Nos. 07-5078, 07-5163

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES H. O'BRYAN et al.,

Plaintiffs-Appellees/Cross-Appellants,

v.

HOLY SEE,

Defendant-Appellant/Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

FINAL BRIEF FOR THE UNITED STATES AS INTERVENOR AND AMICUS CURIAE SUPPORTING THE DEFENDANT

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The United States requests oral argument, which it believes will be helpful to the Court.

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The United States files this brief as intervenor under 28 U.S.C. § 2403 and as amicus curiae under 28 U.S.C. § 517 and Federal Rule of Appellate Procedure 29(a). As explained below, we argue that the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1330, 1601–1611, governs here, and that the FSIA is constitutional as applied to the defendant Holy See. The United States takes no position regarding the merits of plaintiffs' underlying suit against the Holy See. The United States also takes

no position on the applicability of the exceptions to immunity stated in the FSIA to plaintiffs' various claims.

JURISDICTIONAL STATEMENT

Plaintiffs-appellees asserted jurisdiction under 28 U.S.C. §§ 1330, 1331, 1332, and 1367. (R. 1, Compl. pp. 4–9, Apx. pp. 14–19.) On October 6, 2005, the district court held that the Holy See can be sued, if at all, only under an exception to foreign sovereign immunity established by the FSIA. (R. 39, Mem. Op. pp. 3–5, Apx. pp. 194–198.) On January 10, 2007, the district court held that some of plaintiffs' claims against the Holy See come within an FSIA exception to foreign sovereign immunity. (R. 82, Mem. Op., Apx. pp. 81–100.) The Holy See filed a timely notice of appeal on January 17, 2007. (R. 85, Notice of Appeal, Apx. p. 101.) This Court has jurisdiction over the Holy See's appeal under the collateral order doctrine. *See Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 815 (6th Cir. 2002). Plaintiffs filed a timely notice of cross-appeal on February 8, 2007. (R. 88, Notice of Cross-Appeal.)

STATEMENT OF THE ISSUES

This appeal challenges the Holy See's entitlement to immunity under the FSIA, as well as the constitutionality of the FSIA as it applies to the Holy See. The United States will address the following questions:

1. Whether plaintiffs may sue the Holy See outside the FSIA because of the Holy See's function as the head of the Roman Catholic Church;

2. Whether plaintiffs' arguments that the FSIA, as applied to the Holy See, violates the Constitution can properly be raised in this interlocutory appeal;

3. Whether the FSIA violates the Establishment Clause or the Due Process Clause of the Constitution or violates plaintiffs' constitutional right to a jury trial, insofar as it immunizes the Holy See from suit in U.S. courts.

STATEMENT OF THE CASE

Plaintiffs allege sexual abuse by Catholic priests in the United States. They filed this putative class action against the Holy See, alleging that the Holy See imposed a policy of secrecy concerning incidents of childhood sexual abuse and failed to take steps to prevent further abuse or to punish the offending priests. (R. 1, Compl. pp. 20–30, 32–41, Apx. pp. 30–40, 42–51.) Although the Holy See is recognized by the Executive Branch as a foreign sovereign, plaintiffs sought to avoid the limitations imposed by the FSIA by suing the Holy See both as a foreign state and in its capacity as the head of the Roman Catholic Church. (R. 1, Compl. p. 1, Apx. p. 11.) The district court held that the Holy See can be sued, if at all, only under the FSIA. (R. 39, Mem. Op. pp. 3–4, Apx. pp. 196–97). The district court further held that, although some of plaintiffs' claims are barred by the FSIA, others are not. (R. 82,

Mem. Op. p. 1, Apx. p. 81.) The Holy See appealed the district court's determination that it is not fully immune from suit under the FSIA. Plaintiffs cross-appealed the district court's decision that they may sue the Holy See only under the FSIA and that some of their claims are barred under that statute.

STATEMENT OF THE FACTS

I. The Foreign Sovereign Immunities Act

The FSIA provides that U.S. district courts have jurisdiction over a civil action against a "foreign state" for claims "with respect to which the foreign state is not entitled to immunity" under the FSIA or international agreements. 28 U.S.C. § 1330(a). "Foreign state" is defined in the statute only as "includ[ing] a political subdivision of a foreign state or an agency or instrumentality of a foreign state." *Id.* § 1603(a). Thus, the statutory definition does not provide any details as to what type of entity is covered by the statute at the outset.

The FSIA further provides that, subject to international agreements, "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except [as the statute otherwise provides]." *Id.* § 1604. The statute then sets out exceptions to immunity, including those for certain commercial and tortious activities. *Id.* §§ 1605–1607.

II. The Executive Branch's Recognition of the Holy See

For over one thousand years, as sovereigns of the Papal States, popes of the Roman Catholic Church have exercised secular authority over portions of the Italian peninsula. Bureau of European & Eurasian Affairs, Dep't of State, Background Note: Holy See (May 2007), *available at* http://www.state.gov/r/pa/ei/bgn/3819.htm. In the mid-nineteenth century, the Kingdom of Italy seized most of the Papal States and eventually seized the Pope's remaining territory by fully annexing Rome, including the Vatican. *Ibid.*

In 1929, the Kingdom of Italy signed the Lateran Pacts with the Holy See. Those agreements recognized the independence and sovereignty of the Holy See and created the State of Vatican City "to provide a territorial identity for the Holy See in Rome." *Ibid.* As the State Department has explained, "[t]he Pope exercises supreme legislative, executive, and judicial power over the Holy See and the State of the Vatican City." *Ibid.* In addition to its secular authority, the Holy See also exercises religious authority, as the "'central government' of the Roman Catholic Church." *Ibid.*

Almost from its founding, the United States has recognized the Pope's temporal power. Again according to the State Department, "[t]he United States maintained consular relations with the Papal States from 1797 to 1870 and diplomatic relations

with the Pope, in his capacity as head of the Papal States, from 1848 to 1868, though not at the ambassadorial level." *Ibid.*

From 1870 to 1984, the United States did not have formal diplomatic relations with the Holy See. *Ibid.* However, between 1939 and 1984, several Presidents designated "personal envoys to visit the Holy See periodically for discussions of international humanitarian and political issues." *Ibid.* On January 10, 1984, the Executive Branch announced formal diplomatic relations with the Holy See "at the level of an embassy on the part of the United States and of a nunciature on the part of the Holy See." Dep't of State, 1 Cum. Digest of U.S. Practice in Int'l Law, 1981–1988, at 894 (1993). That same day, President Reagan nominated an ambassador to the Holy See. *Ibid.* The Senate confirmed the nominee two months later. *Id.* at 895. The United States has continuously maintained diplomatic relations with the Holy See since then.

Significantly for this case, on the day the United States announced formal diplomatic relations with the Holy See, a State Department spokesman explained that the Executive Branch's purpose was to "upgrad[e] that relationship so that our relationship with the Holy See, the government of a sovereign city-state, will conform to the relationship we have with other countries, and, indeed, will conform to the relationship that most other countries have with the Holy See." Dep't of State, Daily

Press Briefing, at 8 (Jan. 10, 1984)[1]; *cf.* Restatement (Third) of Foreign Relations Law § 201, reporter's note 7 (1987) ("The Vatican (an entity whose territory is surrounded by Italy) is generally accepted as a state, and the Holy See (the central administration of the Catholic Church) as its government.").

The State Department describes the United States' relations with the Holy See as follows: "Establishment of diplomatic relations has bolstered the frequent contact and consultation between the United States and the Holy See on many important international issues of mutual interest. The commitment to human dignity at the core of both the U.S. and Holy See approach to the world gives rise to a common agenda for action to promote religious freedom, justice, religious and ethnic tolerance, liberty, respect for women and children and for the rule of law. The relationship is best characterized as an active global partnership for human dignity." Background Note: Holy See.

III. The Proceedings Below

The plaintiffs in this case have filed this action against the Holy See. As noted above, plaintiffs allege that the Holy See imposed a policy of secrecy concerning incidents of childhood sexual abuse and failed to take steps to prevent further abuse

[1] We have attached the State Department Daily Press Briefing as an addendum to this brief, for the Court's convenience.

or to punish the offending priests. (R. 1, Compl. pp. 20–30, 32–41, Apx. pp. 30–40, 42–51.) Plaintiffs seek both injunctive relief and damages. (R. 1, Compl. pp. 31, 42, Apx. pp. 41, 52.)

