No. 25-661

IN THE

Supreme Court of the United States

ERIK BLECHER, *et al.*,

Petitioners,

v.

THE HOLY SEE,
AKA THE APOSTOLIC SEE,

Respondent.

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

REPLY BRIEF

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PRELIMINARY STATEMENT

Petitioners submit this Reply Brief pursuant to Sup. Ct. R. 15(6) to address new points raised by Respondent the Holy See in its Opposition Brief.

The Holy See's arguments fail to deflect from the importance of the issue whether the discretionary function exclusion of the FSIA, 28 U.S.C. § 1605(a)(5)(A), denies subject matter jurisdiction where an employee of a foreign state acts in compliance with the foreign state's injurious mandatory policy or regulation. The decision in this case on that issue is in conflict with the decision of another court of appeals, and has not previously been addressed by this Court. Resolution by this Court of this important matter—which arises in the context of the prolific sexual abuse of children by Catholic clergy over many decades—is warranted.[1]

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1. The Holy See denies that the "courthouse door" has been shut for victims of Catholic clergy abuse in New York, noting that a substantial majority of the named Plaintiffs have brought claims against Dioceses and received compensation. (Brief in Opp., p. 37, n. 27). These claims, however, were not brought in court but pursuant to the Dioceses' Independent Reconciliation Compensation Programs, which were a device created by the Dioceses to allow them to resolve clergy sex abuse claims at great discounts before the New York Child Victims Act (CVA), CPLR 214-g (2019), went into effect. *See In re Roman Catholic Diocese of Rockville Centre*, 650 B.R. 58 (Bankr. S.D.N.Y. 2023). Since the CVA was enacted, six of the eight Dioceses in New York filed Chapter 11 bankruptcies. Additionally, as alleged in the Amended Complaint, the Holy See is largely responsible for the epidemic of clergy-on-child sexual abuse in the Catholic Church, and the FSIA presents the only means for the Holy See to be held accountable civilly for its actions in the United States. (*See* A 19-20).

ARGUMENT

I. THE SIXTH CIRCUIT'S DECISION IN *O'BRYAN* PRESENTS A CERTWORTHY CONFLICT

The Holy See attempts to degrade and minimize the conflict between the Second Circuit's *Blecher* decision and the Sixth Circuit's decision in *O'Bryan v. Holy See*, 556 F.3d 361 (6th Cir. 2009). It disingenuously asserts that "[t]he two case involved different complaints advancing different causation theories." (Brief in Opp., p. 27). This argument ignores, however, the overwhelming commonalities in the two decisions. They arrive at opposite conclusions on application of the discretionary function exclusion to the identical policy set forth in the same document, *Crimen* S*ollicitationis* ("*Crimen*") (referred to in *O'Bryan* as the "1962 Policy"). (*Compare O'Bryan*, 556 F.3d at 370, 387, *with* 22a – 35a). The Court in *O'Bryan* noted that the plaintiffs' claims in that case "advance theories of liability premised on the conduct of Holy See employees in the United States [the Bishops] engaged in the supervision of the allegedly abusive priests." 556 F.3d at 386. Likewise, Petitioners allege that the Holy See employed the Bishops who implemented the mandatory secrecy policy directing priests and other clergy under their control. (A 36-40; *see also* 52a-55a [district court's discussion of employment relationship]).

While the Court in *O'Bryan* rejected application of the discretionary function exclusion at the pleadings stage, holding that "following the 1962 Policy cannot … be deemed discretionary," the *Blecher* decision held that the plaintiff, "to overcome the discretionary function exclusion," must demonstrate that "the allegedly tortious

act 'violate[d] the mandatory regulation.'" (556 F.3d at 387; 34a – 35a [citation omitted]). *O'Bryan* and *Blecher* both addressed claims brought by victims of clergy sexual abuse in the Catholic Church alleging that Bishops' adherence to the same mandatory secrecy policy caused the plaintiffs' abuse and injuries. *O'Bryan* expressly holds that *following* this policy results in the claims falling outside the discretionary function exclusion, while *Blecher* holds that only the *violation* of a mandatory policy or regulation could fall outside this exclusion. It is difficult to imagine two decisions more squarely in conflict. Any differences in pleading are immaterial and fail to provide a basis for distinguishing these cases from each other.

