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Obama administration sides with Vatican in Oregon case

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tIn a strongly worded brief for the United States Supreme Court, the Obama administration has sided with the Vatican in an Oregon lawsuit that names the Holy See as a defendant for its role in the sexual abuse crisis.

tIn effect, the brief asserts that the standards for an exception to the immunity that foreign governments enjoy under American law have not been met in the Oregon case.

tFiled on Friday, the brief stops short of recommending that the Supreme Court directly take up the case of *Doe v. Holy See*, originally filed in federal district court in Oregon in 2002. Instead, it suggests that the Supreme Court set aside the 2009 ruling of an appeals court that allowed the case to go forward, sending it back for further consideration.

tExperts say this is the first time the United States government has officially expressed an opinion about efforts to sue the Vatican in American courts, as opposed to the pope personally. In 2005, the U.S. State Department recommended dismissing Pope Benedict XVI from a Texas lawsuit over the sexual abuse crisis, on the basis of a separate personal guarantee of immunity enjoyed by heads of state. The judge in that case complied.

tFriday?s brief was filed by the Acting Solicitor General of the United States, the top deputy to Supreme Court nominee Elana Kagan, as well as by officials from the Attorney General?s office and the State Department.

tThe brief asserts that the Court of Appeals for the Ninth Circuit made a mistake in ruling that a district court in Oregon has jurisdiction over the claim that the Vatican is liable for sexual abuse committed by Catholic priests.

tThough the legal fine points are complicated, the Obama administration?s brief makes a distinction between two questions:

?tThe jurisdictional standards for suing a foreign government under the 1976 Foreign Sovereign Immunities Act;
?tThe liability standards for holding an employer responsible for damages caused by an employee under Oregon law.

Essentially, the brief argues that before a court can even consider the second question, it has to resolve the first ? and that in the case of the suit against the Vatican, the standards for overcoming sovereign immunity have not been met.

The brief does not address the substantive question of whether Catholic priests are actually Vatican ?employees? for purposes of American civil law.

The Foreign Sovereign Immunities Act recognizes the general immunity of foreign governments to being sued in American courts, but also lays out nine exceptions, including the ?tort exception? invoked in the Oregon case. It holds that a government can be sued for harms caused by its employees and agents in the course of

performing duties within the scope of their employment.

In the *Doe v. Holy See* case, a district court found that sexual abuse of a minor is clearly outside the scope of employment of a Catholic priest, meaning the things a priest is supposed to do on behalf of the church. Nevertheless, Oregon law also recognizes liability if the acts that led up to a harm being caused do fall within the scope of employment. Under that principle, church officials could be held liable if a priest?s normal pastoral activity created the conditions in which he was able to commit an act of sexual abuse.

On that basis, both the district court and the appeals court ruled that the lawsuit against the Vatican could proceed.

The Solicitor General?s brief, however, asserts that the courts are mistaken. The broader liability standard under Oregon law, the brief says, only applies if the court has jurisdiction in the first place ? and, according to the brief, the tort exception to the Foreign Sovereign Immunities Act requires that the wrongdoing fall within the scope of employment.

?A court may not use a state liability rule to expand the grounds on which the Foreign Sovereign Immunities Act permits the court to exercise jurisdiction over a foreign sovereign,? the brief says.

The brief asks the Supreme Court to make clear that an exception to the normal presumption of immunity applies ?only if the tort itself was committed by the employee while acting within the scope of his office or employment.?

In general, the brief argues that exceptions to sovereign immunity ought to be narrowly construed, not expanded beyond the limits intended by Congress.

?Improperly subjecting a foreign state to suit can in some circumstances raise foreign relations and reciprocity concerns,? the brief asserts.

Observers say that Lena may file a response to the Solicitor General?s brief, arguing that its legal analysis supports stronger action from the Supreme Court than simply sending the case back to the appeals court for reconsideration. Lena could ask that the Supreme Court dismiss the case entirely.

If the case survives that challenge, the next step may be for the district court in Oregon to consider requests from plaintiff?s lawyers to depose top Vatican officials and to request access to Vatican records. Observers say that the district court judge in Oregon has seemed more inclined to support broad requests for depositions of Vatican officials than the judge in the *O?Bryan v. Holy See* case in Kentucky, another instance of the Vatican being sued for its role in the sexual abuse crisis.

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