

No. 07-1090

IN THE
Supreme Court of the United States

REPUBLIC OF IRAQ,
Petitioner,

v.

JORDAN BEATY, et al.,
Respondents.

**On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the District of Columbia Circuit**

REPLY BRIEF FOR PETITIONER

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Respondents' scant opposition contests none of the petition's central points. There is no discussion of the conflict between the decision below and the most crucial foreign policy objective of the United States today. There is not one word about the flawed analysis of the D.C. Circuit and its conflict with this Court's precedents. And there is no showing as to how jurisdiction can exist now that the only statute even arguably abrogating Iraq's immunity has been repealed and replaced with a new provision that the President has waived as to Iraq.

Instead, the opposition rests on a single incorrect premise: that Section 1083(c)(4) of the recent NDAA shows that neither the Executive nor Congress

considers this a case of exceptional national importance. Opp. 11. Far from showing that the question presented is unimportant and correctly decided, the veto and alteration of the NDAA proves the opposite. By taking the extraordinary step of vetoing this massive military funding bill, the President ensured that Section 1083(c)(4)—a backroom attempt to create subsequent “history” to the earlier EWSAA—would have no legal effect on Iraq. As respondents omit mentioning, the President *waived* that provision of the NDAA as to Iraq, pursuant to authority Congress expressly granted him. And in any event, the views of current legislators can have no bearing on the meaning of an expired statutory authority enacted years earlier.

These actions show that the President continues to recognize that this and similar cases threaten our nation’s vital foreign policy of supporting Iraq and its new democratic government. And the NDAA itself has confirmed the restoration of Iraq’s sovereign immunity by repealing the only arguable jurisdictional basis for this case and replacing it with a new provision that the President has undeniably waived as to Iraq.

Iraq has been mired in nearly four years of burdensome and costly litigation since the D.C. Circuit’s flawed decision in *Acree*, and there is no certainty that the issue would come before this Court in the foreseeable future if certiorari is not granted now. The time has come for this nation’s highest Court to review this exceptionally important question affecting the fundamental sovereignty of a crucial U.S. ally.

**I. THE IMPORTANCE OF THIS CASE, AND
THE CONFLICT WITH THIS COURT'S
PRECEDENTS, ARE UNREFUTED.**

Respondents nowhere dispute that the sovereign immunity of the new democratic, allied government of Iraq is a question of overriding national and international importance. Nor do they even *attempt* to defend the flawed reasoning of the D.C. Circuit. Those critical flaws—expressly criticized or implicitly questioned by four judges, *see* Pet. 18—stand unrefuted by respondents.¹

Instead, respondents place all their eggs in the non-existent basket of NDAA § 1083(c)(4). They assert that this eleventh-hour conference amendment, which was attached without debate to the pre-veto bill, *see* Pet. 11, shows that both the President and Congress consider the question in this case unimportant and correctly decided. But the President did *not* acquiesce in this clumsy attempt to cast doubt on his prior exercise of foreign policy authority (which would have been ineffective in any event). Rather, he vetoed the bill and refused to sign any replacement until he was given the authority to waive any and all provisions of Section 1083—necessarily including Section 1083(c)(4)—to the extent they affect Iraq. In vetoing funding for the

¹ Respondents incorrectly argue that Judge Brown must have agreed with *Acree v. Republic of Iraq*, 370 F.3d 41 (D.C. Cir. 2004) because she was a member of the motions panel that granted summary affirmance. Opp. 6 n.1. Judge Brown's views on *Acree* are more tellingly reflected by her earlier dissent from denial of initial hearing en banc. Once the D.C. Circuit declined en banc consideration, Judge Brown correctly recognized that, as a panel member, she was bound by *Acree* as Circuit precedent.

entire military solely because of the potential effect of Section 1083 in this and similar cases, the President confirmed, through this decisive action and his words, the continuing importance of the foreign policy concerns at stake. *See* Pet. 12-14.