The Holy See further attempts to diminish *O'Bryan* as precedent, focusing on a recent district court decision from outside the Sixth Circuit criticizing *O'Bryan*. (Brief in Opp, pp. 28-29). It cannot be denied, however, that *O'Bryan* has never been overruled, nor has it been expressly challenged, criticized or limited at the Circuit Court level. While the *Blecher* decision cites to *O'Bryan* (47a, fn.1), it does not attempt to address or even mention the holding in *O'Bryan* on application of the FSIA's discretionary function exclusion. The Holy See vainly attempts to manufacture a retreat by the Sixth Circuit from the decision in *O'Bryan*, contending that in *A.O. Smith Corp. v. United States*, 774 F.3d 359, 371 (6th Cir. 2014), the Court "applied the full *Berkovitz/ Gaubert* framework." (Brief in Opp., p. 29). But that decision in a FTCA case is not helpful in applying the discretionary function exclusion under the FSIA, as did the Court in *O'Bryan*. While *A.O. Smith* concerned, *inter alia*, discretionary "decisions relating to the amount of personnel assigned to a particular task," discretion in

the assignment of Priests to parishes is a red herring having nothing to do with the Bishops' compliance with the mandatory secrecy policy that Petitioners allege enabled clergy-on-child sexual abuse. (*See* Petition, pp. 28-29).

There is simply nothing to indicate that the Sixth Circuit would revisit or potentially reverse its decision on application of the discretionary function exclusion in *O'Bryan*. The decisions in *O'Bryan* and *Blecher* are undeniably squarely in conflict, and certiorari is warranted to resolve this important issue on application of the discretionary function exclusion under the FSIA.

II. THE HOLY SEE'S FACTUAL ATTACK ON THE AMENDED COMPLAINT'S ALLEGATIONS ARE UNAVAILING

The Holy See contends that this case would be a "poor vehicle" for resolving the issues before the Court in application of the discretionary function exclusion of the FSIA, relying largely on statements by Thomas Doyle, whom the Holy See describes as Petitioners' "own designated expert."[2] Initially, the District Court decided not to consider Mr. Doyle's Declaration given that the Holy See had made a facial attack on the Amended Complaint, and addressed only the well-pleaded allegations in the Amended Complaint. (50a, fn.2). Petitioners did not challenge that choice on appeal. Accordingly, statements

2. The Holy See disingenuously props up Mr. Doyle for the purpose of tearing him down, using certain isolated statements made outside of this case to argue the otherwise unsupported point that *Crimen* is not a strict secrecy policy and that the written 1962 Policy was never effectively communicated to the Bishops. (Brief in Opp., pp. 30-31).

by Mr. Doyle should have no bearing on this Court's consideration of whether this case is appropriate for review.

In any event, the Holy See omits important statements made by Mr. Doyle which are consistent with the allegations in the Amended Complaint. For example, in a 2006 release by Mr. Doyle relied upon by Respondent, Mr. Doyle states that, although the 1922 and 1962 Policy documents were issued in secrecy, "they nevertheless were communicated to every bishop in the world," rejecting the notion that they were sent only to selected bishops. (SA 160, ¶ b). Mr. Doyle explains in his Declaration the great weight and force of *Crimen*, noting that, despite the lack of formal prosecutions pursuant to its terms, "it is apparent that the Ordinaries [Bishops] adhered to and complied with the requirements of the 1922 and 1962 *Instructions* by *not* initiating a preliminary investigation and maintaining allegations of child sexual abuse in complete secrecy. Indeed, given the numerous allegations and reports of child sexual abuse subject to the 1922 and 1962 *Instructions* over the course of decades, it may be inferred that the concealment of these allegations [of clergy abuse] in strict secrecy was the pope's purpose and intent in issuing the *Instructions*, and how the Ordinaries understood what was required of them." (SA 20-21, ¶ 38). For present purposes at this pre-answer stage, there is simply no basis to impugn the facts plead concerning *Crimen* in the Amended Complaint. (A 36-40).