The complaint sues the Holy See in its capacity as a foreign state and also in its capacity as an "Unincorporated Association and Head of an International Religious Organization." (R. 1, Compl. p. 1, Apx. p. 11.) The Holy See moved to dismiss, pressing, among other arguments, that its sovereign status is a non-justiciable political question and that, accordingly, plaintiffs' claims against it as an unincorporated association must be dismissed. (R. 29, Mem. in Supp. of Mot. to Dismiss pp. 6–14, Apx. pp. 123–131.) The Holy See also argued that it is entitled to foreign sovereign immunity under the FSIA, and that no exception to immunity applies to plaintiffs' claims. (R. 28, Mem. in Supp. of Mot. to Dismiss.)

In response, plaintiffs observed that the United States did not establish formal diplomatic relations with the Holy See until January 1984. They argued that, because all of their claims concern conduct occurring before 1984, the Holy See may not rely on the immunity afforded by the FSIA. (R. 34, Resp. to Mot. to Dismiss.) Plaintiffs further argued that, because the Holy See is also the head of the Roman Catholic Church, it has a status independent of its statehood and can be sued in that separate capacity outside the terms of the FSIA. (*Ibid.*)

The district court rejected plaintiffs' arguments and held that the Holy See is a foreign government recognized by the United States, and therefore can be sued only under applicable exceptions in the FSIA. First, the court noted that the Executive Branch "has recognized the Holy See as a foreign sovereign since January 10, 1984." (R. 39, Mem. Op. p. 3, Apx. p. 196.) Next, the court observed that it is "well established" that the Executive's authority to recognize a foreign sovereign cannot be reviewed by any court. (*Ibid.* (citing *Ams. United for Separation of Church & State v. Reagan*, 786 F.2d 194, 201–02 (3d Cir. 1986)).)

The district court further held that the FSIA "is retroactive and applies to actions of foreign sovereigns prior to the passage of the FSIA." (*Ibid.* (citing *Republic of Austria v. Altmann*, 541 U.S. 677 (2004)).) Finally, the district court rejected plaintiffs' argument that the Holy See could be sued outside of the FSIA, in virtue of its "non-sovereign function" as the head of the Roman Catholic Church, because recognizing such an exception "would entirely defeat the purposes of the FSIA" by permitting plaintiffs "to skirt the requirements of the FSIA merely by claiming that a sovereign was not acting as a sovereign in the 'context' of a particular case, but rather was acting in some other 'capacity.'" (*Ibid.*); *see Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989) ("[T]he FSIA provides the sole basis for obtaining jurisdiction over a foreign state in federal court.").

In a separate opinion, the district court considered whether plaintiffs could assert their claims under any FSIA exception to immunity. It rejected plaintiffs' arguments that the Holy See had waived its sovereign immunity and that plaintiffs' claims came within the FSIA's commercial activity exception. (R. 82, Mem. Op. pp. 4–6, Apx. pp. 84–86.) The district court also held that, while some of plaintiffs' claims do not come within the FSIA's tortious activities exception, others do and so can be pursued. (R. 82, Mem. Op. pp. 7–15, Apx. pp. 87–95.)

IV. Plaintiffs' Arguments on Appeal

The Holy See appealed the district court's determination that plaintiffs' claims concerning the alleged torts by U.S. clergy came within the tortious activities exception. *See Keller*, 277 F.3d at 815 ("[T]he denial of a claim of [foreign] sovereign immunity is immediately appealable under the collateral order doctrine.").

On appeal, plaintiffs contest the district court's holding that the Holy See may not be sued outside of the FSIA, its determination that plaintiffs' claims do not come within the statute's commercial activity exception, and its determination that some of plaintiffs' claims are not covered by the tortious activity exception.

As to whether the FSIA provides the sole basis for suit against the Holy See, plaintiffs emphasize that the Holy See has two distinct capacities "as a foreign state (State of Vatican City), and as the unincorporated head of an international religious

organization." Pls.' Answering/X-Opening Br. 19. Plaintiffs acknowledge that recognition of a government as representative of a foreign sovereign state is a non-justiciable political question. *Id.* at 19. But they point out that "Congress' stated purpose in enacting the FSIA was to place determinations regarding the immunity of foreign states squarely and solely with the courts." *Ibid.* For this reason, they argue, the Executive's establishment of diplomatic relations with the Holy See does not foreclose judicial determination of whether the Holy See is entitled to the immunities afforded by the FSIA. *Id.* at 19–20.

Plaintiffs urge this Court to hold that, while the "Holy See, as State of the Vatican" meets the Restatement standard for a "foreign state," the Holy See "as the head of the Roman Catholic Church" does not. *Id.* at 21; *see* Restatement § 201 ("Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities."). Plaintiffs accordingly contend that this Court should hold that the Holy See, because it is the head of the Roman Catholic Church, is subject to suit outside the FSIA. Pls.' Answering/X-Opening Br. 22.

Plaintiffs further argue that, if the FSIA is construed to limit a party's ability to sue the Holy See, then the FSIA violates the Constitution's Establishment Clause.

Relying on the Supreme Court's decision in *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994), and that Court's more recent Establishment Clause cases involving government aid programs (*e.g., Zelman v. Simmons-Harris*, 536 U.S. 639 (2002)), plaintiffs argue that the Establishment Clause requires the U.S. Government to "pursue a course of neutrality which favors neither one religion over another, nor favors religion generally to non-religion." Pls.' Answering/X-Opening Br. 23. In addition, they argue, a statute must not have the effect of advancing or inhibiting religion. *Id.* at 24.

Granting the Holy See foreign sovereign immunity violates these principles, plaintiffs contend: "Immunization of the Holy See due to the federal government's establishment of diplomatic relations with it is a blatant 'special favor' that benefits one, and only one, religion: the Roman Catholic Church. This special treatment impacts, among other things, what claims the Plaintiffs may pursue, what they must prove to prevail on those claims, and whether those claims will be adjudicated by a court or a jury." *Id.* at 25.

In a few brief sentences, plaintiffs also contend that application of the FSIA to the Holy See violates plaintiffs' due process rights by limiting the claims they can assert, and violates their constitutional right to a jury trial because the FSIA provides only for non-jury trials. *Id.* at 26.

Finally, plaintiffs argue that, because the FSIA cannot constitutionally immunize the Holy See in its capacity as the head of an international religious organization, it also cannot be used to immunize the Holy See as a foreign state, because the Holy See's two capacities are "inextricable." *Ibid.*

V. The United States' Intervention

Because plaintiffs' argument calls into question the constitutionality of an Act of Congress, on July 13, 2007, this Court's Chief Deputy Clerk sent notice to the Department of Justice to provide the Government an opportunity to intervene to defend the constitutionality of the statute. *See* 28 U.S.C. § 2403(a) (authorizing the United States to intervene in any case, "hav[ing] all the rights of a party," to defend the constitutionality of an Act of Congress). Concurrent with the filing of this brief, the United States has filed a notice, exercising its intervention right.[2]

SUMMARY OF ARGUMENT

I. Although plaintiffs acknowledge that the Holy See is a foreign government recognized by the Executive Branch, they nonetheless argue that they may sue this entity outside the FSIA because the Holy See is also the head of the Roman Catholic

[2] In this brief, the United States addresses as an intervenor plaintiffs' argument that the FSIA is unconstitutional insofar as it immunizes the FSIA from suit. As amicus curiae, the United States addresses plaintiffs' argument that this Court may construe the FSIA not to apply to the Holy See, insofar as the Holy See is sued as the head of the Roman Catholic Church.

Church. That argument is mistaken. Congress enacted the FSIA to establish a comprehensive scheme governing suits against foreign sovereigns in U.S. courts. That scheme establishes a general principle of foreign sovereign immunity, with specified exceptions to that immunity. In addition, the FSIA creates various procedural rules, inapplicable to private litigants, that apply to foreign sovereigns even when they are subject to suit.

