

# John V. Doe v. Holy See

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

\_\_\_ Federal Reporter 3d \_\_ (2009)

**Author’s Note:** This case was perhaps the first case to analyze the Vatican’s potential amenability to a lawsuit in the U.S., under both the *commercial activity* and *tortious activity* exceptions to foreign sovereign immunity. Very few suits against the Vatican<sup>a</sup> have successfully proceeded to a disposition on the merits. The Vatican’s chief defender in the U.S. has enjoyed “extraordinary success.”<sup>b</sup> In this case, the plaintiff was successful at the trial court level. The appeals court’s fractious decision: (a) affirmed in part, reversed in part, and remanded the case back to the trial judge for further proceedings; and (b) included a dissent from some of the majority’s conclusions.

In a 2005 Case in Texas, the US expressed its view on the Pope’s Head of State immunity in the following terms:

The doctrine of head of state immunity is applied in the United States as a matter of customary international law and an incident of the Executive Branch's authority in the field of foreign affairs. Unlike sovereign and diplomatic immunity, head of state immunity has not been codified in U.S. law either by statute or by treaty. As a matter of U.S. law, the doctrine ... “came to be regarded as extending virtually absolute immunity to foreign sovereigns.” Over time, the absolute immunity of the state itself was diminished through the widespread acceptance by states of the restrictive theory of sovereign immunity, a theory reflected in the passage in 1976 of the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§1602. Nevertheless, U.S. courts have held that limitations on immunity contained in the FSIA do not apply to heads of state .... Thus, under customary international law and pursuant to this Suggestion of Immunity, Pope Benedict XVI, as the head of a foreign state, is immune from the Court’s jurisdiction in this case.<sup>c</sup>

The preliminary matter for decision in such cases is not be on the merits. It is, instead, whether or not the plaintiff has filed a viable claim that plausibly survives scrutiny under the US Foreign Sovereign Immunity Act (FSIA). If the courts are satisfied that the plaintiff has a plausible claim which survives FSIA scrutiny, then the case can proceed to trial. The Vatican could, at some point, decide to settle this case to avoid a precedent that subjects it to suit for such acts in the US.

A number of the court’s references to legal authorities and internal court documents have been removed. Underling has been added in several passages. The numbered footnotes are those of the court. The lettered footnotes were inserted by the author.

<sup>a</sup> The Holy See and the State of the Vatican City are separate legal entities. They are treated synonymously for most purposes, including the analysis in this case.

<sup>b</sup> D. Rosenthal, *Defending the Vatican*, 28 CALIFORNIA LAWYER 24, 26 (Feb. 2008).

<sup>c</sup> J. Crook, *U.S. Brief Suggests Pope’s Immunity as Head of State*, 100 AMER. J. INT’L L. 219, 220 (2006).

*Court's Opinion:* [This case is very unusual, not only because of the issue presented, but also because *each* of the three judges hearing this appeal had a distinct written opinion.]

### PER CURIUM

We consider whether, on the allegations made in the Plaintiff's complaint in this case, the Holy See is entitled to immunity from suit under the Foreign Sovereign Immunities Act ("FSIA").

John V. Doe brought suit in the United States District Court for the District of Oregon against the Holy See, the Archdiocese of Portland, Oregon ("Archdiocese"), the Catholic Bishop of Chicago ("Chicago Bishop"), and the Order of the Friar Servants ("Order"), alleging that when he was fifteen or sixteen years old he was sexually abused by Father Ronan, a priest in the Archdiocese and a member of the Order. Doe alleged various causes of action against the Holy See: (1) for vicarious liability based on the actions of the Holy See's instrumentalities, the Archdiocese, the Chicago Bishop, and the Order; (2) for respondeat superior liability based on the actions of the Holy See's employee, Ronan; and (3) for direct liability for the Holy See's own negligent retention and supervision of Ronan and its negligent failure to warn Doe of Ronan's dangerous proclivities. The Holy See contended in the district court that all of Doe's causes of action against it must be dismissed because, as a foreign sovereign, it is immune from suit in U.S. courts. The district court disagreed, holding that it has jurisdiction over all but one of Doe's claims under the FSIA's tortious act exception to sovereign immunity. The Holy See appeals.