The fact that subject matter jurisdiction is implicated does not materially alter the analysis. While courts are generally authorized to resolve factual disputes before trial when determining subject matter jurisdiction, this

Court has "long held that courts may not do so when the factual disputes are intertwined with the merits." *Perttu v. Richards*, 605 U.S. 460, 472-73 (2025); *see also Montez v. Department of Navy*, 392 F.3d 147, 150 (5th Cir. 2004) ("where issues of fact are central both to subject matter jurisdiction and the claim on the merits, we have held that the trial court must assume jurisdiction and proceed to the merits"). Here, the questions of whether *Crimen* was, in form and practice, a mandatory policy or regulation that compelled the Bishops to impose strict secrecy in response to allegations of clergy-on-child sexual abuse are factually intensive and go to the heart of the Holy See's liability for negligence. (*See* A 48-50). The factual dispute arising from application of the FSIA's discretionary function exclusion is thus intertwined with the merits, and cannot be resolved at the beginning stage of the proceeding.

III. RESOLUTION OF THE DISPUTE DOES NOT REQUIRE INTERPRETATION OF RELIGIOUS DOCTRINE

The Holy See asserts that resolving the question of whether *Crimen* was a mandatory policy or regulation "would require this Court to resolve questions of internal canonical legislation," citing to *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709 (1976). (Brief in Opp., pp. 34-35). The Holy See's argument, however, fails to recognize the difference between a third-party tort claim applying neutral negligence principles, such as that before the Court, and intra-church disputes. *See Serbian Eastern Orthodox*, 426 U.S. at 718 (intra-church employment dispute); *Jones v. Wolf*, 443 U.S. 595, 605-06 (1979) (holding that the free exercise clause is not implicated in church property dispute where "neutral

principles" of law are applied). In *Martinelli v. Bridgeport Roman Catholic Diocesan Corp.*, 196 F.3d 409 (2d Cir. 1999), the Court held that "[t]he First Amendment does not prevent courts from deciding secular civil disputes involving religious institutions when and for the reason that they require reference to religious matters." *Id.* at 431. The claims brought by Plaintiffs—particularly the determination of whether *Crimen* imposes a mandatory policy or regulation—require only the application of neutral principles of law, and do not purport to seek the exegesis of religious writings. The First Amendment, accordingly, does not apply to prevent this Court from addressing the question of subject matter jurisdiction under the FSIA that is raised in the Second Circuit's *Blecher* decision.

IV. THE HOLY SEE'S INDEPENDENT GROUNDS FOR AFFIRMANCE ARE INSUFFICIENT

Respondent asserts alternative grounds for affirmance, including the FSIA's misrepresentation exclusion; the "entire tort" rule; the failure to establish causation; and whether the Bishops are "officials or employees" of the Holy See. None of these grounds are meritorious, at least at the pleadings stage, nor do they detract from the reasons for granting certiorari.

1. The Misrepresentation Exclusion

The misrepresentation exclusion, 28 U.S.C. § 1605(a)(5)(B), applies to any claim arising out of, *inter alia*, "misrepresentation" and "deceit." Defendant asserts that this exception is applicable here because the Amended Complaint alleges a failure to warn or report. (Brief in

Opp., p. 35). However, the claims based on the Holy See's strict secrecy policy cannot be characterized as arising out of misrepresentation or deceit. "[T]he essence of an action for misrepresentation, whether negligent or intentional, is the communication of misinformation on which the recipient relies." *Block v. Neal*, 460 U.S. 289, 296 (1983). The allegations in this case do not concern misstatements or misinformation relied upon by Petitioners. Rather, the alleged mandatory secrecy policy governed and controlled the internal activities and operations of the Bishops, resulting in foreseeable injuries to Petitioners from clergy-on-child sexual abuse. The Court looks to the "gravamen of the action" to determine if it is one for misrepresentation. *Id*. The Holy See's argument for application of the misrepresentation exception was rejected in *O'Bryan*. 556 F.3d at 388 ("plaintiffs' claims are not best characterized as stemming directly from the misinformation disseminated by the Holy See[;] [i]nstead, plaintiffs' claims are more akin to claims of negligent supervision as employees of the Holy See are alleged to have provided inadequate supervision over those under its care").[3]

2. The "Entire Tort" Rule

Defendant contends that "*Crimen* was promulgated in Vatican City, not the United States," and thus the tort did not occur in the United States. *See* 28 U.S.C. § 1605(a)(5); Brief in Opp., p. 36). In *O'Bryan*, the Court applied