The Supreme Court has recognized that Congress intended the FSIA to be the sole basis for obtaining jurisdiction in civil cases against a foreign sovereign. Plaintiffs' argument that the Holy See can be sued outside the FSIA for its non-sovereign acts contradicts Congress' purpose. Plaintiffs incorrectly ask this Court to upend Congress' determination that foreign sovereigns are immune from civil suits unless the FSIA itself provides an exception. Moreover, their position would deprive the Holy See of the many procedural protections afforded by the FSIA to foreign sovereigns.

Plaintiffs also urge the Court to disregard the Executive Branch's recognition of the Holy See and to instead apply the "Restatement standard" to determine whether the Holy See, as the head of the Roman Catholic Church, qualifies as a foreign state. But binding judicial precedent — and the Restatement — uniformly establish that the recognition of a foreign sovereign is a uniquely Executive prerogative under the Constitution. For that reason, any issue of an entity's status as

a foreign sovereign is a nonjusticiable political question. Accordingly, because the Executive Branch accepts the Holy See as a foreign government, the only permissible inquiry for the Court is whether the plaintiffs' claims come within FSIA exceptions.

II. Plaintiffs further argue that granting the Holy See immunity from suit under the FSIA violates the Establishment Clause, Due Process Clause, and plaintiffs' Seventh Amendment right to a trial by jury. This Court should not consider plaintiffs' constitutional challenges at this time because they were not raised in the district court when plaintiffs challenged the applicability of the FSIA to the Holy See. Accordingly, the district court has not ruled on them.

III. Should the Court choose to address plaintiffs' constitutional arguments, it should reject them.

It is unclear whether plaintiffs direct their Establishment Clause challenge solely toward the application of the FSIA to the Holy See, or also toward the Executive Branch's recognition of the Holy See as a foreign government. The latter challenge is foreclosed because, as already discussed, the Executive Branch's recognition decisions are nonjusticiable, even when plaintiffs assert constitutional claims.

Plaintiffs' challenge to the application of the FSIA fares no better. Under this Court's precedent, government action violates the Establishment Clause: (1) if the

government acts with the predominant purpose of advancing religion; (2) if it acts in a manner that a reasonable person would view as endorsing religion; or (3) if it fosters excessive government entanglement with religion.

Plaintiffs do not argue that Congress enacted the FSIA to advance religion, and Congress' purpose — to codify a restrictive theory of foreign sovereign immunity — is manifestly secular. Plaintiffs do argue that application of the FSIA to the Holy See has the effect of advancing religion. But no reasonable observer, knowing the context and history of the FSIA, the Holy See's secular authority, and the United States' diplomatic relations with the Holy See, could conclude that application of the FSIA to the Holy See is an endorsement of the Roman Catholic Church by the U.S. Government. And recognition of the Holy See's immunity under the FSIA does not foster an excessive entanglement with religion; it merely affords the Holy See the same immunity granted to every other foreign sovereign recognized by the Executive Branch, even ones tied intimately to a particular religion (such as Norway, Israel, and Saudi Arabia).

Plaintiffs' remaining constitutional arguments also lack merit. This Court's precedent (and the precedent of six other courts of appeals) forecloses plaintiffs' argument that the FSIA improperly deprives them of their right to a jury trial under the Seventh Amendment. And Congress' decision to condition the district court's

subject matter jurisdiction over claims against foreign sovereigns on an FSIA exception is an ordinary exercise of Congress' constitutional authority to define the jurisdiction of the lower courts. There is no authority for the proposition that the Due Process Clause requires Congress to establish jurisdiction in the lower federal courts to hear any particular claims against foreign sovereigns.

STANDARD OF REVIEW

Whether the district court has jurisdiction over plaintiffs' claims against the Holy See other than that provided by the FSIA is a legal question this Court reviews de novo. *See, e.g., Keller*, 277 F.3d at 815. If it addresses the matter, this Court will review in the first instance whether the FSIA is unconstitutional as applied to the Holy See, given the plaintiffs' failure to raise this argument below.

ARGUMENT

I. The Holy See's Immunity, Like that of Other Foreign Sovereigns, Is Governed by the FSIA, Regardless of the Nature of the Particular Activity Challenged.

A. The FSIA Is the Sole Basis for Obtaining Civil Jurisdiction over a Foreign Sovereign State in a U.S. Court.

Significantly, plaintiffs acknowledge that "the Holy See is *both* church *and* state" (Pls.' Answering/X-Opening Br. 17), that "operates in two distinct but *inextricable* capacities" (*id.* at 26 (emphasis added)). Thus, plaintiffs concede that, in a suit

against the Holy See, there is no separate legal entity that can be sued independently of the state.[3] Nevertheless, plaintiffs argue that they may sue the Holy See outside of the FSIA because, when it acts as head of the Roman Catholic Church, the Holy See does not act as a foreign sovereign. *Id.* at 21. They identify 28 U.S.C. §§ 1331 (federal question jurisdiction), 1332 (diversity jurisdiction), and 1367 (supplemental jurisdiction) as the jurisdictional bases for their claims against the Holy See in its capacity as the head of the Roman Catholic Church. *Id.* at 1. Plaintiffs fundamentally misunderstand the operation of the FSIA and the limitations Congress imposed on U.S. courts' jurisdiction to entertain suits against foreign sovereigns.

Until 1952, the United States adhered to an "absolute" theory of foreign sovereign immunity, "under which a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign." *Permanent Mission of India to the U.N. v. City of N.Y.*, 127 S. Ct. 2352, 2356 (2007). In 1952, the Department of State announced the adoption of the "restrictive" theory of foreign sovereign immunity. *See*

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[3] To be precise, the Holy See is not a foreign state. It is the government of the State of Vatican City, as we have explained above. However, the distinction is irrelevant for purposes of the FSIA, because "a State acts only by its legislative, executive, or judicial authorities." *Pulliam v. Allen*, 466 U.S. 522, 541 (1984); *see, e.g., Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992) (holding that FSIA commercial activity exception applies "when a *foreign government* acts, not as regulator of a market, but in the manner of a private player within it" (emphasis added)). As a foreign government, the Holy See is as much an integral part of the State of Vatican City as the U.S. Government is a part of the United States.

Letter from Jack B. Tate, Acting Legal Adviser, to Philip B. Perlman, Acting Att'y Gen. (May 19, 1952) (Tate Letter), *reprinted in Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711 (1976) (App. 2 to opinion of the Court). The United States thereby joined the majority of other countries by adopting the restrictive theory of sovereign immunity, under which "the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*)." *Permanent Mission of India*, 127 S. Ct. at 2357.

In 1976, Congress enacted the FSIA to establish a "comprehensive scheme" governing the manner by which "foreign sovereigns may be held liable in a court in the United States." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 496–97 (1983). The FSIA codifies the restrictive theory of sovereign immunity, allowing foreign states to be sued for their non-sovereign activities. *Permanent Mission of India*, 127 S. Ct. at 2357. The statute establishes the general rule that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided" by the act. 28 U.S.C. § 1604. It then provides the specific circumstances in which foreign states may be sued for certain non-sovereign acts, principally involving commercial and tortious activities. 28 U.S.C. §§ 1605–1607; *see Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543, 1551 (D.C. Cir. 1987)

(foreign state not immune under the FSIA "when it acts in an essentially private rather than sovereign capacity").

In addition to establishing the immunity to suit of foreign sovereigns and enumerating the exceptions to that immunity, the FSIA provides a variety of other protections for foreign sovereigns. Thus, it establishes the "exclusive procedures for service on a foreign state" (H.R. Rep. 94-1487, at 23 (1976); *see* 28 U.S.C. § 1608(a)), requires plaintiffs to establish a "right to relief by evidence satisfactory to the court" prior to entry of a default judgment (28 U.S.C. § 1608(e)), and limits plaintiffs' right to execute against the property of a foreign sovereign in aid of execution on a judgment (*id*. §§ 1609–1611). The FSIA also amended the removal statute to permit a foreign sovereign to remove to a federal court any action against it in state court, "even if there are multiple defendants and some of these defendants desire not to remove the action or are citizens of the States in which the action has been brought." H.R. Rep. 94-1487, at 32; *see* 28 U.S.C. § 1441(d); *cf. Harper v. AutoAlliance Int'l, Inc*, 392 F.3d 195, 201 (6th Cir. 2004) (removal generally requires consent of all defendants). And where a foreign state is subject to suit under an FSIA exception, the statute provides a right to a trial by a judge. 28 U.S.C. § 1330(a).

