

# Justice attorney backs Vatican's claim of immunity from abuse lawsuit

WASHINGTON - In one of two cases that seek to draw the Holy See into U.S. courts over liability for sexual abuse by priests, the Obama administration's solicitor general said lower courts were wrong to conclude both that an abuser was acting within "the scope of his employment" and also that as his "employer," the Vatican could be sued.

In a brief to the Supreme Court filed May 21, Neal Kumar Katyal, who is acting solicitor general, said the 9th U.S. Circuit Court of Appeals erred in finding that the Holy See could be held vicariously liable for sexual abuse committed by a priest because he arguably could be considered an employee of the Vatican.

The Obama administration was asked by the Supreme Court to weigh in on whether the court should accept the case of Holy See v. John Doe, in which an Oregon man seeks to hold the Vatican financially responsible for his sexual abuse by a priest in the 1960s. A decision about whether the court will hear the case could come before the court adjourns in late June or once it resumes work in the fall.

A second case involving a similar effort to sue the Holy See is progressing through a U.S. District Court in Kentucky, where motions filed by the Vatican's U.S. attorney May 17 argue that the court lacks jurisdiction in the matter.

In the Kentucky case, James O'Bryan, Donald Poppe and Michael Turner want to hold the Vatican liable for actions by bishops in failing to prevent sexual abuse by priests. They argue that the bishops who supervised the abusive priests were employees of the Holy See.

Writing about the Oregon case, Katyal's brief dissected the 9th Circuit and lower court rulings. The 9th Circuit held that the unidentified plaintiff, Doe, had "sufficiently alleged" that the late Father Andrew Ronan, "was an employee of the

Holy See acting within the ‘scope of his employment’ under Oregon law,” and that his actions “can be attributed to the Holy See for jurisdictional purposes.”

The one-time Servite priest admitted sexually abusing minors in Ireland and Chicago before he was laicized in 1966. He died in 1992.

The legal arguments revolve around the Foreign Sovereign Immunities Act, which protects governments from being hauled into U.S. courts. The law previously has been found to apply to efforts to sue the Holy See, exempting it from facing tort claims.

But in the Oregon case, lower courts found that the state law’s broader definition of what constitutes “scope of employment” could apply in allowing a liability claim against the Holy See to proceed.

The 9th Circuit in its March 2009 ruling agreed with the District Court that because of the way Oregon law defines employment, the priest’s actions fit within an exception to the Foreign Sovereign Immunities Act, so the Holy See is not immune from being sued in this case.

The solicitor general’s brief picked apart the 9th Circuit’s ruling, listing multiple “errors” in how the court concluded that the Holy See was not immune from a legal claim; in how it found that Ronan was arguably acting within the scope of his employment when he allegedly committed sexual abuse; and in how the court used Oregon’s employment law to find an exception to the federal Foreign Sovereign Immunities Act.

The brief noted that the request to the Supreme Court to take the case lacks a usual criteria for consideration – conflicting judgments of different lower courts. But while the case does not merit review under that standard, the brief said, the high court might wish to take the case, vacate the lower court’s judgment and send it back for further consideration.

Katyal said it would be appropriate for the Supreme Court to simply address the 9th Circuit’s mistaken premise about exceptions to the immunities law “by making clear that (it) authorizes suit against a foreign state for a tort by the (foreign) state’s

employee only if the tort itself was committed by the employee while acting within the scope of his office or employment.”

Then the court could remand the case to the appeals court for further consideration in light of the narrower interpretation of the immunities act and in light of an Oregon Court of Appeals ruling that concluded “that sexual abuse is not within the scope of a priest’s employment.”

Or, Katyal’s brief said, the court could simply vacate the 9th Circuit’s ruling and send the case back for reconsideration. A third option would be to simply decline to take the case because it “does not warrant plenary review,” the brief said. Then, the 9th Circuit decision would stand for the time being and the case could proceed further in the trial court.

A legal expert familiar with the case notes that, if that occurred, for John Doe to win he ultimately would have to prove that Ronan actually was an employee of the Holy See when the sexual abuse occurred and that the abuse was within the scope of his employment.

For the lower court to reach its previous ruling, Doe’s attorney needed only to adequately “plead” that the priest was an employee of the Holy See. A much higher standard of proof would have to be met for the case against the Holy See to ultimately succeed, the expert said.

The Kentucky case also revolves around the Foreign Sovereign Immunities Act, but focuses on whether bishops are employees of the Holy See and the claim that the exemption provisions of the immunities law provide a legal channel for holding the church liable.

In motions filed with the District Court of Western Kentucky May 17, the Holy See’s attorney, Jeffrey Lena, asked the court to dismiss the case by O’Byrne, Poppe and Turner “for lack of subject matter jurisdiction” and “for failure to state a claim upon which relief can be granted.”

Supporting material filed with the motions included hundreds of pages of documents, including much of the personnel files of the priests whose actions are at

the core of the suit. It also included declarations about the job of the archbishop of Louisville, Ky., and his working relationships with priests and with the Holy See.