For its part, Congress did not countermand the President on these critical foreign policy determinations. To the contrary, as it had before in the EWSAA, Congress gave the President statutory authority to determine whether national security and foreign policy interests warranted exempting the new Iraqi government from a law directed at state sponsors of terrorism. Congress authorized the President to waive Section 1083(c)(4) and other provisions of Section 1083 as to Iraq, provided he determined, *inter alia*, that a waiver “is in the national security interest of the United States” and “will promote the reconstruction of, the consolidation of democracy in, and the relations of the United States with, Iraq.” NDAA § 1083(d)(1). The President made these determinations, *see* 73 Fed. Reg. 6571, thereby reemphasizing the national and international importance of the issues at stake.

II. THE ENACTMENT OF THE NDAA AND PRESIDENTIAL WAIVER PROVIDE AN ADDITIONAL REASON FOR REVIEW.

A. The NDAA Does Not Affect The D.C. Circuit’s Flawed Interpretation Of The President’s EWSAA Authority.

Respondents do not dispute that the D.C. Circuit’s holding that the EWSAA did not authorize the President to make 28 U.S.C. § 1605(a)(7) inapplicable to Iraq, and thereby restore Iraq’s sovereign immunity, will have continuing effect long

into the future. *See* Pet. 23. Rather, respondents contend only that NDAA § 1083(c)(4) is dispositive of the question presented. That contention is wrong, and should not prevent certiorari.

First, Section 1083(c)(4) can have no legal effect on this case because the President waived its applicability pursuant to express statutory authority. Congress specifically authorized the President to “waive any provision of [Section 1083] with respect to Iraq, insofar as that provision may, in the President’s determination, affect Iraq or any agency or instrumentality thereof,” provided the President made certain determinations and reported to Congress. NDAA § 1083(d). The President did just that, waiving *all* operative provisions of Section 1083 as to Iraq. Therefore, Section 1083(c)(4), the sole provision of law on which respondents rely, could have no conceivable effect on Iraq in this case. Iraq noted this obvious point in the petition, *see* Pet. 27 n.11, and respondents tellingly offer no response.

Second, even if it had not been waived, this provision could not displace the traditional canons of statutory interpretation in construing the earlier EWSAA authority. An attempt by later legislators to ascribe intent to a previous, differently-constituted Congress, even if codified, cannot override the plain language of the statute as an expression of the intent of the Congress that passed it. *See Rainwater v. United States*, 356 U.S. 590, 593 (1958) (“At most, the 1918 amendment is merely an expression of how the 1918 Congress interpreted a statute passed by another Congress more than a half century before. Under these circumstances, such interpretation has very little, if any, significance.”); *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 839-40

(1988) (“the opinion of this later Congress as to the meaning of a law enacted 10 years earlier does not control the issue”).² “[P]ostenactment views ‘form a hazardous basis for inferring the intent’ behind a statute; instead, Congress’ intent is ‘best determined by [looking to] the statutory language that it chooses.’” *United States v. Monsanto*, 491 U.S. 600, 610 (1989) (citations omitted).

This oxymoronic nature of “subsequent legislative history” is particularly evident here, where the President properly and effectively exercised his EWSAA authority while it was in effect, *see* Pet. 17-18, but that authority expired long before the NDAA. In these circumstances, any attempt by later legislators to hypothesize the intent of the earlier authorization is of no moment. The President’s interpretation of his statutory authority should be judged based on the unambiguous words of the statute before him when he acted, not by an after-the-fact, failed attempt to manufacture “history.”

B. The NDAA And The President’s Waiver Confirm The Lack Of Jurisdiction.

The D.C. Circuit’s misinterpretation of the EWSAA is itself reason for certiorari, as that issue is dispositive on its own. But if there were any doubt as to whether Section 1605(a)(7) was made inapplicable to Iraq in 2003, the NDAA resolved that issue by expressly *repealing* Section 1605(a)(7) and replacing it with a new jurisdictional provision that

² *See also South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 354-55 (1998); *Haynes v. United States*, 390 U.S. 85, 87 n.4 (1968) (“[t]he view of a subsequent Congress of course provide[s] no controlling basis from which to infer the purposes of an earlier Congress”).

the President then waived as to Iraq pursuant to authority granted by Congress. This issue falls squarely within the question presented, is a jurisdictional issue that cannot be ignored, and is an additional reason to grant review.

