No. 07-___

IN THE

Supreme Court of the United States

REPUBLIC OF IRAQ,
Petitioner,
v.
JORDAN BEATY, et al.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the Republic of Iraq possesses sovereign immunity from the jurisdiction of the courts of the United States in cases involving alleged misdeeds of the Saddam Hussein regime and predicated on the exception to immunity in former 28 U.S.C. § 1605(a)(7).

PARTIES TO THE PROCEEDINGS

Petitioner is the Republic of Iraq, which was the defendant and appellant below.

Respondents are Jordan Beaty; Austin Makenzie Beaty, a minor by her next friend Robin Beaty; William R. Barloon; Bryan C. Barloon; and Rebecca L. Barloon. Respondents were plaintiffs and appellees below.

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Petitioner Republic of Iraq ("Iraq") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The order of the D.C. Circuit granting summary affirmance is unreported and is reproduced at page 1a of the appendix to this petition ("App."). The opinion of the District Court is reported at 480 F. Supp. 2d 60 and reproduced at App. 5a.

JURISDICTION

The judgment of the D.C. Circuit was entered on November 21, 2007. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The text of the relevant statutes is set forth in the appendix to this petition. App. 96a.

INTRODUCTION

This case involves a question of extraordinary national and international importance. In this case, the D.C. Circuit adhered to its earlier decision in *Acree* v. *Republic of Iraq*, 370 F.3d 41 (D.C. Cir. 2004), in which a panel of that court—over the disagreement of then-Judge Roberts on this issue—narrowly interpreted a broad statutory grant of authority to deny the President the ability to carry out a crucial foreign policy determination: the restoration of Iraq's sovereign immunity in cases like this one, involving the alleged misdeeds of the former Saddam Hussein regime.

That decision was manifestly wrong and warrants this Court's review. The D.C. Circuit rewrote broad statutory language to include limitations nowhere set forth in the statute, inappropriately limiting the President in the area of foreign policy. The question of Iraq's sovereign immunity is also exceptionally important for both Iraq and the United States. The issue affects pending cases against Iraq involving asserted liability of more than $1 billion, will potentially have continuing effect long into the future, and threatens the critical U.S.-Iraqi alliance and the foremost foreign policy goal of the United States today. As the U.S. government stated in the District Court below, the continuation of this and

similar cases against Iraq poses "a serious threat to the crucial foreign policy goal of promptly rebuilding Iraq into a democratic, self-sustaining nation," would "significantly interfere with the establishment of a new, peaceful government" in Iraq, and "stand[s] as an obstacle to achieving the Nation's foreign policy goals." U.S. Statement of Interest 12, 13, 16 (filed Mar. 15, 2004).

Moreover, since the D.C. Circuit entered its judgment in this case, legislative developments have further reinforced both the overriding importance of this case and the need for this Court's review. Because of the important foreign policy interests at stake, the President vetoed the initial version of an omnibus Defense Department funding statute solely because of provisions that would have increased the potential for Iraq's liability in this and similar cases. Congress subsequently enacted a new version of that statute, which both repealed the only conceivable basis for jurisdiction in this case and gave the President the authority—which he has since exercised—to waive the newly enacted replacement provision as to Iraq.

Accordingly, for the reasons that follow, the Court should grant the petition and reverse the judgment below. In the alternative, the Court should vacate the judgment and remand for further consideration in light of the enactment of Section 1083 of the National Defense Authorization Act for Fiscal Year 2008 ("NDAA"), Pub. L. No. 110-181, § 1083, 122 Stat. 3 (2008), and the President's waiver as to Iraq issued pursuant to that statute.

STATEMENT OF THE CASE

1. The Complaint. The plaintiffs are the children of Kenneth Beaty and William Barloon, who (along with their spouses) sued Iraq in 1996 alleging improper detention and treatment by the Saddam Hussein regime in 1993 and 1995. *See* App. 9a. At the time of those acts, Iraq possessed absolute sovereign immunity from such claims. But in 1996, Congress amended the Foreign Sovereign Immunities Act ("FSIA") to add 28 U.S.C. § 1605(a)(7) ("Section 1605(a)(7)"). That statute deprived countries designated as state sponsors of terrorism (which then included Iraq) of immunity for certain claims. In the case of *Daliberti* v. *Republic of Iraq*, the Beatys and Barloons obtained (and ultimately recovered on) a default judgment for more than $10 million. *See Daliberti* v. *Rep. of Iraq*, 146 F. Supp. 2d 19 (D.D.C. 2001); Order, *Daliberti* v. *Fed. Reserve Bank of N.Y.*, No. 1:03-cv-01055-JES (S.D.N.Y. Mar. 14, 2003).