The Supreme Court has recognized that the "text and structure of the FSIA demonstrate Congress' intention that the FSIA be the sole basis for obtaining

jurisdiction over a foreign state in our courts." *Amerada Hess*, 488 U.S. at 434. Like the plaintiffs here, the plaintiffs in *Amerada Hess* argued that they could sue a foreign sovereign outside the FSIA. There, the plaintiffs invoked the district court's jurisdiction under the Alien Tort Statute (ATS). *Amerada Hess*, 488 U.S. at 432; *see* 28 U.S.C. § 1350 ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."). The court of appeals held that the district court retained ATS jurisdiction over foreign sovereigns, despite Congress' enactment of the FSIA, because Congress had failed to repeal the ATS. *Amerada Hess*, 488 U.S. at 435.

The Supreme Court decisively rejected that view, explaining that:

> [i]n light of the comprehensiveness of the statutory scheme in the FSIA, we doubt that even the most meticulous draftsman would have concluded that Congress also needed to amend *pro tanto* the Alien Tort Statute and presumably such other grants of subject-matter jurisdiction in Title 28 as § 1331 (federal question), § 1333 (admiralty), § 1335 (interpleader), § 1337 (commerce and antitrust), and § 1338 (patents, copyrights, and trademarks). Congress provided in the FSIA that "[c]laims of foreign states to immunity should *henceforth* be decided by courts of the United States in conformity with the principles set forth in this chapter," and very likely it thought that should be sufficient. § 1602 (emphasis added).

Id. at 437–38 (footnote omitted). Referring specifically to the diversity statute on which plaintiffs here partially rely, the Supreme Court explained that the "FSIA amended the diversity statute to delete references to suits in which a 'foreign stat[e]'

is a party" as a defendant, because, "'[s]ince jurisdiction in actions against foreign states is comprehensively treated by the new section 1330, a similar jurisdictional basis under section 1332 becomes superfluous.'" *Id.* at 438 n.5 (quoting H.R. Rep. No. 94-1487, at 14 (1976)). Thus, the Supreme Court has unambiguously held that the FSIA provides the sole basis for civil suits against foreign sovereigns in U.S. courts.

Moreover, as the district court properly determined, plaintiffs' argument that the Holy See can be sued outside the FSIA because of its "non-sovereign function" as the head of the Roman Catholic Church "would entirely defeat the purpose of the FSIA." (R. 39, Mem. Op. p. 4, Apx. p. 197.) Under plaintiffs' theory, even though it is a recognized foreign sovereign, the Holy See would not enjoy "immun[ity] from the jurisdiction of the courts of the United States and of the States except as provided" by the FSIA. 28 U.S.C. § 1604. And as we have noted, in the FSIA, Congress addressed the issue of foreign sovereigns acting in a non-sovereign "capacity" by depriving the foreign sovereign of immunity for certain acts. But even in those instances where immunity is denied, the foreign sovereign retains its entitlement to the procedural protections of the FSIA, such as the service procedures, limitations on default judgments, limitations on attachment, the right to remove, and the right to a bench trial (noted above). Plaintiffs' theory would deprive the Holy See of these protections. In short, plaintiffs' view would place a recognized foreign sovereign in the

identical position as any other private litigant in suits involving the foreign state's "non-sovereign functions." That result is clearly *not* what Congress legislated in the FSIA. If it were, Congress would not have required those protections in suits permitted to go forward against foreign sovereigns under the exceptions to immunity.

Thus, the text, structure, and purpose of the FSIA make clear that a foreign sovereign such as the Holy See may be civilly sued in a U.S. court under the terms specified by the FSIA, or not at all.

B. Courts Lack Authority to Authorize Suits against Foreign Sovereigns Outside the FSIA.

In arguing that they may sue the Holy See outside the FSIA, plaintiffs urge this Court to disregard the Executive Branch's recognition of the Holy See as the sovereign of a foreign state. They argue that the Court should apply the "the multi-factor 'Restatement standard'" and make its own determination whether the Holy See, "as the head of the Roman Catholic Church," is a foreign state. Pls.' Answering/X-Opening Br. 21. This argument is wrong because it asks this Court to overrule a foreign state recognition determination made by the Executive Branch, a decision that the Constitution assigns solely to the Executive.

As noted earlier, the FSIA establishes the immunity of a "foreign state." The statute defines "foreign state" to include the state's political subdivisions and agencies

or instrumentalities. 28 U.S.C. § 1603(a). And the statute further defines "agency or instrumentality." *Id.* § 1603(b). Thus, courts routinely consider whether an entity, such as a corporation, is an "agency or instrumentality" of a foreign state, and so entitled to the protections the FSIA. *See, e.g., Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003). But, although it explains that a foreign state "includes" the state's political subdivisions as well as its agencies or instrumentalities, the statute does not provide any criteria for courts to use in determining whether an entity is the foreign sovereign state itself, in contrast to one of its component or subsidiary parts. This lack of definition is unsurprising, since the courts have long decided that the recognition of foreign sovereigns is an exclusively Executive function.

The Constitution vests in the President the power to "receive Ambassadors and other public Ministers" from foreign countries. U.S. Const. art. II, § 3. Because the power to receive ambassadors includes the power to decide which ambassadors to receive and, hence, with which governments to establish diplomatic relations, the Supreme Court has long held that the Constitution grants the President the exclusive power to recognize foreign sovereigns. *See, e.g., Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964) ("Political recognition [of a foreign sovereign] is exclusively a function of the Executive."); *United States v. Pink*, 315 U.S. 203, 229 (1942) (same); *Williams v. Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415, 420 (1839) (same); *see also Am. Int'l*

Group, Inc. v. Islamic Republic of Iran, 657 F.2d 430, 438 (D.C. Cir. 1981) (Supreme Court has recognized the "President's plenary power to recognize foreign sovereigns"); *Can v. United States*, 14 F.3d 160, 163 (2d Cir. 1994) ("It is firmly established that official recognition of a foreign sovereign is solely for the President to determine."); *see also* Restatement § 204 ("Under the Constitution of the United States, the President has exclusive authority to recognize or not to recognize a foreign state or government, and to maintain or not to maintain diplomatic relations with a foreign government.").

The Executive Branch's establishment of formal diplomatic relations with the Holy See in January 1984 is definitive evidence that the Executive recognizes the Holy See as the legitimate government of the State of Vatican City. *See* Daily Press Briefing, at 8. That recognition is determinative of whether the Holy See is a foreign government and is "binding and conclusive upon the courts of the United States" (*Jones v. United States*, 137 U.S. 202, 213–14 (1890)), as the Restatement itself recognizes (Restatement § 204, cmt. a (Presidential recognition of foreign states or governments is "binding on Congress and the courts")).[4]

[4] While the establishment of formal diplomatic relations demonstrates the Executive Branch's recognition of a foreign sovereign, the Executive may recognize a foreign state without establishing diplomatic relations. The State Department maintains a list of "independent states" recognized as such by the United States, including those with which the Untied States currently does not have diplomatic

Plaintiffs argue that this Court should nevertheless undertake its own independent analysis of the Holy See's status because "Congress' stated purpose in enacting the FSIA was to place determinations regarding the immunity of foreign states squarely and solely with the courts." Pls.' Answering/ X-Opening Br. 19. But considering the considerable Supreme Court precedent, Congress' intent in enacting the FSIA was obviously to have courts apply the standards Congress codified for determining whether an entity is an agency or instrumentality of a foreign state and for determining whether a foreign state is immune from a particular civil suit in light of the type of conduct involved. It was not Congress' intent to have courts determine whether a defendant is a foreign sovereign state. Nothing in the text of the FSIA even hints at a Congressional desire to attempt to transfer recognition authority from the President to the courts, and no such intent can validly be inferred because to do so would raise serious constitutional questions. *See Armstrong v. Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991) ("When Congress decides purposefully to enact legislation restricting or regulating presidential action, it must make its intent clear."). There is

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relations. *See* Office of the Geographer & Global Issues, Bureau of Intelligence & Research, Dep't of State, Independent States in the World, *available at* http://www.state.gov/s/inr/rls/4250.htm. Cuba, Iran, Montenegro, and North Korea are listed as recognized independent states with which the United States does not have diplomatic relations. *Ibid*. This distinction is irrelevant in this case.

no indication — let alone a clear statement — that Congress intended to disrupt the Executive Branch's historic foreign sovereign recognition power.

