp-dyn/articles/A36324-2005Feb19.html> (correction to the original article).

3. *Id.* The costs continue to increase by staggering amounts. In 2007, the Los Angeles Archdiocese settled with sex abuse victims for a record \$660 million. See Laurie Goodstein, *Payout Is Bittersweet for Victims of Abuse*, N.Y. TIMES, July 17, 2007, at A15, available at <http://www.nytimes.com/2007/07/17/us/17abuse.html>.

4. The instances in which the Holy See has been named a co-defendant are discussed *infra*, Part II.

5. *Doe v. Holy See*, 434 F. Supp. 2d 925, 931 (D. Or. 2006).

6. *Id.* at 931.

7. Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602–1611 (1976). The tort exception is found at 28 U.S.C. § 1605(a)(5).

8. *Doe v. Holy See*, 434 F. Supp. 2d at 931.

The FSIA serves as the exclusive vehicle by which to obtain jurisdiction over a foreign sovereign.⁹ It immunizes a foreign sovereign from jurisdiction in U.S. courts except as provided in certain sections of the act.¹⁰ The Holy See was first recognized as a foreign sovereign by the United States in 1984.¹¹ Originally filed in 2002 and amended two years later, plaintiff John V. Doe's complaint asserted three causes of action against the Holy See, including negligence,¹² respondeat superior,¹³ and fraud.¹⁴

The Oregon District Court concluded that the plaintiff's allegations were "sufficient to establish the applicability of the tortious activity exception to the FSIA such that plaintiff survives the Holy See's facial attack in this motion to dismiss."¹⁵ Under Oregon's "expansive" respondeat superior doctrine, it seemed only sensible that the Holy See should be subject to liability for the alleged acts of Ronan, its agent.¹⁶ As for negligence, however, the Oregon District Court was obliged to address the fact that some of the Holy See's alleged conduct did not occur in the United States,¹⁷ a fact that has typically led courts to determine that the FSIA's tort exception does not apply.¹⁸ The language of the tort excep-

9. *Id.* at 933 (citing *Republic of Austria v. Altmann*, 541 U.S. 677, 699 (2004)).

10. 28 U.S.C. § 1604.

11. *O'Bryan v. Holy See (O'Bryan I)*, 490 F. Supp. 2d 826, 829 (W.D. Ky. 2005).

12. According to the Restatement (Second) of Torts:

Negligent conduct may be either: (a) an act which the actor as a reasonable man should recognize as involving an unreasonable risk of causing an invasion of an interest of another, or (b) a failure to do an act which is necessary for the protection or assistance of another and which the actor is under a duty to do.

Restatement (Second) of Torts § 284 (1979).

13. "The doctrine holding an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency." BLACK'S LAW DICTIONARY 1338 (8th ed. 2004).

14. *Doe v. Holy See*, 434 F. Supp. 2d at 931. According to the Restatement (Second) of Torts:

A misrepresentation is fraudulent if the maker (a) knows or believes that the matter is not as he represents it to be, (b) does not have the confidence in the accuracy of his representation that he states or implies, or (c) knows that he does not have the basis for his representation that he states or implies.

Restatement (Second) of Torts § 526 (1979).

15. *Doe v. Holy See*, 434 F. Supp. 2d 925, 957 (D. Or. 2006).

16. *Id.* at 949.

17. *Id.* at 951–53.

18. Joseph W. Dellapenna, *Refining the Foreign Sovereign Immunities Act*, 9 WILLAMETTE J. INT'L L. & DISP. RESOL. 57, 136–37 (2001) (noting that "most courts that

tion expressly requires the injury to occur in the United States, but is silent as to the tortious act or omission.¹⁹ The confusion with regard to the site of the tort has not gone unnoticed by judges or scholars.²⁰ In dealing with this issue, the Oregon District Court decided that since the plaintiff alleged that at least one entire tort occurred in the United States, the negligence complaint was sufficient to withstand dismissal.²¹

This Note will argue that *Doe v. Holy See*, although decided correctly, exemplifies the unnecessary confusion surrounding the FSIA's tort exception. Such confusion must be addressed in view of the wave of clergy sex abuse litigation in the United States that is now more likely to name the Holy See as a defendant. Part I of this Note will discuss the language of the tort exception and how it is typically interpreted in FSIA jurisprudence in terms of both legislative history and statutory construction. Part II will discuss similar clergy sex abuse cases in which the Holy See was named a defendant and the unsuccessful endeavors of plaintiffs to pierce its sovereign veil. Part III will discuss in further detail the facts, reasoning, and unusual holding of the Oregon District Court in *Doe v. Holy See*. Part IV will argue that the plaintiff-friendly result of *Doe v. Holy See*, though atypical, is proper given the language of the tort exception and the FSIA's stated objective to "serve the interests of justice."²² Finally, Part V will conclude that in the absence of much needed amendment to the FSIA's tort exception, courts should look more favorably upon plaintiffs that sue the Holy See for its role in the clergy sex scandal epidemic, provided their complaints sufficiently allege tortious conduct occurring either at home or abroad with direct effects in the United States.

I. VARIOUS INTERPRETATIONS OF THE TORT EXCEPTION

As a general proposition, sovereign immunity of a foreign state is a rule, not an exception.²³ The FSIA states, "Subject to existing interna-

have addressed the issue have held that both the tortious act or omission also must occur in the United States").

19. See 28 U.S.C. § 1605(a)(5) (1976).

20. See, e.g., Dellapenna, *supra* note 18, at 137.

21. *Doe v. Holy See*, 434 F. Supp. 2d 925, 953 (D. Or. 2006).

22. 28 U.S.C. § 1602 (1976).

23. 28 U.S.C. § 1330(a) provides:

The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

tional agreements to which the United States is a party . . . a foreign state shall be immune from the jurisdiction of the courts of the United States . . . except as provided in sections 1605–07 of this chapter.”²⁴ One reason for the FSIA’s enactment, as discussed by Congress, was to codify the “restrictive principle” of sovereign immunity, under which a foreign state is subject to jurisdiction in U.S. courts only for its commercial or private acts.²⁵ Further, Congress intended this principle to apply in litigation, leaving the question of sovereign immunity in the hands of the judiciary in order to alleviate pressure on the executive branch with potentially adverse consequences for foreign relations.²⁶ This goal is highlighted in the FSIA’s declaration of purpose, which states in part: “The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts.”²⁷

While these intentions may be clear cut, the FSIA’s substantive provisions are not always so transparent.²⁸ The tort exception, upon which *Doe v. Holy See* was decided,²⁹ is one such provision. FSIA section 1605(a)(5) provides:

A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . 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.³⁰

28 U.S.C. § 1330(a) (1976). The same holds true for the Holy See. As the Oregon District Court noted, “The Holy See, a foreign sovereign, is presumptively immune from suit under the FSIA unless an exception applies.” *Doe v. Holy See*, 434 F. Supp. 2d at 931.

24. 28 U.S.C. § 1604 (1976).

25. H.R. Rep. No. 94-1487, at 7 (1976).

26. *Id.* (discussing how, prior to enactment of the FSIA, foreign states would “often request the Department of State to make a formal suggestion of immunity to the court” and possibly “attempt to bring diplomatic influences to bear upon the State Department’s determination”).

27. 28 U.S.C. § 1602.

28. Working Group of the American Bar Association, *Report: Reforming the Sovereign Immunities Act*, 40 COLUM. J. TRANSNAT’L L. 489, 492 (2002) [hereinafter Working Group] (stating that “the structure and language of the [FSIA] have challenged courts”).

29. *Doe v. Holy See*, 434 F. Supp. 2d 925, 931 (D. Or. 2006).

30. 28 U.S.C. § 1605(a)(5) (1976). The tort exception is subject to two limitations. The provision does not apply to:

Among the provision's noteworthy features is the explicit language calling for the injury to occur in the United States while providing no geographic requirement as to the tortious act or omission. As the Oregon District Court in *Doe v. Holy See* explained, this is because of the "placement of the clause 'in the United States' after 'injury' but before 'caused by act or omission.'"³¹ This inconsistency has been dealt with numerous times by the courts, which generally acknowledge that, on its face, the tort exception would allow jurisdiction regardless of where the act or omission took place.³² Legislative intent, however, has usually swayed courts in favor of the theory that the entire tort, including the act or omission, must occur in the United States.³³ The House Report appurtenant to the FSIA explicitly states as much.³⁴

Some courts have interpreted the tort exception to require the tortious conduct to occur within the United States as a matter of statutory construction based on the language of another FSIA exception to immunity—the commercial activity exception. Found in section 1605(a)(2), that provision states:

A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is based upon a commercial activity carried on in the United States by the

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or (B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

28 U.S.C. § 1605(a)(5)(A)-(B). The underlying purpose of 28 U.S.C. § 1605(a)(5)(A) is "to allow government executives to make policy decisions in an atmosphere free of concern over possible litigation." *Olsen v. Gov't of Mexico*, 729 F.2d 641, 647 (9th Cir. 1984). *See also* Working Group, *supra* note 28, at 569 (observing that "the more the conduct involves the exercise of judgment and the more it appears to be grounded in social, economic, or political policy, the more likely courts will find it to be a discretionary function").