1. Jurisdiction over foreign sovereigns exists only if “the foreign state is not entitled to immunity either under sections 1605–1607 of this title or under any applicable international agreement.” 28 U.S.C. § 1330(a). Exceptions to immunity are thus jurisdictional: without an applicable exception there is no subject matter jurisdiction. *See, e.g., Acree*, 370 F.3d at 43 (“the terrorism exception to the FSIA is * * * a jurisdictional provision”). The only exception to immunity invoked here, and therefore the only arguable basis for jurisdiction, was former Section 1605(a)(7). But that statute has been repealed. *See* NDAA § 1083(b)(1)(A)(iii); Pet. 12. Because Section 1605(a)(7) was repealed and replaced with a new statute, 28 U.S.C. § 1605A(a)(1), and because the President waived Section 1605A as to Iraq pursuant to the unequivocal authority granted him in the NDAA, there is no longer any basis for jurisdiction in this case regardless of whether Section 1605(a)(7) was earlier made inapplicable to Iraq in 2003.

This Court has long held that “when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law.” *Bruner v. United States*, 343 U.S. 112, 116–17 (1952); *The Assessors v. Osbornes*, 76 U.S. (9 Wall.) 567, 575 (1869) (“Jurisdiction * * * was conferred by an Act of Congress, and when that Act of Congress was repealed the Power to exercise such jurisdiction was withdrawn, and inasmuch as the repealing act contained no savings clause, all

pending actions fell, as the jurisdiction depended entirely upon the Act of Congress.”). That presumption is the natural outcome of the basic principle that “[f]ederal courts are courts of limited jurisdiction” that “possess only that power authorized by Constitution and statute.” *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). “Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.” *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 514 (1868).

Moreover, in the specific context of foreign sovereign immunity, this Court has held that newly enacted exceptions to immunity in the FSIA apply to cases based on prior acts. *See Republic of Austria v. Altmann*, 541 U.S. 677 (2004). This is because “such immunity reflects current political realities and relationships, and aims to give foreign states and their instrumentalities some *present* ‘protection from the inconvenience of suit as a gesture of comity.’” *Id.* at 696 (emphasis in original; citation omitted). The same basic principle applies here, where Congress has repealed an exception to immunity and immediately replaced it with a new provision. Just as newly-enacted exceptions to immunity apply to cases based on prior events, so too should the newly-enacted Section 1605A(a)(1)—subject to the President’s waiver authority as to Iraq—govern current cases. Absent express Congressional intent to the contrary, foreign sovereign immunity is governed by existing statutory provisions.³

³ Congress may overcome that presumption by expressing a contrary legislative intent. In *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2765 (2006), the Court held that Congress did not intend

With the repeal of Section 1605(a)(7), Section 1605A(a)(1) is the only statute under which continuing subject matter jurisdiction could exist. But the President's waiver has eliminated that exception to immunity as to Iraq, thereby confirming the restoration of Iraq's sovereign immunity in this and other cases based on former Section 1605(a)(7).

2. Although the President's EWSAA determination was itself sufficient to render former Section 1605(a)(7) inapplicable and thereby restore Iraq's sovereign immunity, the identical effect of the repeal of Section 1605(a)(7) and waiver of Section 1605A(a)(1) is squarely within the question presented and open to the Court's consideration in this case.

The effect of the NDAA is "fairly included" in the question presented in the petition. Sup. Ct. R. 14(a). The question is "[w]hether the Republic of Iraq possesses sovereign immunity from the jurisdiction of the courts of the United States in cases * * * predicated on the exception to immunity in former 28 U.S.C. § 1605(a)(7)." Pet. i. That question can be answered in the affirmative either by holding that the President rendered former Section 1605(a)(7) inapplicable in 2003, or by holding that that the repeal of that provision and waiver of its replacement accomplished the same result in 2008. Respondents agree that the effect of the NDAA is

for the limited divestment of habeas jurisdiction in the Detainee Treatment Act to apply to pending cases because Congress expressly provided that two other accompanying jurisdictional provisions applied to pending cases, thus demonstrating a different intent with respect to the third. But the NDAA expresses no such intent—no provisions of Section 1083 were selectively made inapplicable to pending cases.

within the question presented. *See* Opp. i (question must be considered “in light of 28 U.S.C. §1605A”). They only disagree as to what that effect is. And in any event, whether the NDAA and waiver has restored Iraq’s sovereign immunity is a jurisdictional issue open to the Court’s consideration at any time.