... As to the Holy See's respondeat superior liability for Ronan's acts, we conclude that, because Doe has sufficiently alleged that Ronan was an employee of the Holy See acting within the "scope of his employment" under Oregon law, Ronan's acts can be attributed to the Holy See for jurisdictional purposes. Further, we agree with the district court that Ronan's acts come within the FSIA's tortious act exception, so the Holy See is not immune from suit for the respondeat superior cause of action. ... The decision of the district court on the appeal by the Holy See is therefore affirmed in part, reversed in part, and remanded for further proceedings not inconsistent with this opinion. ...

## I. PROCEDURAL BACKGROUND

### A. Complaint

In his amended complaint, filed April 1, 2004, Doe describes as follows Father Andrew Ronan's alleged sexual abuse of young boys: In 1955 or 1956, while employed as a parish priest in the Archdiocese of Armagh, Ireland, Father Ronan molested a minor and admitted to doing so. Ronan was later removed from Our Lady of Benburb and placed in the employ of the Chicago Bishop, at St. Philip's High School. At St. Philip's, Ronan molested at least three male students. Confronted with allegations of abuse, Ronan admitted to molesting the boys. The Chicago Bishop, "acting in accordance with the policies, practices, and procedures" of the Holy See, did not discipline or remove Ronan from his post.

In approximately 1965, when Doe was 15 or 16 years old, the Holy See and the Order of the Friar Servants, of which Ronan was a member, "placed" Ronan in a parish priest position at St. Albert's Church in Portland, Oregon. Doe met Ronan at St. Albert's

and came to know Ronan “as his priest, counselor and spiritual adviser.” Doe was a devout Roman Catholic, and for him “Ronan was a person of great influence and persuasion as a holy man and authority figure.” Using his position of trust and authority, Ronan “engaged in harmful sexual contact upon” Doe on repeated occasions. The sexual contact occurred “in several places including the monastery and surrounding areas.”

Based on these facts, Doe alleged causes of action against the Holy See, its “instrumentalities or agents” ... , the Archdiocese, the Chicago Bishop, and the Order, all of whom it alleged were employers of Ronan. According to the amended complaint:

Defendant Holy See is the ecclesiastical, governmental, and administrative capital of the Roman Catholic Church. Defendant Holy See is the composite of the authority, jurisdiction, and sovereignty vested in the Pope and his delegated advisors to direct the world-wide Roman Catholic Church. Defendant Holy See has unqualified power over the Catholic Church including each and every individual and section of the [C]hurch. Defendant Holy See directs, supervises, supports, promotes[,] and engages 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. The Holy See engages in these activities through its agents, cardinals, bishops[,] and clergy, including religious order priests, brothers[,] and sisters, who engage in pastoral work under the authority of its bishop[s]. The Holy See is supported through the contributions of the faithful[,] which are received through donations from the dioceses around the world, including those in the United States. Defendant Holy See promotes and safeguards the morals and standards of conduct of the clergy of the [C]atholic [C]hurch. Defendant Holy See does this by and through its agents and instrumentalities, including the Congregation for the Clergy and the Congregation for Religious both delegated by the Pope and acting on his behalf. It creates, divides[,] and re-aligns dioceses, archdioceses[,] and ecclesiastical provinces. It also gives final approval to the creation, division[,] or suppression of provinces of religious orders.... It creates, appoints, assigns and re-assigns bishops [and] superiors of religious orders, and through the bishops and superiors of religious orders [it] has the power to directly assign and remove individual clergy. All bishops, clergy, and priests, including religious order priests, vow to show respect and obedience to the Pope and their bishop. Defendant Holy See also examines and is responsible for the work and discipline and all those things which concern bishops, superiors of religious orders, priests[,] and deacons of the religious clergy. In furtherance of this duty, Defendant Holy See requires bishops to file a report, on a regular basis, outlining the status of, and any problems with, clergy. Defendant Holy See promulgates and enforces the laws and regulations regarding the education, training[,] and standards of conduct and discipline for its members and those who serve in the governmental, administrative, judicial, educational[,] and pastoral workings of the Catholic [C]hurch world-wide. Defendant Holy See is also *directly responsible for removing* superiors of religious orders, bishops, archbishops[,] and cardinals from service and/or *making them ineligible for positions of leadership* in the various divisions and offices of the Catholic [C]hurch [italics added].