The current plaintiffs were not present in Iraq during their fathers' detention. *See* Third Amended Compl. ¶¶ 23, 24. Nevertheless, in 2003 they filed this Section 1605(a)(7) case against Iraq seeking, under state common law, additional millions of dollars for emotional distress they allegedly suffered because of their fathers' treatment.

2. The EWSAA. Shortly after a U.S.-led coalition deposed the Saddam Hussein regime, Congress enacted the Emergency Wartime Supplemental Appropriations Act of 2003 ("EWSAA"), Section 1503 of which gave the President the authority to "make inapplicable with respect to Iraq" a specific sanctions law as well as "any other provision of law that applies to countries

that have supported terrorism." Pub. L. No. 108-11, § 1503, 117 Stat. 559, 579 (2003).

On May 7, 2003, President Bush issued Presidential Determination No. 2003-23, which lifted various sanctions against Iraq and expressly exercised his EWSAA authority to make inapplicable with respect to Iraq "*any* * * * provision of law" applying to countries that have supported terrorism. 68 Fed. Reg. 26,459 (May 7, 2003) (emphasis added). On May 22, 2003, the President confirmed to Congress that this included rendering inapplicable with respect to Iraq Section 1605(a)(7), which was the only conceivable basis for subject matter jurisdiction in this case. App. 99a; *Message to the Congress*, 39 Weekly Comp. Pres. Doc. 647, 647-48 (May 22, 2003).

The effect of that determination should have been to render Iraq once again immune from the jurisdiction of the courts of the United States in this and similar cases, just as Iraq was immune when the acts at issue were allegedly committed. Pursuant to 28 U.S.C. § 1330(a), federal 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." Because Section 1605(a)(7) was the only exception to sovereign immunity asserted to be applicable to Iraq in this case, and because the President made that statute inapplicable pursuant to authority granted by Congress, there was no longer any basis for subject matter jurisdiction in this case.

On May 22, 2003, the President issued Executive Order 13,303, in which he declared that the threat of judicial process against Iraqi assets "obstructs the

orderly reconstruction of Iraq, the restoration and maintenance of peace and security in the country, and the development of political, administrative, and economic institutions in Iraq." 68 Fed. Reg. 31,931 (May 22, 2003). The President declared that "[t]his situation constitutes an unusual and extraordinary threat to the national security and foreign policy of the United States[.]" *Id.*

The Executive Order prohibited attachments against numerous Iraqi assets. And in his message to Congress, the President declared that it is "[a] major national security and foreign policy goal of the United States" to ensure that all "Iraqi resources"—not merely those that were the main subject of the Executive Order—are dedicated to reconstruction of Iraq and "other purposes benefiting the people of Iraq." 39 Weekly Comp. Pres. Doc. at 647. He explained that he had taken certain actions to protect Iraqi property from judicial process, which "jeopardiz[ed] the full dedication of such assets to purposes benefiting the people of Iraq." *Id.* The President stated that one of these actions was his earlier Determination making Section 1605(a)(7) of the FSIA inapplicable to Iraq. *Id.* at 647-48. Thus, given that Section 1605(a)(7) was the only potential basis for abrogating Iraq's sovereign immunity in this case, the President confirmed that this case, and others like it, pose the threat to national security and foreign policy that he had identified.

In March 2004, the United States urged dismissal of this case in a Statement of Interest, asserting that the President's EWSAA Determination had validly restored Iraq's sovereign immunity. The Statement also elucidated the key foreign policy concerns that had led the President to issue that Determination

and to make it applicable to Section 1605(a)(7). The United States stated that adjudication of this case poses "a serious threat to the crucial foreign policy goal of promptly rebuilding Iraq into a democratic, self-sustaining nation," would "significantly interfere with the successful establishment of a new, peaceful government," and "stand[s] as an obstacle to achieving the Nation's foreign policy goals." U.S. Statement of Interest 12, 13, 16 (filed Mar. 15, 2004). The Statement also explained that it is the Nation's foreign policy goal to "preserve plaintiffs' claims * * * pending the establishment of a successor government capable of negotiating the diplomatic or other resolution of claims arising from the misdeeds of its predecessor." *Id.* at 16 n.9; *see also* Reply in Supp. of U.S. Statement of Interest 23-24 (filed May 5, 2004) (noting the "foreign policy determination of the political branches" that cases like this "could unduly impede efforts to reconstruct Iraq and to facilitate the development of a stable, peaceful and democratic Iraqi government").