III. CERTIORARI SHOULD BE GRANTED WITHOUT FURTHER DELAY.

Iraq’s sovereign immunity is a fundamental threshold jurisdictional issue that should be resolved without miring Iraq in precisely the kind of burdensome litigation that immunity is intended to prevent. Pet. 26-27. Yet respondents wrongly contend that this Court should deny certiorari and relegate Iraq to further uncertain litigation in the lower courts. Opp. at 12-13. Since the D.C. Circuit’s erroneous jurisdictional ruling in *Acree*, it has taken nearly four years for Iraq to be able to assert its sovereign immunity before this Court. The time has come for the Court to decide the issue.

Respondents incorrectly assert that certiorari should be denied because the effect of the NDAA is being considered in a different case. *See Simon v. Republic of Iraq*, Nos. 06-7175 (D.C. Cir.) (consolidated with *Seyam v. Republic of Iraq*, No. 06-7178). There is no guarantee that *Simon* will resolve this issue, and continued delay subjects Iraq to costly and burdensome litigation in numerous pending cases involving hundreds of plaintiffs and billions in asserted liability. *See* Pet. 23 n.6.

In *Acree*, the D.C. Circuit wrongly decided the sovereign immunity issue, but the United States could not seek certiorari on that issue because the case was dismissed on other grounds. *Simon*

presents the same concern. The district court dismissed those complaints on statute of limitations grounds. If the D.C. Circuit again wrongly concludes that Iraq is not immune from those lawsuits, or does not reach the issue, it still may affirm. In that event, Iraq would likely be unable to petition for certiorari and would be forced to endure more costly litigation for perhaps another four years until another case is ripe for this Court's review. And even if the D.C. Circuit were to reverse, the statute of limitations issue would complicate this Court's review. *Cf. John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750 (2008) (statute of limitations enacted with partial waiver of sovereign immunity is jurisdictional).

Likewise, if certiorari is denied now it may be years before this case is again ripe for review. Respondent notes that Iraq petitioned the D.C. Circuit for discretionary review of Judge Bates' order under 28 U.S.C. § 1292(b), and that the court has stayed ruling on that petition until after its decision in *Simon*. Opp. 6. But respondents have *opposed* that petition, which is left to the discretion of the D.C. Circuit. If the D.C. Circuit denies Iraq's petition, the parties will have to return to the district court for a final resolution or other appealable order and then return to the D.C. Circuit for another lengthy appeals process. If the D.C. Circuit grants Iraq's petition, it may be years before the case is briefed, argued, and decided on the many issues included in the certified order, and that decision may prevent review by this Court if it dismisses the case on other grounds. Meanwhile, plaintiffs in the various other cases will continue to subject Iraq to burdensome litigation, thereby exacerbating the foreign policy

conflicts that the President, and this petition, have sought to eliminate.

At the very least, the Court should remand the case for further consideration rather than deny certiorari. *See* Pet. 28. Without merits review, the Court should not credit respondents' newly-asserted (and mistaken) assertions about the effect of the NDAA, and a denial would simply relegate Iraq to potentially years of uncertain litigation.

But the proper action is to grant certiorari now, without further delay. The question presented, whether considered under the EWSAA or the NDAA, is a pure question of law requiring no factual development.⁴ It is of paramount national and international importance, involves the sovereignty of a crucial U.S. ally, and warrants plenary consideration now by this country's highest Court.

⁴ Respondents devote much of their opposition to irrelevant factual assertions. Respondents, however, focus on the alleged facts of their *fathers'* claims, which were satisfied long ago through default judgments. Respondents' own claims are for remotely-suffered emotional distress—allegations that pale in comparison to the damage inflicted by the Saddam Hussein regime on the Iraqi people, from whom respondents now effectively seek payment.

CONCLUSION

For the foregoing reasons, the petition should be granted and the judgment below reversed.

Respectfully submitted,

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