31. *Doe v. Holy See*, 434 F. Supp. 2d at 951.

32. *See, e.g., Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 379 (7th Cir. 1985) (noting that "[a]t first blush, it appears that there is jurisdiction [under the tort exception] if the injury . . . occurs in this country, regardless of whether the tortious act causing the injury occurred within this nation's borders"); *English v. Thorne*, 676 F. Supp. 761, 762 (S.D. Miss. 1987) (observing that "the provision is silent as to the situs of the alleged tortious conduct").

33. *See, e.g., Frolova*, 761 F.2d at 379 (stating that "there is explicit legislative history indicating that Congress intended that the tortious act or omission, as well as the injury, occur in the United States").

34. H.R. Rep. 94-1487, at 21 (1976) (stating that "the tortious act or omission must occur within the jurisdiction of the United States").

foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.³⁵

The construction of this particular provision influenced the Supreme Court's interpretation of the tort exception in *Argentine Republic v. Amerada Hess Shipping Corporation*.³⁶

In *Amerada Hess*, two Liberian corporations sued the Argentine Republic in tort for damages sustained by a neutral oil tanker attacked at sea.³⁷ The respondents argued that, of the FSIA's various exceptions to immunity,³⁸ the tort exception was "most in point."³⁹ The Court rejected this argument, stating, "[The tort exception] is limited by its terms . . . to those cases in which damage or loss of property occurs *in the United States*."⁴⁰ In its discussion, the Supreme Court gave credence to Congress's "primary purpose" behind the provision, which was "to eliminate a foreign state's immunity for traffic accidents and other torts committed in the United States, for which liability is imposed under domestic tort law."⁴¹

Further, the Supreme Court opined that the tort exception "covers only torts occurring within the United States."⁴² Here the Court employed a comparison of the commercial activity exception with the tort exception.⁴³ It observed that, unlike the commercial activity exception, the tort exception "makes no mention of 'territory outside the United States' or of 'direct effects' in the United States."⁴⁴ Thus the use of "explicit language" in one provision but not the other indicates that Congress intended noncommercial torts to be actionable under the FSIA only if the

35. 28 U.S.C. § 1605(a)(2).

36. 488 U.S. 428 (1989).

37. *Id.* at 431-32. At the time of the attack, Great Britain and the Argentine Republic were at war over the Falkland Islands and the Islas Malvinas, off the Argentine coast. *Id.* at 431. Both countries were informed by the United States of the presence of oil tankers and "to avoid any attacks on neutral shipping." *Id.*

38. *See* 28 U.S.C. § 1605(a)-(d).

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

40. *Id.*

41. *Id.* at 439-40. *See also* H.R. Rep. No. 94-1487, at 21 (1976) (stating that "the purpose of section 1605(a)(5) is to permit the victim of a traffic accident or other non-commercial tort to maintain an action against the foreign state to the extent otherwise provided by law").

42. *Amerada Hess*, 488 U.S. at 441.

43. *Id.*

44. *Id.* (citing 28 U.S.C. § 1605(a)(2)).

tort occurred in the United States.⁴⁵ As Justice Blackmun noted, however, the question of whether one of the FSIA's exceptions to immunity applied to the case had not been addressed by the Court of Appeals or fully briefed by the parties.⁴⁶ He therefore felt it was inappropriate to address the issue at first instance.⁴⁷

The Seventh Circuit employed reasoning similar to the Supreme Court's four years earlier in the case of *Frolova v. Union of Soviet Socialist Republics* when it affirmed the district court's dismissal of the plaintiff's action.⁴⁸ The absence of language similar to that of the commercial activity exception lent support to the Seventh Circuit's conclusion that Congress intended both the injury and act or omission to occur in the United States.⁴⁹ In *Persinger v. Islamic Republic of Iran*, a majority of the District of Columbia Circuit agreed that where Congress uses explicit language in one provision of a statute but not in the other, "a strong inference arises that the two provisions do not mean the same thing."⁵⁰

Other courts and scholars, however, have recognized the problem with the foregoing deference to legislative intent, particularly in cases where the site of the tortious conduct is not entirely clear.⁵¹ The Ninth Circuit

45. *Id.*

46. *Id.* at 443. Because the respondent corporations originally attempted to invoke jurisdiction under the Alien Tort Statute, 28 U.S.C. § 1350, hence the FSIA was not the focus of the district court proceedings, or of the Second Circuit Court of Appeals, which reversed the district court's dismissal of the complaints. *Amerada Hess*, 488 U.S. at 432–33.

47. *Id.* at 443 (Blackmun, J., concurring in part).

48. *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 372 (7th Cir. 1985). The plaintiff in *Frolova*, an American woman, sought an injunction and damages against the Soviet Union for its refusal to allow her husband, a Muscovite, to return to the United States with her after her Soviet visa expired. *Id.* at 371. The allegations included mental anguish, physical distress, and loss of consortium. *Id.*

49. *Id.* at 379–80 (stating that "[the commercial activity exception] demonstrates that when Congress intended to provide jurisdiction for acts outside this country having an effect within our borders, it said so explicitly").

50. *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 843 (D.C. Cir. 1984). The plaintiff, a United States Marine captured by Iranian militants in Tehran and held hostage for fifteen months, sought damages for violations of international law, constitutional law, and common law. *Id.* at 837. His parents, co-plaintiffs in the action, sought damages for "mental and emotional injuries suffered by virtue of their son's confinement." *Id.* at 844 (Edwards, J., dissenting in part and concurring in part). The majority held that, despite its plain language, the FSIA's tort exception requires both the tort and injury to occur in the United States. *Id.* at 842. Therefore the court found it did not have jurisdiction over the claims. *Id.* at 843.

51. For further discussion of this issue, and the many other uncertainties found in the FSIA, see Dellapenna, *supra* note 18.

was confronted with just such a case in *Olsen v. Government of Mexico*.⁵² In *Olsen*, two children brought a wrongful death action based in negligence for the death of their parents, both prisoners, who died in a plane crash less than one mile inside the United States.⁵³ The crash victims were en route from Monterrey to Tijuana, where they were to be transferred to American authorities for incarceration in the United States.⁵⁴ Poor weather conditions required maneuvering the plane within the airspaces of Mexico and the United States, as well as communication between air controllers in Tijuana and San Diego, before the aircraft struck a telephone pole and crashed.⁵⁵ The appellants alleged that “Mexico negligently maintained, directed and piloted the aircraft.”⁵⁶ Mexico challenged the applicability of the tort exception, contending it “must be construed to require all of the tortious conduct to occur in the United States before a foreign state will be denied immunity.”⁵⁷ Thus Mexico asserted its immunity on the grounds that “some allegedly tortious acts or omissions took place outside the United States.”⁵⁸

The Ninth Circuit rejected Mexico’s argument, stating that such an interpretation “contradicts the purpose of the FSIA, which is to ‘serve the interests of justice and . . . protect the rights of both foreign states and litigants in United States courts.’”⁵⁹ The court reasoned that to adopt such a strict situs requirement “would encourage foreign states to allege that some tortious conduct occurred outside the United States.”⁶⁰ Instead the court held that jurisdiction is proper under the tort exception where a plaintiff alleges that “at least one entire tort” occurred in the United States.⁶¹

The Ninth Circuit’s approach is more closely aligned with recent scholarship concerning the language of the FSIA. For example, in a 2002 report, the Working Group of the International Litigation Committee of the Section of International Law and Practice of the American Bar Association (“Working Group”) recommended various amendments to the FSIA, including the tort exception.⁶² Given its uncertainties, the Working

52. *Olsen v. Gov’t of Mexico*, 729 F.2d 641(9th Cir. 1984).

53. *Id.* at 643–44.

54. *Id.* at 643.

55. *Id.* at 643–44.

56. *Id.* at 647.

57. *Olsen*, 729 F.2d at 646.

58. *Id.*

59. *Id.* (quoting 28 U.S.C. § 1602).

60. *Id.*

61. *Id.*

62. Working Group, *supra* note 28, at 564–73. The Working Group discussed *Olsen* in support of this proposition. *Id.* at 567.

Group proposed that the tort exception be amended to require a “substantial portion” of the tortious activity to occur in the United States.⁶³ As the Working Group noted, however, other “influential” authority, such as the American Law Institute’s Restatement (Third) of Foreign Relations Law, interprets the tort exception to apply “regardless of where the act or omission causing the injury took place.”⁶⁴

II. A FORMIDABLE ADVERSARY

Doe’s complaint against the Holy See was certainly not the first of its kind to reach a United States District Court.⁶⁵ The Holy See, however, has most often prevailed against the piercing of its sovereign status.⁶⁶

63. *Id.* at 573.