3. Acree. On June 4, 2004, the D.C. Circuit decided the *Acree* case. Although Iraq was also the named defendant in that case, *Acree* involved different plaintiffs and different claims from the present case, and Iraq did not appear in *Acree* either in the District Court or the D.C. Circuit. Instead, the United States intervened to appeal a $959 million default judgment that had been entered against Iraq, arguing that the President's determination to render Section 1605(a)(7) of the FSIA inapplicable to Iraq—and thus restore Iraq's sovereign immunity—was a valid exercise of his EWSAA authority.

A panel of the D.C. Circuit rejected that argument. Even though Section 1503 of the EWSAA expressly

authorized the President to make inapplicable with respect to Iraq "*any* * * * provision of law that applies to countries that have supported terrorism," (emphasis added), and even though Section 1605(a)(7) was a provision of law that applied *only* to countries that have supported terrorism, the panel interpreted Section 1503 narrowly to include only "legal restrictions on assistance and funding for the new Iraqi Government." *Acree*, 370 F.3d at 57.

But even the majority found that this was an "exceedingly close question," *id.* at 51, and its analysis was refuted by then-Judge Roberts. As he explained, the EWSAA language "'[a]ny other provision' should be read to mean 'any other provision,' not, as the majority would have it, 'provisions that present obstacles to assistance and funding for the new Iraqi government.'" *Id.* at 60 (citation omitted).

The panel nevertheless vacated the entire judgment against Iraq, holding that "generic common law" may not furnish a cause of action in a Section 1605(a)(7) case and that plaintiffs failed to "identify a particular cause of action arising out of a specific source of law." *Id.* at 59. Because the judgment was vacated, there was no opportunity for the United States to seek *en banc* or Supreme Court review of the panel majority's jurisdictional holding on the EWSAA issue.

4. Proceedings Below. Iraq retained counsel in this case and moved to dismiss. Plaintiffs moved for partial summary judgment on liability. The United States also appeared, stating that it "stands by its position that the Court lacks subject matter jurisdiction in this suit as the result of the combined legislative and executive action that rendered

Section 1605(a)(7) of the FSIA inapplicable to Iraq" and "reiterat[ing] the crucial foreign policy interests underlying those political actions." Third U.S. Statement of Interest 2-3 (Nov. 17, 2006). On March 20, 2007, the district court (the Hon. John D. Bates) granted in part and denied in part both parties' motions. The court first determined that under *Acree* Iraq was not entitled to sovereign immunity as a result of the President's 2003 Determination. App. 22a. Judge Bates stated, however, that Judge Roberts' opinion in *Acree* has "considerable force" and that the court "would be inclined to adopt that position if free to do so." *Id.*

The court then proceeded, in the bulk of its opinion, to address Iraq's alternative grounds for dismissal, which included arguments under the political question, foreign affairs preemption, and Act of State doctrines. These grounds are independent of the sovereign immunity issue, and rely on the obvious and clear conflict between adjudication of this case and U.S. foreign policy as authoritatively expressed by the President and the Executive Branch.

Because the denial of sovereign immunity was immediately appealable as a collateral order, *see, e.g.*, *Permanent Mission of India to the United Nations* v. *City of New York*, 127 S. Ct. 2352 (2007); *Kilburn* v. *Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1126 (D.C. Cir. 2004), Iraq timely noticed an appeal from the District Court's March 20 order.[1]

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[1] As noted, the March 20 opinion primarily addressed Iraq's alternative grounds for dismissal. Judge Bates later certified that order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), and Iraq has petitioned the D.C. Circuit for acceptance of that appeal. The D.C. Circuit has held that petition in

The plaintiffs moved for summary affirmance on the basis of *Acree*. Iraq filed a petition for initial hearing *en banc*, urging the D.C. Circuit to reconsider and overrule *Acree*. The United States filed an amicus brief urging that the petition for initial *en banc* review be granted. In that brief, the United States stated that the issue of Iraq's sovereign immunity is one of "exceptional and continuing importance," Brief for United States as Amicus Supporting Initial Hearing En Banc at 2 (filed July 23, 2007), and also asked the D.C. Circuit to reconsider and overrule its decision in *Acree*.

On November 6, 2007, the Court of Appeals denied the petition for initial hearing *en banc*. Judges Kavanaugh and Brown, however, dissented from that determination. App. 94a.