Plaintiffs rely on the First Circuit's decision in *Ungar v. Palestinian Liberation Organization*, 402 F.3d 274 (1st Cir. 2005), and the Second Circuit's decision in *National Petrochemical Co. of Iran v. M/T Stolt Sheaf*, 860 F.2d 551 (2d Cir. 1988), as examples of cases in which courts have undertaken an independent analysis of an entity's status under the Restatement standard. Pls.' Answering/X-Opening Br. 21. But their reliance on those cases is unavailing.

In *Ungar*, the First Circuit "caution[ed] that the Restatement standard, though embraced by both sides in this case, is not inevitably correct. It may be argued that a foreign state, for purposes of the FSIA, is an entity that has been recognized as a sovereign by the United States government." 402 F.3d at 284 n.6. Because it would not have made a difference to its decision, the court did not decide whether reliance on the Restatement standard was proper: "The defendants' sovereign immunity defense fails the Restatement test. * * * If recognition were the test, the result would be the same. After all, the United States has not recognized Palestine as a sovereign nation. Thus, we need not probe the point too deeply." *Ibid*.

In *National Petrochemical Company*, the Second Circuit addressed the question whether Iran could bring suit as a "foreign state" under the district court's diversity

jurisdiction.[5] Although the Second Circuit referred to the Restatement standard, it explained that, "[i]n order to take advantage of diversity jurisdiction, a foreign state and the government representing it must be 'recognized' by the United States." 860 F.2d at 553. The Second Circuit further explained that "the Supreme Court has acknowledged the President's exclusive authority to recognize or refuse to recognize a foreign state or government and to establish or refuse to establish diplomatic relations with it." *Ibid.* Although the United States did not (and currently does not) have diplomatic relations with Iran, the Second Circuit held that "formal" recognition of Iran's government was not determinative of the question of whether Iran could sue. *Id.* at 554–55. Instead, the Court deferred to a Statement of Interest filed by the Executive Branch in the case, and held that Iran and its instrumentality should be permitted to bring the suit. *Id.* at 555–56.

[5] As noted above, when Congress enacted the FSIA, it amended the Diversity Jurisdiction statute to delete references to foreign states as defendants. It also "added a new paragraph * * * that preserves diversity jurisdiction over suits in which foreign states are plaintiffs." *Amerada Hess*, 488 U.S. at 437 n.5.

The Second Circuit's deference to the Executive Branch was entirely proper.[6] Because recognition of a foreign sovereign is a political determination, it would be inappropriate for a court to determine an entity's status as a foreign state. Precisely because the Constitution vests exclusively in the Executive Branch the power to recognize foreign sovereigns, the question of an entity's status as a foreign sovereign is a nonjusticiable political question. *Baker v. Carr*, 369 U.S. 186, 216 (1962); *see Ams. United*, 786 F. 2d at 202 ("Legal challenges to the establishment of diplomatic relations require the review of one of the rare governmental decisions that the Constitution commits exclusively to the Executive Branch."). Indeed, where, as here, the President has recognized an entity as a foreign sovereign, it is impossible for a court to determine that the recognized foreign sovereign could be sued outside the confines of the FSIA "without expressing lack of the respect due coordinate branches of government" (*Baker*, 369 U.S. at 216), since the political branches established the

[6] In a subsequent case, *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44 (2d Cir. 1991), the Second Circuit applied the Restatement standard in holding that the Palestinian Liberation Organization is not a foreign sovereign for purposes of the FSIA. While purporting to follow its prior decision in *National Petrochemical Company* (*id.* at 47), the decision is instead inconsistent with the Second Circuit's prior acknowledgment that courts must defer to the Executive Branch's decisions regarding recognition of foreign states. This Court should not follow *Klinghoffer*'s mistaken approach.

FSIA as "the sole basis for obtaining jurisdiction over a foreign state in federal court" (*Amerada Hess*, 488 U.S. at 439).

Accordingly, when the Executive Branch has recognized a foreign sovereign and that foreign sovereign is sued, the proper inquiry for the court is whether the plaintiff's claims come within an exception to the immunity established by the FSIA. In light of the Executive Branch's recognition of the Holy See's sovereignty, the district court here correctly determined that plaintiffs may sue the Holy See only under an applicable FSIA exception.

II. Plaintiffs Cannot for the First Time on Appeal Raise Their Arguments that the FSIA Is Unconstitutional as Applied to the Holy See.

This Court should decline to consider plaintiffs' constitutional challenge to the FSIA's application at this time. As the Holy See notes, plaintiffs did not make any constitutional arguments in the district court when challenging the applicability of the FSIA to the Holy See. Plaintiffs cannot raise those arguments for the first time on appeal before this Court. Holy See Reply/X-Answering Br. 25–26; *see Thurman v. Yellow Freight Sys., Inc.*, 90 F.3d 1160, 1172 (6th Cir.1996) ("Issues that are not squarely presented to the trial court are considered waived and may not be raised on appeal.").

In their cross-reply brief, plaintiffs argue that they preserved their constitutional arguments in the district court. Pls.' X-Reply Br. 22 (citing R. 61, Response to Mot. to Dismiss pp. 34–35, Apx. pp. 248–49). The document to which they cite does not at all address two of the three constitutional arguments plaintiffs make on appeal: those involving the Due Process Clause and the Seventh Amendment right to a jury trial. Plaintiffs' district court filing does address the Establishment Clause, but not in the context of the FSIA. Independently of its FSIA arguments, the Holy See had argued that the Free Exercise and Establishment Clauses precluded litigation of plaintiffs' claims. In response, plaintiffs argued that, "[a]ssuming the Establishment Clause is relevant in a case involving a foreign sovereign," allowing the Holy See to shield itself from liability through the First Amendment would itself violate the Establishment Clause. (R. 61, Response to Mot. to Dismiss pp. 34–35, Apx. pp. 248–49.) At no time did the plaintiffs argue in the district court that the FSIA's immunity provision, as applied to the Holy See, violates the Establishment Clause.

Absent "exceptional circumstances," this Court does not consider arguments not presented to the district court. *United States v. Chesney*, 86 F.3d 564, 567–58 (6th Cir. 1996). Plaintiffs provide no explanation for their failure to make their constitutional arguments below. Pls.' X-Reply Br. 22–23. Thus, they have failed to establish any exceptional circumstances that would warrant this Court's consideration

of arguments that plaintiffs could have, but did not, raise below. *Cf. Chesney*, 86 F.3d at 568 (finding exceptional circumstances where critical Supreme Court decision "was decided after the district court entered judgment in this case").

III. Recognition of the Holy See's Immunity under the FSIA Does not Violate the Establishment or Due Process Clauses or Plaintiffs' Seventh Amendment Right to a Jury Trial.

Should the Court choose to address plaintiffs' constitutional arguments, it should hold that the FSIA is constitutional as applied to the Holy See.

A. Recognizing the Holy See's Immunity Does Not Violate the Establishment Clause.

As an initial matter, it is not clear whether plaintiffs' Establishment Clause argument seeks to challenge the Executive Branch's recognition of the Holy See as a foreign government or only the application of the FSIA to the Holy See. *See, e.g.*, Pls.' Answering/X-Opening Br. 19. If plaintiffs are actually challenging the Executive Branch's decision to recognize the Holy See as a foreign government, that claim is unambiguously foreclosed for the reasons explained above. *See, e.g., Baker*, 369 U.S. at 212 ("[R]ecognition of foreign governments so strongly defies judicial treatment that without executive recognition a foreign state has been called 'a republic of whose existence we know nothing.'"). Moreover, the only court of appeals to have passed on the issue held that the President's recognition of the Holy See is not justiciable,

even where, as here, the plaintiffs assert a challenge under the Establishment Clause. *See Ams. United*, 786 F. 2d at 201–02.