64. *Id.* at 567 (quoting Restatement (Third) of Foreign Relations Law of the United States § 454 cmt. e (1987)). With regard to tort claims, the Restatement reads like the FSIA. It states:

Under international law, a state is not immune from the jurisdiction of the courts of another state with respect to claims in tort for injury to persons or property in the state of the forum.

Courts in the United States may exercise jurisdiction with respect to claims in tort against foreign states for injury to persons or property in the United States, other than claims based upon an exercise of a discretionary function or claims for malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

Restatement (Third) Foreign Relations Law § 454. With regard to place of injury, the commentary provides:

Under Section 1605(a)(5) of the Foreign Sovereign Immunities Act, courts in the United States have jurisdiction over tort claims against a foreign state only if the injury took place in the United States, regardless of where the act or omission causing the injury took place. Indirect effects in the United States, such as loss of consortium resulting from injury to a claimant’s spouse inflicted by the foreign state outside the United States, are not within the jurisdiction of courts in the United States under Subsection (2).

Id. cmt. e.

65. *See, e.g.,* English v. Thorne, 676 F. Supp. 761, 762 (S.D. Miss. 1987) (“[P]laintiffs seek to impose liability upon the various other defendants, including the Vatican, based upon allegations that they negligently employed, retained and reassigned [Catholic priest] as pastor of the Holy Ghost Parish of the Catholic Diocese of Jackson”); *O’Bryan I*, 490 F. Supp. 2d 826, 828 (W.D. Ky. 2005) (noting that plaintiffs’ claims against the Holy See, including respondeat superior, infliction of emotional distress, and negligence, “arise from allegations of sexual abuse by local Catholic priests many years ago”).

66. *Doe v. Holy See*, 434 F. Supp. 2d 925, 933 (D. Or. 2006) (noting that in this case “the sovereign status of the Holy See is not in dispute”). *See also* John L. Allen, Jr., *U.S.*

The results of prior clergy sex abuse cases—both state and federal—are indicative of the difficulties involved in suing the Holy See. In *Doe v. O'Connell*, for example, the Missouri Court of Appeals for the Eastern District affirmed the dismissal of the plaintiff's claims against all defendants on statute of limitations grounds,⁶⁷ while the claims against co-defendant Holy See had already been dismissed for failure to prosecute.⁶⁸ In the New York case of *Doe v. Holy See (State of Vatican City)*, the plaintiff's claims were similarly dismissed on statute of limitations grounds, and also for jurisdictional reasons, "even absent a motion from [the Holy See]."⁶⁹ The *O'Connell* and *State of Vatican City* opinions were not specific as to why the Holy See should escape liability. The 1987 case of *English v. Thorne*, however, clearly turned on the FSIA with regard to both service of process and the tort exception.⁷⁰

In *English*, the Holy See based its motion to dismiss upon insufficiency of process, lack of personal jurisdiction and lack of subject matter jurisdiction.⁷¹ The plaintiffs acknowledged that service of process was defective and requested leave to correct it.⁷² The court could have granted such

Court Oks Legal Action Against The Holy See, NAT'L CATHOLIC REPORTER, June 16, 2006, <http://nationalcatholicreporter.org/word/word061606.htm#five> (stating that "[t]o date, the wall of sovereign immunity in American courts has held up where the Vatican is concerned").

67. *Doe v. O'Connell*, 146 S.W.3d 1, 2 (E.D. Mo. 2004) (per curiam).

68. *Id.* at 2 n.1. The complaint in *O'Connell* arose from the alleged sex abuse of the plaintiff by Father O'Connell, which began in the 1960s when plaintiff, then a minor, was a seminary student. *Id.* at 3. The opinion is silent as to how or why the plaintiff failed to prosecute the Holy See.

69. *Doe v. Holy See (State of Vatican City)*, 793 N.Y.S.2d 565, 567 n.1 (N.Y. App. Div. 2005), *leave to appeal denied*, 845 N.E.2d 1274 (N.Y. 2006). The four consolidated matters in this case asserted various causes of action stemming from clergy sex abuse occurring as far back as fifty years. *Id.* at 793–94. The opinion is silent as to what "jurisdictional grounds" the New York Supreme Court invoked when it ordered dismissal of the complaint against co-defendant Holy See, and on appeal the plaintiffs apparently did not assert a substantive argument regarding that dismissal. *Id.* at 794 n.1. For purposes of this Note, the terms "Holy See," "Vatican," or "Vatican City" may be used interchangeably, as seen in the name of this case. For a detailed analysis of those entities and their international status, see Matthew N. Bathon, *The Atypical International Status of the Holy See*, 34 VAND. J. TRANSNAT'L L. 597 (2001).

70. *English v. Thorne*, 676 F. Supp. 761 (S.D. Miss. 1987). The plaintiffs alleged tortious conduct of a Catholic priest during his service at the Holy Ghost Parish in Jackson, Mississippi. *Id.* at 762. The complaint against co-defendant Holy See alleged negligent employment, retention, and reassignment of the priest to the parish. *Id.*

71. *Id.* at 762.

72. *Id.* The plaintiffs attempted to effect service under Mississippi statutes, rather than under the FSIA as required. *Id.* at 762 n.1. See also 28 U.S.C. § 1608 (1976).

a request,⁷³ but instead dismissed the complaint in its entirety for lack of subject matter jurisdiction.⁷⁴ The court found two major problems with the complaint, both arising from the FSIA's tort exception.⁷⁵ First, the *English* court found that the complaint challenged "the policies and/or procedures utilized by the Vatican in instructing or ordaining its priests, matters which are undeniably of a policy-making nature and clearly discretionary functions."⁷⁶ Thus the court held that the complaint was barred by the FSIA's discretionary function limitation.⁷⁷ Second, the *English* court determined that "the alleged acts or omissions by the Vatican would not have occurred within the jurisdiction of the United States, but rather within the confines of the Vatican."⁷⁸ In analyzing the FSIA's tort exception, the court favored the legislative history of the provision and, like numerous courts before it, concluded that in addition to the injury, "the *conduct* complained of must also have occurred in the United States."⁷⁹

The Kentucky case of *O'Bryan v. Holy See* makes for an interesting look at the foregoing issues given that thus far two opinions have been published in the case—one prior to the Oregon District Court's decision in *Doe v. Holy See*,⁸⁰ and one after.⁸¹ In *O'Bryan I*, the first class action suit in which the Holy See was named as the sole defendant for clergy sex abuse,⁸² the plaintiffs failed to effect proper service upon the Holy See pursuant to the stringent requirements of the FSIA.⁸³ Though the court noted that "the Holy See's sovereign status does not guarantee its immunity from suit,"⁸⁴ it also emphasized the importance of "strict compliance" with the FSIA's provisions regarding service of process.⁸⁵ The

73. *English*, 676 F. Supp. at 762.

74. *Id.* The cause of action was dismissed as to all defendants because the plaintiffs based subject matter jurisdiction solely on 28 U.S.C. § 1330, a provision under which the court found jurisdiction did not exist. *English*, 676 F. Supp. at 764.

75. *Id.* at 763–64.

76. *Id.* at 764.

77. *Id.* at 763–64. *See also* 28 U.S.C. § 1605(a)(5)(A) (1976).

78. *English*, 676 F. Supp. at 764.

79. *Id.*

80. *See O'Bryan I*, 490 F. Supp. 2d 826 (W.D. Ky. 2005).

81. *O'Bryan v. Holy See (O'Bryan II)*, 471 F. Supp. 2d 784 (W.D. Ky. 2007).

82. Peter Smith & Andrew Wolfson, *Louisville Attorney Sues the Vatican*, *COURIER-J.*, June 6, 2004, available at http://www.courtroomlaw.com/news_vatican.shtml.

83. *O'Bryan I*, 490 F. Supp. 2d at 832.

84. *Id.* at 830 n.1.

85. *Id.* at 831. With regard to service of process, the FSIA provides in part:

Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state: (1) by delivery of a copy

plaintiffs were granted sixty days to perfect service,⁸⁶ which is apparently a difficult task given that they made several prior (and unsuccessful) attempts to do so,⁸⁷ and the Holy See was hardly an amenable defendant.⁸⁸

In *O'Bryan II*, much like in *Doe v. Holy See*,⁸⁹ the Holy See challenged the court's subject matter jurisdiction under the FSIA.⁹⁰ Thus the court was compelled to undertake a similar analysis of the FSIA as applied to employees of the Holy See and the Holy See itself.⁹¹ With regard to the duties allegedly breached by the Holy See's agents, the court concluded these "squarely fall under the tortious activity exception of FSIA" given

of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or (2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or (3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or (4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

28 U.S.C. § 1608(a) (1976).

86. *O'Bryan I*, 490 F. Supp. 2d at 832.

87. *Id.* at 832. Ultimately the court found that plaintiffs failed to properly comply with 28 U.S.C. § 1608(a)(3), *supra* note 85, because they addressed the summons and complaint to the Head of the Secretariat of State, rather than the Foreign Minister. *O'Bryan I*, 490 F. Supp. 2d at 832.