On November 21, 2007, a motions panel of the D.C. Circuit granted plaintiffs' motion for summary affirmance in No. 07-7057. Citing only *Acree*, the panel ruled that "[t]he district court correctly held that the Republic of Iraq's sovereign immunity, waived or abrogated under 28 U.S.C. § 1605(a)(7), has not been restored under the Emergency Wartime Supplemental Appropriations Act ("EWSAA"), Pub. L. No. 108-11, 117 Stat. 559 (2003), and Presidential Determination 2003-23." App. 99a. This petition seeks review of that jurisdictional determination that Iraq's sovereign immunity was not restored.

5. The Veto, Revision, and Reenactment of Section 1083 of the NDAA. On December 14,

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abeyance pending its decision in *Simon* v. *Republic of Iraq*, No. 06-7175. *See* Order of Dec. 19, 2007, *Beaty* v. *Republic of Iraq*, No. 07-8004 (D.C. Cir.). If this Court grants the petition in this case and holds that Iraq's sovereign immunity has been restored, that Section 1292(b) petition would be moot.

2007, Congress passed the initial version of the NDAA, whose main purpose was to authorize funding for the military. Section 1083 of that bill, however, contained new jurisdictional, liability, and other provisions for litigation against current and former state sponsors of terrorism, which has included Iraq.

One provision, Section 1083(c)(4), appears to have been specifically directed at this case, purporting to state the current Congress' view regarding the intent of the earlier Congress that had enacted the EWSAA in 2003. *See* H.R. 1585, 110th Cong. § 1083(c)(4) (2007) (providing that "[n]othing in section 1503 of the [EWSAA] has ever authorized, directly or indirectly, the making inapplicable of any provision of chapter 97 of title 28, United States Code, or the removal of the jurisdiction of any court of the United States"). Section 1083 had originally been introduced as an amendment on the Senate floor, and there were no hearings or substantive debate on it. In particular, Section 1083(c)(4) was an entirely new provision inserted in conference committee with no debate or even identification of its sponsor. *Compare* H.R. Rep. No. 110-477, at 338-344 (2007) *with* 153 Cong. Rec. S12631-32 (daily ed. Oct. 3, 2007).

On December 28, 2007, the President announced that he was vetoing the entire NDAA solely because of the effect of Section 1083 as it would have applied to litigation against Iraq. In his memorandum announcing his disapproval and returning the bill to the House of Representatives, the President explained that Section 1083, if allowed to become law, "would undermine the foreign policy and commercial interests of the United States."

Memorandum of Disapproval, 3 Weekly Comp. Pres. Doc. 1641 (Dec. 28, 2007).[2]

Following the veto, Congress swiftly reenacted a new NDAA. The only significant difference between the new NDAA and the bill vetoed by the President was in Section 1083. As enacted, Section 1083 expressly repeals former 28 U.S.C. § 1605(a)(7), the statute that was invoked as the jurisdictional basis in this and other cases against Iraq. *See* NDAA, § 1083(b)(1)(A)(iii) ("Section 1605 of title 28, United States Code, is amended * * * in subsection (a) * * * by striking paragraph (7)"). In its place, Congress enacted a new jurisdictional exception to immunity for state sponsors of terrorism, now codified at 28 U.S.C. § 1605A(a)(1). *See* NDAA, § 1083(a).

Insofar as it provides a basis for jurisdiction, Section 1605A(a)(1) is largely consonant with former Section 1605(a)(7), but with one important difference. As a result of the veto, the reenacted version of the NDAA contained a new provision, Section 1083(d)(1), which 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." In order to issue such a waiver, the President must determine that a waiver

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[2] The President announced his view that the adjournment of Congress had prevented the return of the bill within the meaning of Article II, Section 7, thereby effectuating a "pocket veto". However, in addition to taking that position, the President announced that "I am also sending H.R. 1585 to the Clerk of the House of Representatives, along with this memorandum setting forth my objections, to avoid unnecessary litigation about the non-enactment of the bill that results from my withholding approval and to leave no doubt that the bill is being vetoed." *Id.*

is "in the national security interest of the United States" and would "promote the reconstruction of, the consolidation of democracy in, and the relations of the United States with, Iraq," and that "Iraq continues to be a reliable ally of the United States and partner in combating acts of international terrorism." NDAA, § 1083(d)(1). Congress provided that the waiver will apply to pre-enactment conduct and regardless of the extent to which it affects pending cases. *Id.* § 1083(d)(2).[3]

On January 28, 2008, the President exercised his authority to waive "all provisions of section 1083 of the Act with respect to Iraq and any agency or instrumentality thereof." Presidential Determination No. 2008-9, 73 Fed. Reg. 6571 (Feb. 5, 2008). This waiver necessarily included the entirety of 28 U.S.C. § 1605A, which was added by Section 1083(a).