Plaintiffs' Establishment Clause argument fares no better when understood as a challenge to the FSIA as applied to the Holy See. Under this Court's precedent interpreting the "*Lemon* test" (*see Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971)), government action violates the Establishment Clause (1) if the government "acts with the ostensible and predominant purpose of advancing religion"; (2) "when it acts in a manner that a reasonable person would view as an endorsement of religion"; or (3) if it "foster[s] an excessive governmental entanglement with religion." *Am. Civil Liberties Union of Ky. v. Mercer County, Ky.*, 432 F.3d 624, 630, 636, 635 (6th Cir. 2005).

Plaintiffs do not (and obviously could not) argue that Congress enacted the FSIA with the predominant purpose of advancing religion. Nevertheless, it bears noting that Congress explained that it enacted the FSIA to establish the internationally accepted restrictive theory of immunity as the touchstone for suits against foreign sovereigns. 28 U.S.C. § 1602 ("Findings and Declaration of Purpose"). That legislative purpose is manifestly secular. This Court "defer[s] to the government's stated purpose, except in those *unusual* cases where the claim was an apparent sham and the primary objective is religious." *Mercer County*, 432 F.3d at

631–32. Plaintiffs have said nothing to suggest that Congress' stated purpose behind the FSIA was a sham.

Plaintiffs' principal argument is that granting the Holy See sovereign immunity under the FSIA has the effect of advancing "one, and only one, religion: the Roman Catholic Church." Pls.' Answering/X-Opening Br. 25. As noted, this Court has interpreted the "effects" prong of *Lemon* as the "endorsement test." *Mercer County*, 432 F.3d at 635. Under that test, the relevant inquiry is whether a reasonable observer would view the government action as an endorsement of religion. *Id.* at 636. This Court has emphasized that "[c]ontext is crucial to this analysis. The reasonable person is deemed aware of the circumstances under which governmental actions arise, including the legislative history and implementation. If context, history, and the act itself send the 'unmistakable message' of endorsing religion, then the act is unconstitutional." *Id.* at 636–37.

Here, there is no plausible argument that a reasonable observer, knowing the context and history of the FSIA, as well as the context and history of the Holy See's secular authority, and the United States' diplomatic relations with the Holy See (discussed above) could conclude that application of the FSIA to the Holy See sends the "unmistakable message" of endorsing the Roman Catholic Church. The FSIA provides immunities for all foreign sovereigns recognized by the Executive Branch,

including those that are purely secular as well as many whose states are founded on an established religion. Indeed, the very fact that the FSIA provides immunity as well to secular foreign states and to those established on the Muslim, Jewish, and non-Catholic Christian faiths rebuts any suggestion that a reasonable observer would view the immunity of the Holy See under the FSIA as an endorsement of the Roman Catholic Church.[7]

Finally, although they do not develop the argument, plaintiffs suggest that immunizing the Holy See under the FSIA constitutes an excessive entanglement with religion. Plaintiffs rely heavily on *Grumet*, arguing that it is "perhaps among the most

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[7] *See, e.g.*, The Basic Law of the Kingdom of Saudi Arabia, art. 1 ("The Kingdom of Saudi Arabia is a sovereign Arab Islamic state with Islam as its religion; God's Book and the Sunnah of His Prophet, God's prayers and peace be upon him, are its constitution."); *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993) (recognizing the immunity of Saudi Arabia under the FSIA); Israel, Basic Law: Human Dignity and Liberty, § 1 (1992) ("The purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state."); *Lane v. Nat'l Airmotive Corp. & Ministry of Defense, State of Israel*, 105 F.3d 665 (9th Cir. 1997) (recognizing the immunity of Israel under the FSIA); Const. of the Kingdom of Norway, art. 2 ("The Evangelical-Lutheran religion shall remain the official religion of the State."); *Risk v. Halvorsen & Kingdom of Norway*, 936 F.2d 393 (9th Cir. 1991) (recognizing the immunity of Norway under the FSIA); *see also* Act of Supremacy, 1559, 1 Eliz. 1 (declaring the English monarch the Supreme Governor of the Church of England); http://www.royalinsight.gov.uk/output/Page4708.asp (official website of the British monarchy) (noting that English monarch appoints bishops and archbishops of the Church of England); *Baglab Ltd. v. Johnson Matthey Bankers Ltd.*, 665 F. Supp. 289, 297 (S.D.N.Y. 1987) (recognizing immunity of Bank of England as an agency or instrumentality of a foreign state).

analogous [Establishment Clause decisions] to the present case." Pls.' Answering/X-Opening Br. 24. *Grumet* involved a school district established by the State of New York in a small village inhabited entirely by a sect of Hasidic Jews. 512 U.S. at 691. The state statute gave significant authority to the school board that would control the district, which was to be composed of members elected from voters in the village. *Id.* at 693 & n.1. The Supreme Court held that the creation of the school district violated the Establishment Clause because, "by delegating important, discretionary governmental powers to [a] religious bod[y]," the State had "impermissibly entangl[ed] government and religion." *Id.* at 697 (describing *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982)); *see ibid.* ("Comparable constitutional problems inhere in the statute before us.").

Plaintiffs' only explanation of *Grumet*'s relevance to this case is the bare assertion that "[t]here is nothing to distinguish New York's special recognition of the village of Kiryas Joel from a construction of the U.S.'s recognition of the Holy See as rendering the Holy See immune from suit under the FSIA." Pls.' Answering/X-Opening Br. 24. That statement is manifestly wrong. Recognizing the immunity of the Holy See as a foreign government delegates no discretionary governmental powers to a religious body. It merely affords the Holy See, as the government of the State of Vatican City, the same the rights and prerogatives of any

other foreign government recognized by the Executive Branch (whether purely secular or established on a particular religion), including limited immunity in U.S. courts under the FSIA.

B. Plaintiffs' Remaining Constitutional Claims Plainly Lack Any Merit.

Where there is an exception to foreign sovereign immunity, the FSIA provides for a "nonjury civil action" against the foreign sovereign. 28 U.S.C. § 1330(a). In two conclusory sentences, plaintiffs assert that the FSIA violates their "right to a jury trial under the Fifth and Seventh Amendments." Pls.' Answering/X-Opening Br. 26. In those same sentences, plaintiffs assert that the FSIA violates their due process rights by "limit[ing] the claims Plaintiffs may pursue." *Ibid.* Because of the perfunctory manner in which plaintiffs raised these issues, they have not been properly asserted in this appeal. *United States v. Winkle*, 477 F.3d 407, 421 (6th Cir. 2007) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." (quotation marks omitted)).

In any event, this Court's precedent squarely forecloses plaintiffs' jury trial argument. *Universal Consol. Companies, Inc. v. Bank of China*, 35 F.3d 243, 243–46 (6th Cir. 1994) (holding that FSIA's proscription against jury trials does not violate the Seventh Amendment's guarantee of a jury trial because the Amendment preserves the right to a jury trial where one existed at common law and foreign sovereigns were

absolutely immune from suit at common law); *cf. Osborn v. Haley*, 127 S. Ct. 881, 900 (2007) (Seventh Amendment does not apply to suits against the United States because there was no right to a jury trial against the sovereign at common law). The six other courts of appeals that have reached the issue have arrived at the same conclusion. *See In re Air Crash Disaster Near Roselawn, Ind. on Oct. 31, 1994*, 96 F.3d 932, 943–44 (7th Cir. 1996); *Arango v. Guzman Travel Advisors*, 761 F.2d 1527, 1535 (11th Cir. 1985); *Goar v. Compania Peruana de Vapores*, 688 F.2d 417, 423–27 (5th Cir. 1982); *Williams v. Shipping Corp. of India*, 653 F.2d 875, 881–82 (4th Cir. 1981); *Ruggiero v. Compania Peruana de Vapores Inca Capac Yupanqui*, 639 F.2d 872, 878–81 (2d Cir. 1981); *Rex v. Cia. Pervana de Vapores, S.A.*, 660 F.2d 61, 68–69 (3d Cir. 1981).