88. *Id.* at 831 (noting that "compliance is admittedly difficult and is made more so by the absence of any accommodation from the Holy See").

89. *See Doe v. Holy See*, 434 F. Supp. 2d 925, 931 (D. Or. 2006).

90. *O'Bryan II*, 471 F. Supp. 2d 784, 786 (W.D. Ky. 2007).

91. Plaintiffs alleged that certain torts were committed "by and through [the Holy See's] agents, servants and employees." *Id.* at 786. These included breaches of the duty to provide safe care to minors, the duty to warn parents and the duty "to report known or suspected perpetrators of childhood sex abuse to the appropriate authorities." *Id.* Plaintiffs also alleged torts of deceit and misrepresentation against the Holy See itself, as an "incorporated association and head of an international religious organization." *Id.* at 786–87.

that both the acts and the injuries occurred in the United States.⁹² As for the torts alleged directly against the Holy See, however, the court was unwilling to assert jurisdiction. To hold otherwise, it stated, “would constitute a dramatic expansion of FSIA” given that the Holy See’s alleged deceit and misrepresentation occurred outside the United States.⁹³ Moreover, not all of the claims that fell within the tort exception survived due to other FSIA intricacies. For example, the court held that the FSIA’s discretionary function limitation⁹⁴ barred the claim that the Holy See (through its agents) failed to provide safe care to children.⁹⁵

Ultimately, several of the *O’ Bryan II* claims withstood the Holy See’s motion to dismiss for lack of subject matter jurisdiction. These included “negligent failure to report, negligent failure to warn . . . outrage and emotional distress, violations of the customary law of human rights, and claims under the doctrine of *respondeat superior*.”⁹⁶ These victories, however, came with a limitation. The court remained willing to reconsider the question of whether the individual actors accused of tortious conduct (the “United States-based bishops, archbishops and other clergy of the Roman Catholic Church”) are actually “employees” or “officials” of the Holy See pursuant to the FSIA.⁹⁷ While the plaintiffs did make a *prima facie* showing that the Holy See exercised “substantial control” over these actors, the FSIA does not define the terms “employee” or “official.”⁹⁸ Thus, at the writing of this Note, the Holy See remains free to present evidence that these actors were not acting within the scope of their employment, and this would “require the court to revisit [its] conclusions and refine the precise acts or omissions subject to jurisdiction under FSIA.”⁹⁹ In other words, the court has left the Holy See with yet another mechanism for challenging jurisdiction.

III. DOE V. HOLY SEE—AN ATYPICAL RESULT

The matter of *Doe v. Holy See* arose from the alleged sexual abuse the plaintiff suffered at the hands of Father Andrew Ronan, a Catholic priest assigned to St. Albert’s Church in Portland around 1965, when the plain-

92. *Id.* at 790.

93. *Id.*

94. 28 U.S.C. § 1605(a)(5)(A) (1976).

95. *O’ Bryan II*, 471 F. Supp. 2d at 793.

96. *Id.* at 795.

97. *Id.*

98. *Id.* at 791 (noting that whether one is an employee of the Holy See is a question of Kentucky law).

99. *Id.* at 792.

tiff was fifteen or sixteen years old.¹⁰⁰ Among the plaintiff's numerous assertions was that, "[d]espite knowing of Ronan's dangerous propensities to abuse children, the Holy See placed Ronan in defendant Archdiocese in Portland, Oregon."¹⁰¹ Further, the complaint alleged that when the "repeated occasions" of sexual abuse occurred, "plaintiff was under the authority and influence of Ronan as a Roman Catholic priest which authority was granted to him by Defendant Holy See, Archdiocese and Order."¹⁰²

The Holy See's motion to dismiss presented a facial attack against the complaint.¹⁰³ That is, it did not dispute the plaintiff's factual allegations, but rather asserted that the complaint on its face was insufficient to invoke federal jurisdiction.¹⁰⁴ In such a situation, "the court must accept as true the factual allegations in plaintiff's complaint."¹⁰⁵

The plaintiff did not dispute the sovereign status of the Holy See, but argued that subject matter jurisdiction was nonetheless proper under both the FSIA's commercial activity exception and the tort exception.¹⁰⁶ The commercial activity theory was based on the fact that the Holy See oversees and participates in "providing religious and pastoral guidance, education and counseling services to Roman Catholics world-wide in exchange for all or a portion of the revenues derived from its members for these services."¹⁰⁷ Ronan, acting as the Holy See's agent, helped obtain such financial support during the course of his agency.¹⁰⁸ The Oregon District Court commented that the commercial activity exception, as applied to the facts of the case, was a "novel and close" issue.¹⁰⁹ Ulti-

100. Doe v. Holy See, 434 F. Supp. 2d 925, 931 (D. Or. 2006).

101. *Id.* at 932 (citing Complaint at ¶ 13, Doe v. Holy See, 434 F. Supp. 2d 925 (D. Or. 2006) (No. CV 02-430-MO)). *See also* Complaint at ¶¶ 11-12, Doe v. Holy See, 434 F. Supp. 2d 925 (D. Or. 2006) (No. CV 02-430-MO) (discussing Ronan's prior admissions, documented in the records of the Roman Catholic Church, to molesting youth in Ireland and Chicago prior to his placement in Portland).

102. Doe v. Holy See, 434 F. Supp. 2d at 932 (citing Complaint at ¶¶ 15, 36, Doe v. Holy See, 434 F. Supp. 2d 925 (D. Or. 2006) (No. CV 02-430-MO)). The Archdiocese of Portland ("Archdiocese") and the Order of Friar Servants ("Order") were named as co-defendants for their role in the alleged sexual abuse by Ronan. *See id.* at 931.

103. *Id.* at 932-33.

104. *Id.* at 932.

105. *Id.*

106. *Id.* at 933.

107. Doe v. Holy See, 434 F. Supp. 2d at 940 (citing Complaint at ¶ 3, Doe v. Holy See, 434 F. Supp. 2d 925 (D. Or. 2006) (No. CV 02-430-MO)) (emphasis omitted).

108. *Id.*

109. *Id.* at 942.

mately, however, the plaintiff could not persuade the Oregon District Court that subject matter jurisdiction existed under that exception.¹¹⁰

The plaintiff's argument that the Holy See was subject to jurisdiction under the tort exception was more successful, at least with regard to the claims of respondeat superior and negligence liability.¹¹¹ As to the former claim, the Holy See argued that the plaintiff failed to allege, per the language of the tort exception, that Ronan was "an employee acting within the scope of his employment."¹¹² The Oregon District Court disagreed.¹¹³ First, the Oregon District Court found that the plaintiff sufficiently alleged Ronan was an employee of the Holy See given that the Holy See had the right to control Ronan, "furnished Ronan with facilities . . . to perform his duties," and was responsible for disciplining its priests.¹¹⁴ Further, the Oregon District Court found sufficient allegations that Ronan acted within the scope of his employment.¹¹⁵ Specifically, the allegations that Ronan "sought and gained" the plaintiff's trust, procured his participation in "counseling and other activities," and did so out of motivation to serve the Holy See, were all relevant to a determination that Ronan's conduct preceding the sexual abuse was within the scope of his employment.¹¹⁶ Based on the foregoing, the Oregon District Court found "sufficient grounds upon which to hold [the Holy See] liable under a theory of respondeat superior."¹¹⁷

In moving to dismiss the negligence claim, the Holy See argued that the FSIA's discretionary function limitation¹¹⁸ shielded it from jurisdiction and that the plaintiff failed to allege that the entire tort occurred in the United States.¹¹⁹ Given the leading tort exception jurisprudence, and

110. *Id.* In its analysis, the Oregon District Court observed that "[t]he true essence of plaintiff's complaint is an allegation of sexual abuse committed by a parish priest. The gravamen of the complaint does not appear to be commercial in nature." *Id.* at 940.

111. *Id.* at 947-53. The plaintiff's cause of action for fraud was based on the notion that the Holy See misrepresented Ronan as a "fit and competent agent of the Holy See and a minister of Christ." *Id.* at 932, 945 (citing Pl.'s Compl. ¶ 35). The plaintiff, however, conceded that the fraud claim was likely barred by 28 U.S.C. § 1605(a)(5)(B), the "misrepresentation exception." *Id.* at 947. *See also* 28 U.S.C. § 1605(a)(5)(B) (1976).

112. *Doe v. Holy See*, 434 F. Supp. 2d at 948.

113. *Id.* at 950.

114. *Id.* at 949. Under Oregon law, these factors are among those considered by courts to establish employee status. *Id.*

115. *Id.* at 950.

116. *Id.* Additionally, these were the type of acts that Ronan was hired to perform, another relevant factor under Oregon's "expansive theory" of scope of employment. *Id.* at 949-50.

117. *Doe v. Holy See*, 434 F. Supp. 2d at 950.

118. 28 U.S.C. § 1605(a)(5)(A) (1976).