...

Doe alleged that the Archdiocese and the Order were vicariously liable for Ronan’s abuse of Doe, and that the Chicago Bishop and the Order were negligent in failing to warn the Archdiocese and Doe of Ronan’s propensities. Doe also alleged that the Holy See was vicariously liable for Ronan’s abuse of Doe and for the negligent actions of the Archdiocese, the Order, and the Chicago Bishop, and that the Holy See was itself negligent in its retention and supervision of Ronan and in failing to warn of his propensities.

## B. District [trial] Court Decision

The Holy See moved to dismiss the complaint in its entirety for lack of subject-matter jurisdiction, arguing that as a foreign sovereign, it is presumptively immune from suit under the FSIA, and that neither the “tortious act” exception to sovereign immunity, 28 U.S.C. § 1605(a)(5), nor the “commercial activity” exception to sovereign immunity, 28 U.S.C. § 1605(a)(2), applies. ...

The Holy See appeals the district court’s decision that the tortious act exception applies. ...

## II. STATUTORY FRAMEWORK

For much of our nation’s history, from at least 1812 until 1952, “the United States generally granted foreign sovereigns complete immunity from suit in the courts of this country.” In 1952, however, the State Department adopted a more “restrictive” theory of foreign sovereign immunity, under which sovereign “immunity is confined to suits involving the foreign sovereign’s *public* acts [italics added].” Applying this restrictive approach, questions of foreign sovereign immunity arising in U.S. courts were decided on a case-by-case basis, often with the assistance of letters from the State Department containing “suggestions of immunity” [when proceeding would adversely impact relations between the US and the particular foreign sovereign nation].

In 1976, to “clarify the governing standards” and to insulate the issue of sovereign immunity from the impact of “case-by-case diplomatic pressures,” Congress enacted the FSIA. The FSIA contains “a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities.” ...

Under the FSIA, a foreign state is “immune from the jurisdiction of the courts of the United States and of the States” unless one of the statute’s enumerated exceptions applies. A foreign state “includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state.” An “agency or instrumentality of a foreign state” is defined in turn as any entity:

- (1) which is a separate legal person, corporate or otherwise, and
- (2) which is an organ of a foreign state or political subdivision thereof, ...  
and
- (3) which is neither a citizen of a State of the United States ... nor created under the laws of any third country.

Section 1605 contains “[g]eneral exceptions to the jurisdictional immunity of a foreign state,” providing in relevant part that:

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

...  
(2) in which the action is based upon a *commercial activity* carried on in the United States by the foreign state [italics added]; 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;

...

(5) ... [or] 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* of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment [italics added]. ...

The statute further defines the elements of the commercial activity exception: A “ ‘commercial activity’ means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the *nature* of the course of conduct or particular transaction or act, *rather than* by reference to its *purpose*” [italics added]. ...

...

### III. ANALYSIS

...

#### C. Determining Which Acts May Be Attributed to the Holy See for Jurisdictional Purposes

##### 1. Determining Whether an Agency Relationship Exists Between the Holy See and Its Domestic Corporations for Purposes of Establishing Jurisdiction over the Holy See

...

The Supreme Court began [another FSIA case analysis] by noting that ... liability was to be assessed according to corporate law principles “common to both international law and federal common law.” Surveying international and federal law on the status of corporations, the Supreme Court recognized a presumption of “separate juridical [status]” for the instrumentalities of foreign states.