Plaintiffs argue that this Court's decision in *Bank of China* is not dispositive because "[t]he Bank of China is not a religious organization and thus the special concerns implicated by the unconstitutional application of immunity to the Holy See, and the additional protections afforded to it under the FSIA, are not implicated." Pls.' X-Reply Br. 25–26. This argument is a non sequitur. Plaintiffs fail to explain how the Holy See's status as the head of a religious organization has any bearing on the Seventh Amendment's guarantee of a right to a jury trial. Plaintiffs' jury trial

argument thus appears to collapse into their Establishment Clause argument. And that argument is mistaken, as we have shown.

Plaintiffs' due process argument fares no better. Plaintiffs argue that, by immunizing the Holy See, the FSIA limits the claims they may assert, and that this violates due process. As an initial matter, it is worth noting that plaintiffs' argument does not turn on the Holy See's "dual capacities." Thus, if plaintiffs' argument is correct, then the Due Process Clause would limit the federal government's ability to recognize, as an exercise of its constitutional foreign affairs powers, the immunity of *any* foreign sovereign from suit in the United States, because such recognition would always "limit[] the claims Plaintiffs may pursue." Pls.' Answering/X-Opening Br. 26. There is no authority for that expansive proposition.

In any event, conditioning the district court's subject matter jurisdiction over claims against foreign sovereigns on an FSIA exception is an ordinary exercise of Congress' constitutional authority to define the jurisdiction of the lower courts. "Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress." *Kline v. Burke Const. Co.*, 260 U.S. 226, 234 (1922); *see* U.S. Const. art. III, § 1, cl. 1 (vesting the judicial power of the United States in the Supreme Court and "such inferior Courts as the Congress may from time to time

ordain and establish"); *id.* art. I, § 8, cl. 9 (empowering Congress "To constitute Tribunals inferior to the supreme Court"). Accordingly, Congress "may give, withhold or restrict such jurisdiction at its discretion," provided only that Congress does not extend the lower courts' jurisdiction beyond the limitations of Article III. *Kline*, 260 U.S. at 234. There is no authority for the proposition that the Due Process Clause requires Congress to establish jurisdiction in the lower federal courts to hear any particular claims. *See, e.g., Perry v. United States*, 294 U.S. 330, 354 (1935) ("[T]he Congress is under no duty to provide remedies through the courts.").

Congress established jurisdiction in the district court to hear claims against foreign sovereigns only if the claim comes within one of the FSIA's immunity exceptions. 28 U.S.C. § 1330(a). In so limiting the jurisdiction of the federal courts, Congress acted well within its constitutional authority. *See* U.S. Const. art. III, § 1, cl. 1; *id.* art. I, § 8, cl. 9; *see also id.* art. I, § 8, cl. 3 (Foreign Commerce Clause); *id.* art. I, § 8, cl. 10 (authorizing Congress to define and punish offenses against the law of nations).

CONCLUSION

This Court should affirm the district court's determination that the Holy See may be sued only under the FSIA, and should hold that plaintiffs' challenges to the constitutionality of the FSIA are not now properly before this Court, or should uphold the validity of the FSIA as applied to the Holy See.

Respectfully submitted,

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September 17, 2007

ADDENDUM

DEPARTMENT OF STATE

DAILY PRESS BRIEFING

Tuesday, January 10, 1984

I N D E X

DEPARTMENT OF STATE
DAILY PRESS BRIEFING

DPC #6

TUESDAY, JANUARY 10, 1984, 11:48 A.M.
(ON THE RECORD UNLESS OTHERWISE NOTED)

MR. HUGHES: Good afternoon, everybody. I have a few announcements up front.

Available in the Press Office are copies of Deputy Secretary of State Kenneth Dam's speech before the American Farm Bureau Federation. The subject is "U.S. Foreign Policy and Agricultural Trade." That's the speech he is giving today in Orlando.

Also available in the Press Office after the briefing will be copies of a report of the National Bipartisan Commission on Central America. The report is embargoed until 3:00 p.m. tomorrow, Wednesday -- that's the Kissinger Commission Report available after the briefing, but embargoed until tomorrow.

Can we have a little quiet back there, please?

Statement on the death of Souvanna Phouma: The United States has learned with regret of the death January 10 of Souvanna Phouma, former Prime Minister of Laos. For many years after Laos gained its independence, Souvanna Phouma was a leading figure in the history of his country. During his long tenure as Prime Minister, many officials of the United States and other countries had the opportunity to work with Souvanna Phouma towards the goal of a united, independent, non-aligned Laos and the peaceful reconciliation of all of Laos' people. The United States extends to Souvanna Phouma's family the condolences of his many friends here.

Finally, on U.S.-Vatican diplomatic relations, the United States of America and the Holy See, in the desire to further promote the existing mutual friendly relations, have decided by common agreement to establish diplomatic relations between them at the level of embassy on the part of the United States of America and of nunciature on the part of the Holy See, as of today, January 10, 1984.

That's all I have for you.

Q Can you explain why the announcement was made from the Vatican at 7:30 this morning?

A I think it had to do with publication in Osservatorio Romano, Jim. I think that was the --

Q They accommodate to the press there? (Laughter)

A There happens to have been a different time schedule.

Q Just as a matter of curiosity, was it not decided to make it a simultaneous --

A I think there was an original thought along those lines, but in practical terms, I think it appeared in their official newspaper a little ahead of the time we were able to get out and give you the news this morning.

Q Another mechanical problem: In most cities, the Papal Nuncio becomes dean of the diplomatic corps. Will that be the case in Washington?

A I can't answer that question, Jim. I don't know.

Q Do they get absolution with free publication? (Laughter)

A Sorry?

Q Do they get absolution?

A I can't answer that question either. Be happy to look at the diplomatic --

Q Physically, what difference does the establishment of these relations make?

A I think, obviously, better communications. We will elevate our representative -- there will no longer be a representative; it will be an Ambassador on the part of the United States -- and I think they have an Apostolic Delegate at the moment, and I think he will be succeeded by a Papal Nuncio. But I would refer you to them for their title.

Q What would be the number of people in the U.S. Embassy?

A I don't know.

Q There is a small office now.

A There is a small office there at the moment, and I'm not sure how that will change.

Q How does that make for better communications? Will the legations be bigger in both --

A I don't know if they will be better; it's just an upgrading of the relationship and I guess an improvement of the channel of communication by elevation.

Q Yes. Well, how does that improve the channel of communication, is what I'm getting at?

A I guess we will have the same channel of communication as the 107 other countries that recognize the Vatican, that have established diplomatic relations before us.

Q Is there a deficiency in the communications now?

A It's not a question of a deficiency; it's a question of putting ourselves on the same basis as 107 other countries at a time when we think it is appropriate to do it.

Q John, what has changed since 1952, the last time this was proposed, when there was a fairly large amount of opposition to the idea of full diplomatic relations with the Vatican? What has changed to make this a more appropriate time, as you just said.

A I think the President has decided that this is the appropriate time to do it.

Q Can you be any more --

A No.

Q -- forthcoming with an explanation for what has changed?

A No, I can't.

Q John, other than communications --

A I think the White House -- Ambassadors being Presidential appointees, I think the White House would make any announcement on any intention to nominate by the President.

I think they will. I think they will at their noon briefing.

Q Will he be available? I believe he's in town, or was supposed to be in town.

A I guess we have to wait until the White House makes its announcement.

Q Is he in town now?

A I guess we'd have to see who they are intending to nominate.

Q Well, let's guess that it's Wilson. Is he here? Do you know whether he is here?

A We'll wait and see what their announcement is. I know we're frustrating you a little, but there is a protocol involved.

Q Has the Secretary received any calls in opposition to this move?

A Not that I'm aware of, no.

Q John, do you anticipate this is going to require a new building, or will the additional expense simply be in salaries?

A I don't know. I'll be glad to look into that and see if, at this stage, there is any further information available.

Q How do you respond to protests from the American Jewish Congress and other religious groups that this is a violation of the separation of church and state?

A Well, it isn't.