119. *Doe v. Holy See*, 434 F. Supp. 2d at 950.

the outcome of *English v. Thorne*, these were not novel arguments.¹²⁰ The Oregon District Court's decision, however, was not typical given the defendant-friendly stance most courts have taken on the issue.¹²¹

The Holy See failed to persuade the Oregon District Court that its alleged conduct fell within the FSIA's discretionary function limitation.¹²² As the Oregon District Court observed, Doe's complaint alleged more than just "negligent hiring or supervision," allegations which would have been sufficient to invoke immunity under the discretionary function limitation.¹²³ Here the complaint detailed Ronan's propensity for child molestation and how the Holy See knew (or should have known) of such propensity when it placed him in the Portland archdiocese without warning parishioners.¹²⁴ The Oregon District Court concluded that these acts or omissions, particularly the Holy See's failure to warn parishioners, were not "based on plausible policy considerations for which the Holy See is entitled to immunity under the discretionary function exception."¹²⁵

The Holy See also argued that the negligence claim should be dismissed for the plaintiff's failure to show that the "entire tort occurred 'in the United States.'"¹²⁶ In so arguing, the Holy See relied on *Amerada Hess* for support that "the tort exception is inapplicable unless the Holy See's alleged acts or omissions occurred entirely within the United States."¹²⁷ The Holy See theorized that the tort exception did not apply under these facts given that the plaintiff's allegations included tortious conduct occurring in Rome.¹²⁸ However, as the Oregon District Court

120. *See supra* text accompanying notes 71–76.

121. *Id.*

122. *Doe v. Holy See*, 434 F. Supp. 2d at 957.

123. *Id.* at 954 (rejecting the Holy See's "rather generic characterization of the plaintiff's allegations").

124. *Id.* at 954–55. According to the complaint, the factual allegations of which went undisputed, Ronan sexually molested a minor in Ireland in the 1950s prior to his placement in Chicago in the private counseling office of St. Philip's High School. *Id.* at 931. There he admitted to abusing three male students and "expressed confusion as to why he would be assigned to work in the private counseling office where temptation to molest children would be maximized." *Id.* He was then placed in Portland. *Id.*

125. *Id.* at 956. This conclusion, apart from being surprisingly favorable to the plaintiff, also demonstrates the importance of detailed pleadings. *Compare id.* (discussing how plaintiff's complaint "adequately alleges" conduct that the discretionary function exception was not "designed to shield"), with *English*, 676 F. Supp. 761, 763 (S.D. Miss. 1987) (stating that "[t]he complaint contains nothing more than general allegations" with regard to defendants' negligence).

126. *Doe v. Holy See*, 434 F. Supp. 2d at 950 (quoting 28 U.S.C. § 1605(a)(5)).

127. *Id.* at 952.

128. *Id.*

observed, “*Amerada Hess* does not require this result.”¹²⁹ This observation is correct. In *Amerada Hess*, the injury itself occurred outside of the United States and therefore the tort clearly did not fall within the exception.¹³⁰ Thus the Supreme Court did not delve into the issue of whether the tortious act or omission also needed to occur entirely within the United States—that analysis was done largely in dictum.¹³¹

Plaintiff Doe, on the other hand, advanced a plain reading of the tortious activity exception to argue that only the injury, not the act or omission, needs to occur in the United States.¹³² Although this particular reading of the provision has been consistently rejected in FSIA jurisprudence,¹³³ the fact remains that the language of the act does not expressly require the tortious act or omission to occur on U.S. soil.¹³⁴

For guidance on the situs issue, the Oregon District Court looked to the Ninth Circuit’s “middle ground” interpretation in *Olsen*.¹³⁵ It noted that Doe’s complaint contained allegations of negligent acts (such as placing Ronan in Portland) as well as omissions (such as failure to warn).¹³⁶ To comport with *Olsen*, the Oregon District Court would have to evaluate whether at least one of these occurred entirely within the United States.¹³⁷ As the opinion observed, “it is difficult to pinpoint the site of an omission.”¹³⁸ Thus the Oregon District Court focused its analysis on the Holy See’s actions that were “easier to locate.”¹³⁹

Apparently the easiest negligent act to locate was the Holy See’s transfer of Ronan from Chicago to Portland, even though it allegedly “knew or should have known of Ronan’s dangerous propensities.”¹⁴⁰ The Oregon District Court reasoned that since this transfer “occurred entirely

129. *Id.*

130. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 440 (1989).

131. *Id.* at 441.

132. *Doe v. Holy See*, 434 F. Supp. 2d at 951.

133. *See, e.g., Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 379 (7th Cir. 1985) (stating that “[a]t least one district court has read [the tort exception] this broadly, but this interpretation has been rejected by the Court of Appeals for that circuit, and by every other court that has considered the issue”) (internal citations omitted).

134. *See* 28 U.S.C. § 1605(a)(5) (1976).

135. *Doe v. Holy See*, 434 F. Supp. 2d at 951. *See also supra* text accompanying notes 59–61.

136. *Doe v. Holy See*, 434 F. Supp. 2d at 952–53.

137. *Id.* at 953.

138. *Id.* The Oregon District Court recognized the dual argument that “the Holy See’s failures could be said to have occurred inside the Vatican On the other hand, it is also possible to situate a failure to warn at the location where such warning would have been heard—Portland, Oregon.” *Id.*

139. *Id.*

140. *Id.*

within the United States,” and since the plaintiff’s injuries thereafter clearly occurred in the United States, the claim for negligence was legitimately based on “acts and injuries occurring entirely in the United States.”¹⁴¹ The court used *Olsen* here in support of the theory that the negligence claim was viable in spite of the plaintiff having alleged “many other bases of tortious conduct . . . possibly occurring outside the United States.”¹⁴² Although the Oregon District Court did not explicitly do so, perhaps one could analogize that Ronan was like the negligent pilot in *Olsen* in the sense that he was under control both at home (by the local archdiocese) and abroad (by the Holy See) before scandal erupted.¹⁴³

The analogy, however, is not completely cohesive given that the Holy See’s negligence, despite the Oregon District Court’s reasoning, cannot logically be placed within the confines of the United States. The authority to make such a transfer was most likely granted from within the confines of the Holy See, despite the wording of the plaintiff’s complaint that the Holy See literally placed Ronan in Portland.¹⁴⁴ Perhaps the Holy See could have prevailed on its motion had it attacked the factual truth of this statement rather than launching only a facial attack as it chose to do.¹⁴⁵ Given that the Oregon District Court was bound to accept the facts as true,¹⁴⁶ however, its decision to deny the Holy See’s motion was sound.

IV. CLERGY SEX ABUSE AND THE NEED FOR LEGISLATIVE CHANGE

The *Doe v. Holy See* decision exemplifies the confusion courts face when interpreting the FSIA’s tort exception in cases where only some (if any) of the tortious act or omission occurs in the United States. In the wake of the new phenomenon of clergy sex abuse litigation,¹⁴⁷ the debate over the FSIA’s tort exception is an issue with which courts will continue to grapple until the matter is resolved once and for all by Congress. Meanwhile, to serve the interests of justice, as Congress intended with

141. *Doe v. Holy See*, 434 F. Supp. 2d at 953.

142. *Id.*

143. *See Olsen v. Gov’t of Mexico*, 729 F.2d 641, 644 (9th Cir. 1984). *See also supra* text accompanying notes 52–61.

144. *Doe v. Holy See*, 434 F. Supp. 2d at 952–53.

145. *Id.* at 932.

146. *Id.* at 931.

147. Although many sex abuse complaints involving the Catholic Church allege conduct occurring well before the enactment of the FSIA, the Author has not found a case prior to 1987 in which the Holy See was named a co-defendant for its role in the abuse. *See English v. Thorne*, 676 F. Supp. 761 (S.D. Miss. 1987).

the FSIA,¹⁴⁸ courts determining the Holy See's immunity for its role in U.S. sex abuse cases should pay greater credence to the plain meaning of the tort exception. Otherwise the Holy See's liability will depend on which case law a particular jurisdiction chooses to follow when deciding the issue, thereby creating inconsistent and potentially unjust decisions.

In his article *Refining the Foreign Sovereign Immunities Act*, Joseph Dellapenna, an international law scholar and a member of the Working Group, cites the tort exception as an example of one of the difficulties "judges have bemoaned" when interpreting the "poorly drafted" FSIA.¹⁴⁹ Further, as the Working Group has stated, "Despite the substantial case authority, there are reasons for questioning the conclusion that the non-commercial tort exception, as currently drafted, requires the tortious act or omission to occur in the United States."¹⁵⁰ The Working Group has also observed that the tort exception's legislative history, upon which courts have often relied, is more ambiguous than it seems given Congress's remark that the tort "must occur within the *jurisdiction* of the United States."¹⁵¹ "Jurisdiction," as the Working Group has noted, is not synonymous with "territory."¹⁵² Dellapenna has asserted that foreclosing jurisdiction on the grounds that only part of the tortious conduct took place outside the United States is "hardly likely to have been what Congress meant in [the tort exception]."¹⁵³

The Working Group has also questioned the role of legislative history as a dispositive factor in FSIA jurisprudence. The Working Group's report noted that the Supreme Court "has not yet squarely addressed the issue."¹⁵⁴ Meanwhile, "some of [the Supreme Court's] current members place substantial weight on plain language and tend to look skeptically

148. 28 U.S.C. § 1602 (1976).