That presumption can be overcome, the Court explained, in two instances: when “a corporate entity is so extensively *controlled* by its owner that a relationship of principal and agent is created,” or when recognizing the separate status of a corporation “would work *fraud or injustice*” [italics added] ...

... A foreign state can only “act through its agents,” be they corporations or individual people [e.g., in this instance, bishops and priests].

...

[W]e conclude that Doe has not alleged sufficient facts to overcome the “presumption of separate juridical status. ...”

Doe’s complaint does not allege day-to-day, routine involvement of the Holy See in the affairs of the Archdiocese, the Order, and the Bishop. Instead, it alleges that the Holy See “creates, divides[,] and re-aligns dioceses, archdioceses and ecclesiastical provinces” and “gives final approval to the creation, division or suppression of provinces of religious orders.” Doe also alleges that the Holy See “promulgates and enforces the laws and regulations regarding the education, training[,] and standards of conduct and discipline for its members and those who serve in the governmental, administrative, judicial, educational[,] and pastoral workings of the Catholic [C]hurch world-wide.” These factual allegations—that the Holy See participated in creating the corporations and continues to promulgate laws and regulations that apply to them—are ... insufficient to overcome the presumption of separate juridical status.

...

The district court apparently found jurisdiction proper by relying on the [prior caselaw] ... that “foreign states cannot avoid their obligations to third parties by engaging in abuses of the corporate form.” But Doe has not alleged that the Holy See has inappropriately used the separate status of the corporations to its own benefit, ... or that the Holy See created the corporations for the purpose of evading liability for its own wrongs.

Doe’s vicarious liability claim for the actions of the Archdiocese, Chicago Bishop, and Order is based entirely on an allegation that the actions of the domestic corporations are attributable to the [remaining, primary defendant, the] Holy See. ... We therefore conclude that the district court lacked jurisdiction over the Holy See for the tortious acts allegedly committed by the Archdiocese, the Chicago Bishop, and the Order [co-defendants].

*2. Actions Performed by the Holy See Itself*

As to Doe’s other causes of action, the Holy See contends that Doe has failed to allege any facts in support of his claims based on the actions of the Holy See itself, rather than of its domestic corporations. We do not agree. Doe has made several allegations regarding actions taken by the Holy See itself—namely, its negligent retention and supervision of Ronan and its failure to warn Doe of Ronan’s dangerousness. Doe has also alleged respondeat superior liability against the Holy See for Ronan’s actions as an alleged employee of the Holy See. We turn now to those allegations, considering whether they are sufficient to support jurisdiction over the Holy See [so that this case may proceed in the trial court].

...

**D. Tortious Act Exception**

*1. Respondeat Superior for Father Ronan’s Tortious Acts*

a. The meaning of “employee”

In his complaint, Doe alleges that the Holy See “employed priests, including one Father Andrew Ronan” and that Ronan was under the “direct supervision and control” of the Holy See. The Holy See was further “responsible for the work and discipline [of] ... priests.” According to the complaint, the Holy See on at least one occasion was responsible for controlling where Ronan performed his functions: the Holy See “placed Ronan in [the] Archdiocese at St. Albert’s Church in Portland, Oregon.” ... Although there is undoubtedly a line beyond which the legal definition of a commonly used term is so complex or contentious that failure to allege each element of the definition would prevent a defendant from understanding the factual basis for the claim, use of the word “employee” falls well short of that line.

b. The meaning of “within the scope of employment”

More complicated under Oregon law is the question of whether Ronan’s actions were “within the scope of employment” as the FSIA requires. ...

As it happens, the Oregon Supreme Court has directly addressed whether a church can be liable under respondeat superior for the actions of a priest who sexually assaults a parishioner.

...

An intentional tort is within the scope of employment, and can support respondeat superior liability for the employer, if conduct that was within the scope of employment was “a necessary precursor to the” intentional tort and the intentional tort was “a direct outgrowth of ... conduct that was within the scope of ... employment.”