3. The reach of the misrepresentation exception is generally limited to the contours of the common law tort of misrepresentation and deceit, which requires statements inducing justifiable reliance. *See United States v. Neustadt*, 366 U.S. 696, 711 n. 26 (1961).

the "entire tort" rule, noting that "plaintiffs' claims are not based solely on the conduct of the Holy See itself … ." *Id.* at 386. Because the plaintiffs in *O'Bryan* alleged that the bishops committed the alleged tortious acts in supervising the offending priests, the entire tort occurred in the United States. *Id.*

This is not a case where the plaintiffs' allegations demonstrate only that a policy adopted or enacted by a foreign sovereign caused their injuries to occur in the United States. *Compare Democratic Nat'l Comm. v. Russian Federation*, 392 F. Supp. 3d 410, 427-28 (S.D.N.Y. 2019) (cyberattack of the plaintiff's computer network from computers in Russia. Rather, the Amended Complaint alleges specifically that "[t]he mandatory secrecy policy of the Holy See was established, implemented and enforced entirely in the United States through the Holy See's agents and employees, the Bishops."[4] (A 40,¶ 75; *see also* A 31-36 [alleging details of agency relationship]). It is the Bishops' local implementation of their employer's policy in supervising abuser priests that gives rise to the tort claims at issue. *O'Bryan*, 556 F.3d at 386.

3. Causation

Consistent with tort law generally, the FSIA's non-commercial tort exception requires that the personal injury alleged be "caused by the tortious act or omission" of the foreign state or any official or employee of the foreign

4. The Amended Complaint further alleges, *inter alia*, that the Bishops conduct the activities of the Catholic Church in their respective territories "under the direction and complete, plenary control of the Holy See." (A 32, ¶¶ 46-47).

state. 28 U.S.C. § 1605(a)(5). The Holy See argues that the Petitioners allege an attenuated causal chain. The district court disagreed, holding that "[t]he amended complaint contains ample well-pleaded allegations of alleged sexual abuse traceable to the alleged negligence of supervising clergy and the Archbishop [citations to record]." (56a). Issues of causation are generally fact intensive and not susceptible to disposition at the pleading stage as a matter of law. *See O'Connor v. Boeing North American, Inc.*, 311 F.3d 1139, 1153 (9th Cir. 2002). (See A 41-42 [allegations in Amended Complaint relevant to causation]. Here, clergy sexual abuse and resulting injuries constitute a common-sense and direct consequence of a mandatory secrecy policy concerned with protecting clergy from scandal instead of protecting children from foreseeable grievous abuse.

4. The "Official or Employee" Requirement

In relevant part, the non-commercial tort exception to the FSIA, 28 U.S.C. § 1605(a)(5), applies to the tortious act or omission of any "official or employee" of the foreign state. The Amended Complaint alleges that the Bishops were officials or employees of the Holy See. The Holy See argues that this "employment premise" is flawed. (Brief in Opp., pp. 32-33). This argument, however, ignores the detailed allegations of the Amended Complaint setting forth the hierarchical structure of the Roman Catholic Church in which the Holy See maintains plenary control over the Bishops, amply demonstrating the status of Bishops as its "officials or employees." (A 31-36, 43-60, ¶¶43-60, 75-76). The district court considered the issue and determined that the Amended Complaint alleges an employment relationship based on the broad test for

employment under New York law.[5] (55a ["[t]he amended complaint alleges facts demonstrating a right of control consistent with New York law that are sufficient to satisfy the plausibility standard for pleading"]). There is no basis for the Holy See's surmise that Petitioners will not prevail in proving the Bishops' employment status.

5. The Amended Complaint also alleges that the Bishops are "officials" of the Holy See. (A 41, ¶ 76). Expert Thomas Doyle, who is invoked in the Holy See's opposition, factually supports this position in his Declaration. (SA 18-19, ¶¶ 30-31).

CONCLUSION

For the reasons set forth above and in the Petition, a writ of certiorari should be granted. The issue of whether the discretionary function exclusion under the FSIA may be avoided by compliance with a mandatory policy needs resolution by this Court, particularly given the conflict with *O'Bryan*. The Petitioners should be provided the opportunity for justice and allowed to pursue their claims against the Holy See for its *Crimen* policy causing rampant clergy-on-child sexual abuse.

Respectfully submitted,

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