149. Dellapenna, *supra* note 18, at 60.

150. Working Group, *supra* note 28, at 566.

151. *Id.* (emphasis added). See also H.R. Rep. No. 94-1487, at 21 (1976).

152. Working Group, *supra* note 28, at 566. Jurisdiction: "A government's general power to exercise authority over all persons and things within its territory; esp., a state's power to create interests that will be recognized under common-law principles as valid in other states." BLACK'S LAW DICTIONARY 867 (8th ed. 2004). Territory: "A geographical area included within a particular government's jurisdiction; the portion of the earth's surface that is in a state's exclusive possession and control. *Id.* at 1512.

153. Dellapenna, *supra* note 18, at 137.

154. Working Group, *supra* note 28, at 566. Presumably the Working Group's assertion here is in reference to *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), and the fact that much of the Supreme Court's opinion regarding the situs of the tortious conduct is dictum, given that the plaintiff's injury in that case occurred outside the United States and clearly precluded jurisdiction over the foreign state. See *supra* text accompanying notes 127-31.

on the use of legislative history.”¹⁵⁵ This approach was also taken by Circuit Judge Edwards in his *Persinger* dissent.¹⁵⁶ To him, the language of the tort exception was not ambiguous at all and therefore he saw “no reason to resort to the legislative history to clarify the plain language of the statute.”¹⁵⁷ The simple fact that Congress did not enact the same language used in the House Report was enough to convince the dissenting judge that the plaintiff’s claims, and those of his parents, fell within the tort exception and should have withstood dismissal.¹⁵⁸

Granted, when the *Persinger* decision came down in the District of Columbia, the Seventh Circuit had yet to hand down its opinion in *Frolova*, a case clearly guided by legislative history.¹⁵⁹ In *Frolova*, however, the court rejected another proposition grounded in the legislative history of the FSIA.¹⁶⁰ The district court had dismissed the plaintiff’s claims *sua sponte*.¹⁶¹ The Soviet Union itself did not file its own motion to dismiss because it did not appear in the action.¹⁶² The FSIA House Report states that “sovereign immunity is an affirmative defense which must be specially pleaded.”¹⁶³ Had the court adopted this theory, the plaintiff’s complaint might not have been dismissed absent a responsive pleading from the Soviet Union raising the defense. Instead, the court stated that this portion of the FSIA’s legislative history “is not entirely accurate,” and that “the question of immunity must be considered by a district court even though the foreign country . . . has not entered an appearance.”¹⁶⁴ Therefore, despite its semblance of deference to Congressional intent, the Seventh Circuit was nonetheless selective as to which portions of the FSIA’s legislative history had merit.

155. Working Group, *supra* note 28, at 566.

156. *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 843 (D.C. Cir. 1984) (Edwards, J., dissenting).

157. *Id.* at 844 (Edwards, J., dissenting).

158. *Id.*

159. The majority in *Persinger* cited the *Frolova* case while it was still at the district court level. *See Persinger*, 729 F.2d at 842 (citing *Frolova v. Union of Soviet Socialist Republics*, 558 F. Supp. 358 (N.D. Ill. 1983)). At the time, as Judge Edwards noted, the majority’s discussion of the FSIA was “pure dictum.” *Id.* at 844 (Edwards, J., dissenting). *See also Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 372 (7th Cir. 1985) (noting that the lower court “discussed, but did not decide, whether the Soviet Union was immune from suit under the [FSIA]”).

160. *Frolova*, 761 F.2d at 373.

161. *Id.* at 371.

162. *Id.* at 371 n.1.

163. H.R. Rep. No. 94-1487, at 17 (1976).

164. *Frolova*, 761 F.2d at 373.

In light of *Doe v. Holy See*, and the plaintiff's initial success in withstanding the motion to dismiss, there are undoubtedly many lawsuits yet to come in which the Holy See will be named a defendant. Given this prospect, consistency, not selectivity, should be a common goal among courts that must decide whether the tort exception permits claims involving tortious activity in multiple countries (as in *Olsen*)¹⁶⁵ or bars them (as in *English*).¹⁶⁶ Such consistency will not only aid courts presented with clergy sex abuse claims, but also those addressing sovereign immunity in cases pending in different districts that involve common questions of fact.¹⁶⁷

V. BENEFITS OF A PLAINTIFF-FRIENDLY APPROACH

Lawsuits involving sex abuse by members of the Roman Catholic clergy have become commonplace in recent U.S. history.¹⁶⁸ Among the archdioceses contributing to the astounding settlement figures are Los Angeles (\$660 million)¹⁶⁹ and Boston (over \$100 million).¹⁷⁰ The Archdiocese of Portland, a co-defendant in *Doe v. Holy See*, recently ended bankruptcy proceedings with a \$75 million settlement.¹⁷¹ The enormous settlements between these archdioceses and sex abuse plaintiffs begs the question of why plaintiffs would include the Holy See as a defendant at all given the general lack of success in piercing its immunity. In other words, why complicate a lawsuit with the inclusion of a foreign sover-

165. *Olsen v. Gov't of Mexico*, 729 F.2d 641 (9th Cir.1984). See *supra* text accompanying notes 59–61.

166. *English v. Thorne*, 676 F. Supp. 761 (S.D. Miss. 1987). See *supra* text accompanying notes 78–79.

167. See, e.g., Notice of Pendency of Other Action or Proceeding, *Alperin v. Vatican Bank*, No. C99-4941MMC (N.D. Cal. June 25, 2002), available at <http://www.vaticanbankclaims.com/plaintiffs.pdf>. Plaintiffs' attorneys filed this document calling for coordination of pretrial matters pertaining to multi-district litigation in which the sovereign immunity of the Holy See was "an issue of first importance." *Id.* at 5–6. The document suggested that lawsuits naming the Holy See as a defendant, including pending sexual abuse cases, should be coordinated to "avoid divergent findings on the issue of Vatican amenability to suit in the United States." *Id.* at 7. See also 28 U.S.C. § 1407(a) (1968).

168. See *supra* text accompanying notes 2–3.

169. Goodstein, *supra* note 3.

170. Katie Zezima, *In Boston, Church Leaders Offer Atonement for Abuse*, N.Y. TIMES, May 30, 2006, at A14, available at <http://www.nytimes.com/2006/05/30/us/30religion.html>.

171. Ed Langlois & Robert Pfohman, *Portland Archdiocese Ends Bankruptcy With \$75 Million Settlement*, CATHOLIC NEWS SERVICE, <http://www.catholicnews.com/data/stories/cns/0702198.htm>.

eign when the local culprits are both more accessible and willing to settle?

One explanation is that suing the Holy See will serve as a wake-up call for the Catholic Church to address the sex scandal epidemic from the root up. William McMurry, a lead attorney in *O'Bryan*, stated, "This won't be over until the party who is directly accountable is brought to justice, and in my opinion that's the Holy See."¹⁷² And, as plaintiff James O'Bryan stated, "I would just like to see the Catholic Church changed."¹⁷³

A recent measure taken by Pope Benedict XVI (the "Pope") suggests that the Holy See feels a similar urgency to quell the clergy sex abuse scandal. In 2005, the Pope was named as an individual defendant in the case of *Doe v. Roman Catholic Diocese of Galveston-Houston*.¹⁷⁴ The complaint, which arose from the alleged sexual abuse of three minors by a local priest, included conspiracy to commit sexual assault, fraudulent concealment, and negligence.¹⁷⁵ In that case, the U.S. Government filed a suggestion of immunity on behalf of the Pope, asking the Southern District of Texas to dismiss the suit against him "on the basis of head-of-state immunity."¹⁷⁶ Consequently, the court granted the Pope's motion to dismiss with prejudice.¹⁷⁷

Just months prior to the decision, however, the Pope approved and ordered publication of an *Instruction* that affirmed the Catholic Church's view that homosexual acts are "intrinsically immoral and contrary to the natural law."¹⁷⁸ Therefore, the document says, the Church "cannot admit to the seminary or to holy orders those who practise homosexuality, present deep-seated homosexual tendencies or support the so-called 'gay

172. John L. Allen, Jr., *Vatican Asks Rice For Help In Sex Abuse Lawsuit*, NAT'L CATHOLIC REPORTER, Mar. 11, 2005, available at http://natcath.org/NCR_Online/archives2/2005a/031105/031105h.php.

173. Smith & Wolfson, *supra* note 82.

174. 408 F. Supp. 2d 272 (S.D. Tex. 2005).

175. *Id.* at 273.