Doe’s allegations meet this standard. Doe has asserted that he “came to know Ronan as his priest, counselor and spiritual adviser,” and that Ronan used his “position of authority” to “engage in harmful sexual contact upon” Doe in “several places including the monastery and surrounding areas in Portland, Oregon.” ...

Under [the applicable] ... law, then, Doe has clearly alleged sufficient facts to show that his claim is based on an injury caused by an “employee” of the foreign state while acting “within the scope of his ... employment,” as required to come within the FSIA’s tortious act exception. The Holy See is therefore not immune from Doe’s respondeat superior claim.

...  
**IV. CONCLUSION**

... It remains to be seen whether Doe can prove his allegations [now that this case can proceed in the trial court]. ... After careful consideration, we have reached the conclusion that most of Doe’s causes of action are not covered by the *tort* exception and overturn the district court’s denial of immunity as to those [italics added]. However, because it would be improper to consider the *commercial activity* exception, we express no opinion regarding that exception [italics added].

For the foregoing reasons, ... the decision of the district court is AFFIRMED in part, REVERSED in part, and REMANDED. ...

**BERZON, Circuit Judge, dissenting in part:**

I agree with the majority that Doe’s negligence claims against the Holy See, as currently pleaded, cannot proceed under the tortious act exception to the Foreign Sovereign Immunities Act (“FSIA”). Unlike the majority, however, I would affirm the district court’s holding that the FSIA does not give the Holy See immunity from Doe’s claims of negligent retention, supervision, and failure to warn. ... [O]ur case law compels the conclusion that Doe’s negligence claims come within the FSIA’s commercial activity exception.

...  
**I. JURISDICTION**

Moreover, I see no prudential reasons whatever for refusing to exercise our jurisdiction [as to the Holy See’s alleged commercial activity]. The application of the commercial activity exception was fully litigated below, the district court decided the question, and the issue has been fully briefed and argued here.

...  
**II. THE COMMERCIAL ACTIVITY EXCEPTION**

Given my view of the jurisdictional posture of the case, I would reach the merits of the commercial activity question....

As the majority explains, Doe’s complaint sufficiently alleged an employment relationship between Ronan and the Holy See.... I would hold that that [same]

relationship [thus] constitutes “commercial activity” for purposes of the FSIA.

Ronan was employed not as a member of the Vatican’s diplomatic, civil service, or military personnel, the employment of whom we have held to be a quintessentially sovereign activity under the FSIA, but in a non-sovereign-here, religious-capacity.

Further, Doe’s negligence claims are “based upon” the employment relationship between Ronan and the Holy See, as the FSIA requires. Doe’s negligent retention, supervision, and failure to warn causes of action against the Holy See therefore fall within FSIA’s commercial activity exception, and the district court has jurisdiction to decide them.

### **A. The Definition of “Commercial Activity” under the FSIA**

The FSIA is often described as having codified the “restrictive” theory of sovereign immunity. The FSIA is often described as having codified the “restrictive” theory of sovereign immunity. Under the restrictive theory, “a state is immune from the jurisdiction of foreign courts as to its sovereign or public acts (*jure imperii*), but not as to those that are private or commercial in character (*jure gestionis*).” *Saudi Arabia v. Nelson*, 507 U.S. 349, 359-60, (1993) [the next principal case in this section of the textbook.] ... The reason *why* the sovereign engages in that activity—its purpose or motive—is immaterial.

What is more, no profit need be made, or need even be possible, for the activity to qualify as “commercial.” ...

In sum, a foreign state engages in commercial activity when it engages in acts that any private citizen has the power to undertake, regardless of the state’s motive or the possibility of making a profit therefrom. ... Examining the FSIA’s legislative history, we noted that the House Report listed “the employment of diplomatic, civil service, or military personnel ... by the Foreign state in the United States” as examples of acts that are “public or governmental and not commercial in nature.” In contrast, the “employment or engagement of [such other employees as] laborers, clerical staff or public relations or marketing agents would be ... included within the definition of commercial activity.” Because [in another case] the plaintiff’s claims were based on an employment relationship with the defendant, the defendant was not entitled to sovereign immunity.