Q Why isn't it?

A It's not a violation of church and state because for a long time, we recognized the Holy See as having an international personality distinct from the Roman Catholic Church. This relationship will be with the Holy See. The Holy See is distinct from the Catholic Church.

Q Could you parse that a little bit? What is the distinction?

A I think the Pope has responsibilities and a leadership role in the Roman Catholic Church, as he has in the Holy See, which is responsible for the Vatican, which is a sovereign city-state. The two roles, as I understand it, are separate.

Q Does that mean the relationship will be between the Government of the United States --

A -- And of the Holy See.

Q -- and of the Government of the Vatican City-State, and not with the Catholic Church?

A With the Holy See, that's correct. With the Holy See.

Q Not with the Catholic Church?

A Correct.

Q O.K. Could I ask you whether this move is being made in anticipation of another Papal visit?

A I'm sorry. I can't see who's asking the question. Oh, sorry Ralph.

Q Sorry. Can I ask whether this move is being made in anticipation of another Papal visit to the United States?

A Not that I know of. I mean, I'm not aware that there is another Papal visit.

-- MORE --

Q Do we need more and better communications with the Holy See, John? I mean, what else is accomplished? We don't trade with the Holy See.

A Well, I think it puts this relationship on a par with similar relationships we have with a variety of other such entities. We have relationships already with the Vatican. We are involved in various treaties with them. We're not exactly in the forefront here. As I say, 107 nations -- all the major nations of the world -- have such relations, and we're simply upgrading to that status.

Q But, John, 107 other nations don't have separation of church and state doctrines either.

A That is not -- as I just said, that's not a problem.

Q The Holy See has been there since a number of centuries. What's new in the relations between the Holy See and the United States to necessitate this step, which, if I may say as a foreign correspondent, is somehow against the trend of the public opinion in the United States.

A I don't think it is against the trend in public opinion, and, as I say, I think we have addressed this question of the separation of church and state. There's a long history of representation. I just refresh your memory.

The United States has had a presidential personal representative to the Holy See for many years. The tradition was established in 1939 by President Roosevelt when he appointed Myron Taylor as his personal representative. The Holy See is an international focal point of diplomatic contact, and, as I say, we're joining 107 other nations, including all our major allies, in establishing diplomatic relations with the Holy See.

Q Sir, you said that the Vatican has an international personality distinct from the Catholic Church --

A Yes.

Q -- and that's how you get around the church-state thing. Could you --

A Well, it's not a "getting around it." It's a recognition of the fact.

Q Could you explain what is that international personality that makes it distinctive and different from the Catholic Church?

A Well, the Holy See is a government of a sovereign city-state and operates as such, and is recognized as such by most of the nations of the world.

Q What does that government do, sir, besides administer 100-some acres?

A Well, I think it's involved in treaties, and it's involved in negotiations, and a variety of other activities, but I don't think I ought to be speaking for the Holy See. I think you ought to talk to them.

Q Would it be accurate for us to report, then, that the relationship will deal not with matters relating to the Catholic Church but only with treaties and --

A I don't think it will be accurate to report that. I think it will be accurate to make a point that there is a separation -- a constitutional, legal separation between the Holy See and the Catholic Church, and that it is not a conflict between church and state for the United States nor, indeed, for the other countries.

Q Sir, would you care to offer any response to the comment put out today by the joint Baptist Conference that refers to this move as a "ludicrous leap of logic reeking of Orwell's 1984?" (Laughter)

A I haven't seen the comment, I'm afraid.

Q Do you care to offer a comment now that you've heard it, sir?

A No. I wouldn't.

Q What are the positive steps for doing it? We've asked about the city-church state, but why did the President decide to now do it?

A Well, what are the reasons for not doing it?

Q That's what we've gone into.

A Well, it's considered an appropriate time by the Administration to do it. As I say, we're not exactly at the head of the diplomatic line here.

Q They offered to help on the U.S.-Soviet arms talks, I believe. Was that involved in any way?

A Well, I wouldn't get into any kind of diplomatic discussions that we might have had, but I think that a suggestion of a quid pro quo is going down the wrong road. This is simply the right time to do it.

Q John, what we're trying to get at is what will be different?

A We will have an Ambassador to the Holy See in Rome. The Holy See will have a Papal Nuncio in Washington as distinct from an Apostolic Delegate.

Q And why --

A It will be an upgrading of that relationship so that our relationship with the Holy See, the government of a sovereign city-state, will conform to the relationship we have with other countries, and, indeed, will conform to the relationship that most other countries have with the Holy See.

Q John, did the Administration, in consideration of what would be an appropriate time, give consideration to the thought of delaying this move until after the election to avoid any possible connection between the 51 million Catholic voters --

A I'm not aware that any consideration was given to that.

Q Did the Congress have any opportunity to have its say?

A Sure. We've consulted with Congress, have done that, have undergone that process, and, as a matter of fact, Congress recently repealed the 1867 Statute which stated that Federal funds could not be used for a diplomatic mission to the Vatican, so Congress has taken the appropriate action.

Q And it will, in effect, have another go at it in the sense that the Ambassador-designate will now have to be approved --

A That's right. That's correct.

Q Although he did not have to be approved previously.

A I guess he did not have to be. I guess he did not have to be -- but he certainly will in the future. Yes. He'll have to be confirmed.

Q John, does this have anything to do with the development of U.S. policy towards Poland?

A No.

Q John, does this, on the other hand, give the Holy See any special status in diplomacy as a neutral ground or a place for the Pope to work through in terms of diplomacy towards world peace?

A Does it enhance --

Q Does this enhance the Holy See as a neutral ground for diplomacy?

A I don't know that it does, Jim. I don't see that it does, but I may be going beyond my expertise in the area, but I can't at first glimpse see that.

Q New subject?

A Sure.

Q No. One more, please. Do you know whether this gentleman -- I think his name is Wilson, the California man who's being appointed -- do you know whether he is a member of the Catholic Church?

A I do not.

Q Yes.

A Somebody tells me he is, but I don't know that.

Q Would this ambassadorial --

A But that's not a requirement. (Laughter) An Ambassador to the Holy See need not necessarily be a Roman Catholic.

Q Would this Ambassadorial link provide any way, for example, for the Administration to try to present its views to the American Conference of Bishops on its nuclear weapons stand? Would that be an appropriate use of this new Ambassadorial upgrading, sir?

A I don't know. I don't think we have had problems in making our views known to the American Bishops in the past. I don't see why this channel would change that.

Q New subject?

A Sure.

Q Can you tell us where Ambassador Rumsfeld is today, and whether he's received an invitation to go to Damascus?

A He's in Israel today. Don't have anything for you on his onward travel plans.

Q Does he have an invitation?

A I don't have anything for you on his onward travel plans.

Q Was he in Algiers?

A Yes. He was in Algiers over the weekend.

Q Anything regarding the Israeli Government's position towards the unilateral withdrawal from Lebanon?

A No.

Q Nothing new?

A Nothing beyond what I said yesterday.

Q Do you have anything on the talks regarding the security plan of the Geneva Conference?

A No. I guess the parties are still talking. Don't have anything new to offer.

Q Okay. Thank you.

Q John, anything on the trip of Mr. Abrams to Nicaragua?

A Mr. Abrams?

Q Abrams -- to Nicaragua?

A Elliott Abrams?

Q Yes.

A I don't know. Anybody know anything about it? (No response) Sorry.

Q Anything new on southern Africa to speak of?

A No. Nothing new on southern Africa.

(The briefing concluded at 12:04 p.m.)

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that this brief uses proportionately spaced font and contains 9,462 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Date: September 17, 2007

CERTIFICATE OF SERVICE

I certify that on this 17th day of September, 2007, I caused the foregoing Brief for the United States as Intervenor and Amicus Curiae to be filed with the Court and served on counsel by causing one original and six copies to be delivered via FedEx OVERNIGHT DELIVERY to:

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INTERVENOR'S DESIGNATION OF APPENDIX

Pursuant to Sixth Circuit Rule 28(d), the United States advises that it designates no additional filings in the district court's records, in addition to those identified by the plaintiffs and defendant, as items to be included in the joint appendix.