176. *Id.* at 279. The court also noted a distinction between the immunity of foreign states and heads of state, stating, "Although the absolute immunity of foreign states has been affected by case law and by passage of the [FSIA], the State Department retains the authority to assert immunity for diplomatic personnel, including foreign heads of state." *Id.* at 278.

177. *Id.* at 282.

178. Congregation for Catholic Education, *Instruction Concerning the Criteria for the Discernment of Vocations With Regard to Persons With Homosexual Tendencies In View of Their Admission to The Seminary And To Holy Orders* (Nov. 4, 2005) [hereinafter Congregation], available at http://www.vatican.va/roman_curia/congregations/ccatheduc/documents/rc_con_ccatheduc_doc_20051104_istruzione_en.html.

culture.”¹⁷⁹ The timing of the *Instruction* was hardly coincidental given the pressure on the Holy See to address the “sex abuse scandal that rocked the church in the United States.”¹⁸⁰ The fact that the Pope happened to be defending himself in a U.S. District Court at the time of the *Instruction*’s release further supports the inference that the Holy See and its officials were feeling pressure from sex abuse plaintiffs.¹⁸¹ Regardless of the controversial nature of such a document,¹⁸² it nonetheless indicates that the movement of sex abuse lawsuits onto a global stage has struck a chord at the very seat of Catholicism.

The United States Conference of Catholic Bishops (“Bishops”) took a similar stance in 2006, when it issued a document entitled *Ministry to Persons with a Homosexual Inclination: Guidelines for Pastoral Care*.¹⁸³ The document likewise affirmed the Catholic view that “homosexual acts cannot fulfill the natural ends of human sexuality”¹⁸⁴ and that “the Church has a right to deny roles of service to those whose behavior violates her teaching.”¹⁸⁵ The document immediately followed news that the Bishops voted to spend \$335,000 to help fund research on the “causes and context” of clergy sex abuse.¹⁸⁶

As with the Pope, the timing of the Bishops’ endeavors is again illustrative of the Catholic Church’s scramble to atone for the devastating sexual misconduct of its clergy. In 2005, the Bishops issued a revision of

179. *Id.*

180. Delia Gallagher, *Vatican Issues Gay Policy Document*, CNN.COM, Nov. 29, 2005, http://www.cnn.com/2005/WORLD/europe/11/29/vatican.gays/index.html?section=cnn_latest.

181. See Chris Buell, *U.S. Says Pope Immune From Clergy Abuse Lawsuit*, JURIST, Sept. 20, 2005, <http://jurist.law.pitt.edu/paperchase/2005/09/us-says-pope-immune-from-clergy-abuse.php> (noting that “[t]he instruction . . . is said to be part of an effort to protect the church from future sex abuse scandals”).

182. See, e.g., Gallagher, *supra* note 180 (noting that “gay groups have said the church is using homosexuals as scapegoats for its sexual abuse scandals”).

183. The United States Conference of Catholic Bishops, *Ministry to Persons with a Homosexual Inclination: Guidelines for Pastoral Care* (November 14, 2006), available at <http://www.usccb.org/dpp/Ministry.pdf>.

184. *Id.* at 3.

185. *Id.* at 17. The Bishops nonetheless went on to state that Catholics should be mindful of “such persons,” and church policies should “explicitly reject unjust discrimination and harassment of any persons, including those with a homosexual inclination.” *Id.* at 17–18.

186. The United States Conference of Catholic Bishops, *U.S. Bishops Vote Unanimously to Release Money for Research On Sexual Abuse by Clergy*, November 13, 2006, <http://www.usccb.org/comm/archives/2006/06-224.shtml>. According to the Bishops’ Web site, the funding will cover three segments of a study undertaken by John Jay College of Criminal Justice. *Id.*

their *Charter for the Protection of Children and Young People*.¹⁸⁷ In the deeply apologetic preamble, the Bishops “express[ed] great sorrow and profound regret” in recognition of the “grave harm” that had been inflicted on minors.¹⁸⁸ The Bishops also suggested that actions by local dioceses were necessary to “restore the bonds of trust.”¹⁸⁹

The actions that some dioceses have taken, however, are not necessarily viewed as just in the eyes of sex abuse victims.¹⁹⁰ For example, the church’s renewed effort to expel homosexuals from the ministry,¹⁹¹ reflected in the *Instruction* and taken in response to this crisis, is unlikely to make amends with those who have already suffered for decades as a result of ministerial indiscretions. “Twist of Faith,” a 2004 documentary film, chronicles a sex abuse victim’s struggle to procure an admission of responsibility from his local archdiocese.¹⁹² The victim, Tony Comes, suggested in an interview with Home Box Office, Inc. that he (and other victims) did not go public to get money, but rather for the truth.¹⁹³ Barring homosexuals from the priesthood, it seems, is hardly an admission of guilt or an apology from the Holy See.¹⁹⁴ And it is doubtful that the secrecy and silence that some archdioceses have employed in the United States with regard to sex abuse¹⁹⁵ is the type of “action” called for by the Bishops in their 2006 *Charter*.¹⁹⁶

For the sex abuse victims who do seek pecuniary damages, there are other obstacles besides the evasiveness of the Catholic Church standing in the way of just compensation. For example, those who sue the alleged

187. CHARTER, *supra* note 1.

188. *Id.*

189. *Id.*

190. *See, e.g.*, TWIST OF FAITH (Home Box Office, Inc. [HBO] Documentary Films 2004) (chronicling the plight of a sex abuse plaintiff in search of not only damages, but an admission from the Catholic Church). *See also infra* text accompanying notes 192–93.

191. *See supra* text accompanying notes 178–79.

192. TWIST OF FAITH, *supra* note 190.

193. Interview with Tony Comes, HBO, http://www.hbo.com/docs/programs/twistoffaith/interview_tonycomes.html (last visited Feb. 22, 2008). Comes “reluctantly” settled with the Catholic Diocese of Toledo for \$55,000. TWIST OF FAITH, *supra* note 190.

194. *See Congregation, supra* note 178.

195. *See* TWIST OF FAITH, *supra* note 190 (discussing the practice of clergy members invoking their “mental reservation” and lying to protect the Catholic Church from scandal). *See also* New Advent Catholic Encyclopedia, *Mental Reservation*, <http://www.newadvent.org/cathen/10195b.htm> (last visited Mar. 13, 2008) (“According to the common Catholic teaching it is never allowable to tell a lie However, we are also under an obligation to keep secrets faithfully, and sometimes the easiest way of fulfilling that duty is to say what is false, or to tell a lie.”).

196. CHARTER, *supra* note 1.

perpetrator (the priest himself) may find that he has taken a vow of poverty,¹⁹⁷ in which case he may be judgment-proof.¹⁹⁸ Assuming those victims may then be inclined to direct their lawsuits at the archdiocese under the doctrine of respondeat superior, the issue of bankruptcy may come into play.¹⁹⁹ Despite the argument that “[u]sing bankruptcy to limit a church’s responsibility to those who have been harmed would contradict the church’s own teachings,”²⁰⁰ several archdioceses have resorted to this very measure in response to the sex abuse lawsuits.²⁰¹ As it can be argued that the vow of poverty serves as a policy justification for holding archdioceses vicariously liable for their priests,²⁰² it can also be said that piercing the sovereign veil of the Holy See is justifiable given that local archdioceses, from which the Holy See receives contributions, attempt to shield themselves from liability by filing for bankruptcy.²⁰³

197. New Advent Catholic Encyclopedia states:

The vow of poverty may generally be defined as the promise made to God of a certain constant renunciation of temporal goods, in order to follow Christ. The object of the vow of poverty is anything visible, material, appreciable at a money value. Reputation, personal services, and the application of the mass, do not fall under this vow; relics are included only on account of the reliquary which contains them, and (at least in practice) manuscripts, as such, remain the property of the religious. The vow of poverty entirely forbids the independent use, and sometimes the acquisition or possession of such property as falls within its scope. A person who has made this vow gives up the right to acquire, possess, use, or dispose of property except in accordance with the will of his superior.

New Advent Catholic Encyclopedia, *Poverty*, <http://www.newadvent.org/cathen/12324a.htm> (last visited Feb. 22, 2008).

198. See Michael J. Sartor, *Respondeat Superior, Intentional Torts, and Clergy Sexual Misconduct: The Implications of Fearing v. Bucher*, 62 WASH. & LEE L. REV. 687, 724 (2005).

199. For an extensive discussion of the implications of bankruptcy in the church sex scandal context, see David A. Skeel, Jr., *The Impact of Clergy Sexual Misconduct Litigation on Religious Liberty: Avoiding Moral Bankruptcy*, 44 B.C. L. REV. 1181 (2003).

200. *Id.* at 1197.

201. Among these are the dioceses of Spokane, Washington, Tucson, Arizona, and Davenport, Iowa. See Assoc’d Press, *Iowa Catholic Diocese Files For Bankruptcy After Sex-Abuse Claims*, FOX NEWS, Oct. 11, 2006, <http://www.foxnews.com/story/0,2933,219741,00.html>; Janet I. Tu, *Spokane Diocese Files For Bankruptcy*, SEATTLE TIMES, Dec. 7, 2004, available at http://seattletimes.nwsourc.com/html/localnews/2002111403_diocese07m.html.