### **B. The Employment Relationship between Ronan and the Holy See**

...

Doe’s amended complaint explains that the Holy See has both “ecclesiastical” and “governmental” functions. In its governmental role, the Holy See undertakes certain functions that are undoubtedly sovereign. It maintains a volunteer military to defend the territory of Vatican City, over which it has complete control; it may enact laws with domestic effect and enter into international treaties and compacts with other nations; and it sends and receives diplomatic representatives to and from other states. ...

But, on the allegations in the complaint, Ronan was not a civil service, diplomatic, or military employee—the types of employees that only sovereign states can employ. Nor is there any evidence that Ronan was “privy to any governmental policy deliberations” or that he engaged in “legislative work” on behalf of the Holy See. Rather, the Holy See hired Ronan to perform ecclesiastical and parochial services—to provide “religious and pastoral guidance, education and counseling services” to the Church’s

faithful. Providing religious, educational, and counseling services is not a peculiarly governmental function; it is something that non-governmental employers can do.

To reach this conclusion, I do not rely at all on the consideration that “churches receive financial support from their parishioners.” ... Instead, the critical factor in the commercial activity analysis in this case is that the Holy See's employment activities alleged in Doe's complaint are not distinctly *sovereign* in nature—that they are the sort of functions that private parties, not just sovereign governments, can perform. ...

I recognize that the Holy See's dual role as not only a sovereign government but also the head of a worldwide church gives this case a peculiar complexion. But that sense of oddity comes about because the Holy See is a sovereign of a very unusual kind. Both in physical size and number of inhabitants, the land it governs is tiny. Its role as a traditional, sovereign government entity is correspondingly small, when compared to its role in running an extremely large international religious organization.

The fact that the Holy See is unique among sovereigns in this respect does not, however, necessitate deviating from the rules we normally follow in construing and applying the FSIA. The operation of a huge international religious institution is a large task, and one of great importance to many people. But it is not an activity that may be undertaken only by *sovereign* states, which is the focus of the FSIA's commercial activity exception. Indeed, in most cases it is non-governmental entities, not governments, that operate international religious institutions, the Mormon Church and the Greek Orthodox Church being two prominent examples. The FSIA's purpose is not to insulate religious institutions from suit; it juxtaposes commercial activities not to *religious* activities, but to *governmental* activities. The Holy See differs from other foreign states in the *nature* of the non-sovereign activities it carries out and, in all likelihood, in the ratio of its non-sovereign activities to its sovereign activities. But it is like other sovereigns in the respect essential here: It engages in a range of non-sovereign activities in the United States, and the FSIA's commercial activity exception lifts the shield of immunity from such non-sovereign activities.

...

#### **D. The “Essence” of Doe's Claims**

...

Doe has alleged that the Holy See continued to employ Ronan, and placed him in the Archdiocese where he molested Doe, even after the Holy See was aware that Ronan had molested young boys on at least two prior occasions while in its employ. He has alleged further that the Holy See did not inform Doe or his parents of what it knew about Ronan's dangerousness, despite its position of trust with respect to Doe and its employment relationship with Ronan. Doe's negligence claims are not a mischaracterization of the factual allegations he has made, but are in fact among the central wrongs he alleges.

In summary, I see no reason why claims arising from actions with an arguably tortious “essence” cannot proceed under the commercial activity exception. As noted above, the phrase “commercial activity” in the FSIA is a term of art. Neither the statute, nor any controlling case, requires the conclusion that the commercial activity exception is necessarily inapplicable whenever the label “tort” would be, in common usage, a better description of the harms a plaintiff alleges.

### E. The Holy See's First Amendment Argument

The Holy See contends that reading the FSIA to allow federal jurisdiction over Doe's claims via the commercial activity exception would violate the First Amendment [separation of church and State clause], because adjudicating the case will require the judicial interpretation of such religious doctrine as the vow of obedience that members of the clergy offer to the Pope. This contention cannot get off the ground because, as a foreign sovereign, the Holy See has no rights under the First Amendment.