202. Sartor, *supra* note 198, at 724 (noting that “[s]ome courts have acknowledged this policy consideration when evaluating respondeat superior claims arising out of sexual assaults perpetrated by clergy members who have taken the vow of poverty”).

203. *But see* Skeel, *supra* note 199, at 1198 (discussing potential benefits of bankruptcy as a way of “coordinating the debtor’s response to a wave of litigation”).

If the Holy See is at all responsible for the horrific sex abuse epidemic in the United States, as *Doe v. Holy See* suggests with uncontroverted facts, the FSIA tort exception can serve as a mechanism for victims who try in vain to seek justice at home. This is something Congress must address, either by amendment or at least a clear cut statement of intent, given that this type of scandal was not likely in mind when it enacted the FSIA. At that time, the Holy See was not yet deemed a foreign sovereign by the United States.²⁰⁴ Further, the wave of litigation involving clergy sex abuse, particularly that which actually implicated the Holy See, did not surface until the late 1980s.²⁰⁵ Therefore, it would be appropriate for Congress to reexamine the terms of the tort exception and enact language to clarify the provision. One option would be to simply incorporate the House Report language into the statute and require the entire tort, including act or omission, to occur in the United States.²⁰⁶ As a matter of policy, however, such a restriction would be damaging to the interests of sex abuse victims that have been wronged by the Holy See's negligence occurring in Rome, especially if local dioceses continue to seek bankruptcy in lieu of settlement.²⁰⁷

Another possibility for the legislature is the Working Group's suggestion that a "substantial portion" of the tortious conduct occur in the United States.²⁰⁸ This measure would at least give courts some license to exercise jurisdiction over the foreign sovereign in difficult multi-country scenarios like that of *Doe v. Holy See*.²⁰⁹ The Working Group conceded, however, that "substantial" is a rather vague term.²¹⁰ Considering the decision in *Doe v. Holy See*, and the near certainty that more plaintiffs will seek retribution from the Holy See in the future given the Oregon District Court's ruling, vague terminology will not assist courts any more than the inconsistent interpretations of the FSIA, judicial or otherwise.²¹¹ Who is to say, for example, that the Holy See's conduct in Oregon (assuming any of its conduct actually occurred there) played a "substantial"

204. It was not so deemed until 1984. *O'Bryan I*, 490 F. Supp. 2d 826, 829 (W.D. Ky. 2005).

205. See *supra* note 147.

206. H.R. Rep. No. 94-1487, at 21 (1976).

207. See *supra* text accompanying notes 197-203.

208. Working Group, *supra* note 28, at 568.

209. *Id.* The Working Group, however, did not cite clergy sex abuse cases as an example here. Its primary example of a "multi-country tort situation" was *Olsen v. Gov't of Mexico*, 729 F.2d 641 (9th Cir. 1984). See Working Group, *supra* note 28, at 568.

210. Working Group, *supra* note 28, at 568 (also noting that the phrase "substantial portion" is "similar to, and no more vague than, other standards currently employed in the FSIA").

211. See *supra* Part I.

role in Ronan's abuse of Doe? The answer is a judge, and judges may very well differ on what constitutes "substantial."

The fact of the matter is that Congress intended the FSIA to serve the interests of foreign states and U.S. litigants alike.²¹² Its language should not be subject to interpretation that sacrifices the interests of one for the other simply because a foreign state's misconduct occurs wholly or partially outside the United States.²¹³ To prevent this from happening, Congress should ratify the Oregon District Court's decision, based on the Ninth Circuit's "middle ground" interpretation,²¹⁴ to prevent foreign states like the Holy See from escaping liability for conduct that severely affects U.S. litigants. Therefore, to avoid confusion, Congress should adopt language more closely aligned to the Restatement of Foreign Relations Law commentary²¹⁵ and the FSIA commercial activity exception.²¹⁶ For example:

A foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States in any case . . . in which money damages are sought against a foreign state for personal injury or death . . . occurring in the United States and caused by the tortious act or omission of that foreign state and *that act causes a direct effect* in the United States. . .²¹⁷

Additionally, in case of lingering confusion, Congress could clarify, as the Restatement of Foreign Relations Law did, that the tort exception does not apply to "indirect" torts, such as loss of consortium, where the injury occurs abroad.²¹⁸

212. 28 U.S.C. § 1602 (1976). Further, as the Ninth Circuit stated, the forum state "has strong interests in protecting its residents from injury and in furnishing a forum where their injuries may be remedied." *Olsen*, 729 F.2d at 650. This interest was one of the factors the *Olsen* court considered in determining the reasonableness of exercising jurisdiction over the foreign state. *Id.* at 649–51.

213. See, e.g., *English v. Thorne*, 676 F. Supp. 761, 764 (S.D. Miss. 1987).

214. *Doe v. Holy See*, 434 F. Supp. 2d 925, 951 (D. Or. 2006).

215. See *supra* note 64 and accompanying text.

216. See *supra* note 35 and accompanying text.

217. 28 U.S.C. § 1605(a)(5) (1976) (emphasis on additional language inserted by Author and adapted from 28 U.S.C. § 1605(a)(2)).

218. *Supra* note 64. Such a clarification might also ameliorate some of the Working Group's concerns regarding claims such as "emotional distress, loss of consortium, and other non-physical injuries stemming from foreign conduct, as well as latent injuries that developed in the United States from earlier exposure to substances or conduct abroad." Working Group, *supra* note 28, at 567 (noting that "if there were no territorial restriction on the tortious act or omission, foreign sovereigns could be subject to suit in U.S. courts for tortious conduct committed anywhere in the world, so long as the conduct had effects in the United States").

Another possibility, and a timely one in light of the *O'Bryan II* opinion,²¹⁹ would be for the FSIA to incorporate a definition of what constitutes an "official" or "employee."²²⁰ Given that these definitions remain a matter of state law,²²¹ there is still room for inconsistency among the courts' opinions regarding Roman Catholic officials, such as priests and bishops. If these positions fell within a uniform definition of "employee," plaintiffs would be almost guaranteed some recourse against the Holy See, if not for its own actions, but for the actions of its officials under the doctrine of respondeat superior.²²² A uniform definition of terms of this kind would help serve the interests of justice in addition to creating more uniformity among courts' decisions involving the Holy See and its agents in general.

CONCLUSION

In conclusion, a "crisis without precedent" that may be caused in part by the acts of a foreign state merits consistent treatment in U.S. courts,²²³ particularly where such acts or omissions are difficult to pinpoint.²²⁴ If *Doe v. Holy See* remains good law,²²⁵ as *Olsen* did in the Ninth Circuit,²²⁶ judges should be at liberty to follow it without having to embark on a confusing analysis of Congressional intent that was never truly enacted in the FSIA.²²⁷ Given the vast impact of the clergy sex abuse scandal in recent history²²⁸ and the fact that not all plaintiffs can procure adequate compensation at home,²²⁹ the FSIA should not prevent litigation against the Holy See in cases where the factual allegations sufficiently demonstrate liability. This principle should hold true irrespective of the territory in which the tortious harm occurred.

219. See *supra* text accompanying notes 97–99.

220. In its current form, the FSIA's definitions section defines the following terms: "foreign state," "agency or instrumentality of a foreign state," the "United States," "commercial activity," and "commercial activity carried on in the United States by a foreign state." 28 U.S.C. § 1603 (1976).

221. *O'Bryan II*, 471 F. Supp. 2d 784, 790 (W.D. Ky. 2007) (noting that whether certain agents are "officials or employees of the Holy See as defined in FSIA . . . is not an easy question to answer").

222. See *id.*

223. CHARTER, *supra* note 1.

224. *Doe v. Holy See*, 434 F. Supp. 2d 925, 953 (D. Or. 2006).

225. See *Allen*, *supra* note 66 (noting that the Holy See's attorney filed notice of appeal in the Ninth Circuit regarding the Oregon District Court's decision).

226. *Doe v. Holy See*, 434 F. Supp. 2d at 951.

227. See *id.* at 950–53.

228. See *supra* Introduction.

229. See *supra* text accompanying notes 197–203.

In light of the foregoing, Congress must amend the FSIA to facilitate uniform interpretation among courts, and more importantly, to allow victims of clergy sex abuse to obtain the recourse they deserve. Revising the language of the tort exception to be less restrictive in terms of territory is one option. Another option would be addressing the question of what constitutes an “official” or “employee” of the Holy See given that these terms remain undefined in the FSIA.²³⁰ It would better serve the interests of justice, as the FSIA purports to do,²³¹ for plaintiffs at the very least to pierce the sovereignty of the Holy See through the acts of its agents at home.

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230. *O'Bryan II*, 471 F. Supp. 2d 784, 790 (W.D. Ky. 2007).

231. 28 U.S.C. § 1602 (1976).

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