...

The D.C. Circuit explained that foreign sovereign nations are not members of the political community for whose benefit the Bill of Rights was adopted. They “are entirely alien to our constitutional system,” and so the protections to which they are entitled have traditionally been governed not by domestic constitutional law, but by international law. ... Unlike private individuals, “sovereign states interact with each other through diplomacy and even coercion in ways not affected by constitutional protections.” They also have recourse to international dispute-resolution mechanisms to which private individuals have no access. Indeed, the FSIA is in part a recognition that grievances against foreign states are sometimes better resolved in these other arenas, not in U.S. courts. In this context, there seems no basis for extending constitutional protections to foreign states in their capacity as such.

...

**FERNANDEZ, Circuit Judge, concurring** [with the majority opinion]:

I agree that we cannot consider the commercial exception to the Foreign Sovereign Immunities Act. But, Judge Berzon does not and has, therefore, gone on to opine that all (or virtually all) activities by churches are actually commercial activity. While I recognize that her opinion cannot be precedential and that a response from me cannot be either, I am loath to leave her disquisition standing alone. Thus, I cannot (or at least will not) refrain from offering my own view on the rather oxymoronic proposition that church functions are commercial.

As I see it, Doe's claim that church functions are simply commercial transactions because parishioners do give donations to the church bespeaks the veriest cynicism about religion and a church's position within religion. Could a church spread the word of God without some funds? Would that it could, but the need for support does not mean that the holy activity is commercial. Is the Mass the marketing of a form of edifying entertainment? Is hearing confessions and giving religious advice—an age-old function of churches—really no more than a commercial activity similar to psychological counseling? Is the sacrament of Holy Eucharist the marketing of bread and wine or is the sacrament of Extreme Unction the marketing of oil? I think not. Normal legal usage and common sense recoil from those possibilities.

...

As the Supreme Court has, somewhat more helpfully, stated:

[W]e conclude that when a foreign government acts, not as a regulator of a market, but in the manner of private player within it, the foreign sovereign's actions are “commercial” within the meaning of the FSIA. Moreover, because the Act provides that the commercial character of an act is to be determined by reference to its “nature” rather than its “purpose” ..., the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the

issue is whether the particular actions that the foreign state performs ... are the *type* of actions by which a private party engages in “trade and traffic or commerce[.]”

Some have focused on the “private player” language, but what is truly significant is the [FSIA’s legislative] emphasis on the market and on “trade and traffic or commerce.”

... Similarly, we have noted that: “[t]he commercial activity exception applies only where the sovereign acts ‘in the market in the manner of a private player.’ ” Again, [the] Holy See has not acted in the market at all. It has simply supplied religious counseling to a church communicant, a service that this unique sovereign entity is designed for.

I think that the problem this case seems to present lies in the fact that Holy See is an unusual type of foreign sovereign. Most governments do, indeed, exist to afford their citizens a degree of physical protection and guidance, so that they may thrive in this world. Holy See is more focused on the next world, and that makes a universe of difference. Because of that, Holy See’s sovereign activities are not simply the passage of mortal laws and the enforcement of those. They, basically, encompass the furnishing of the kinds of services that only Holy See can give: its own kind of religious help, guidance and counseling. It may do more than most sovereigns do, but it is not engaged in the market or in commerce.

In short, [the] Holy See may not be your typical sovereign, but neither is it your typical merchant. Does that lead to some kind of impasse? Of course not. It leads back to the statute itself. Holy See is a foreign state and the commercial activity exception does not strip its immunity from it. Something else may do so, but not that exception. We hierophants of the law are adept at redefining ordinary concepts, but it is no more appropriate to declare that religious services are commercial activities than it would be to declare that ponies are small birds.

...

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*Author’s query:* Which of these three opinions “got it right?”