In issuing his waiver, the President made all of the determinations required by Section 1083(d)(1). He also determined that Section 1083 may adversely affect Iraq "by exposing Iraq or its agencies or instrumentalities to liability in United States courts and by entangling their assets in litigation." *Id.* The President concluded that "[s]uch burdens would

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[3] Section 1083(d) also states the "sense of Congress" that

> the President, acting through the Secretary of State, should work with the Government of Iraq on a state-to-state basis to ensure compensation for any meritorious claims based on terrorist acts committed by the Saddam Hussein regime against individuals who were United States nationals or members of the United States Armed Forces at the time of those terrorist acts and whose claims cannot be addressed in courts in the United States due to the exercise of the waiver authority under paragraph (1).

NDAA, § 1083(d)(4).

undermine the national security and foreign policy interests of the United States, including by weakening the ability of the democratically-elected government of Iraq to use Iraqi funds to promote political and economic progress and further develop its security forces." *Id.* at 6573.

These burdens, in the President's view, included "a potentially devastating impact on Iraq's ability to use Iraqi funds to expand and equip the Iraqi Security Forces, which would have serious implications for U.S. troops in the field acting as part of the Multinational Force-Iraq and would harm anti-terrorism and counter-insurgency efforts." *Id.* at 6574. The President also determined that applying Section 1083 to Iraq "will hurt the interests of the United States by unacceptably interfering with political and economic progress in Iraq that is critically important to bringing U.S. troops home," and "would redirect financial resources from the continued reconstruction of Iraq and would harm Iraq's stability, contrary to the interests of the United States." *Id.* at 6574-75. The President further concluded that "[t]he economic security and successful reconstruction of Iraq continue to be top national security priorities of the United States" and that Section 1083 "threatens those key priorities" by "risk[ing] the entanglement of substantial Iraqi assets in litigation in the United States" and "expos[ing] Iraq to new liability of at least several billion dollars." *Id.* at 6571.

REASONS FOR GRANTING THE WRIT

This case readily meets the criteria for this Court's review. The D.C. Circuit's 2-1 decision in *Acree* runs directly contrary to the governing statute and to precedents of this Court. Moreover, the question

presented—whether Iraq's sovereign immunity has been restored—impacts not only numerous cases pending against Iraq involving more than $1 billion in potential liability, but also what may be the most crucial U.S. foreign policy goal today: U.S. support for the reconstruction of Iraq and its new democratic government. An issue of this magnitude affecting the sovereignty of a vital U.S. ally warrants this Court's review. In the event, however, that the Court is not inclined to review the issue on this record, it should nevertheless vacate the judgment of the D.C. Circuit and remand for further consideration in light of Section 1083 of the NDAA and the President's waiver, which occurred after the D.C. Circuit rendered its decision in this case.

I. THE D.C. CIRCUIT'S DECISION IS MANIFESTLY ERRONEOUS AND CONFLICTS WITH THIS COURT'S PRECEDENTS.

A. Section 1503 Of The EWSAA Unambiguously Authorized The President To Make Section 1605(a)(7) Inapplicable With Respect To Iraq.

The language of the EWSAA is unambiguous. Section 1503 authorizes the President to "make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 or *any other provision of law* that applies to countries that have supported terrorism." Pub. L. No. 108-11, § 1503 (emphasis added). This is exactly what the President did in Determination 2003-23, in which he made inapplicable with respect to Iraq "any * * * provision of law that applies to countries that have supported terrorism." 68 Fed. Reg. 26,459. As the President stated, former Section 1605(a)(7) was among the

provisions of law he made inapplicable to Iraq, thereby restoring Iraq's sovereign immunity in cases like this. *See* Message to the Congress, 39 Weekly Comp. Pres. Doc. 21, at 647-48 (May 22, 2003). That action was squarely within the President's EWSAA authority because Section 1605(a)(7) was a "provision of law" that applied *only* to "countries that have supported terrorism."

Instead of giving effect to the broad language of Section 1503 and the President's implementation of his statutory authority, the *Acree* majority relied on an outcome-determinative analysis to read limits into the President's authority that appear nowhere in the statute. First, applying the *ejusdem generis* canon of construction, the majority concluded that the EWSAA only authorized the President to make inapplicable with respect to Iraq "those provisions of law that impose economic sanctions on Iraq or that present legal obstacles to the provision of assistance to the Iraqi Government," which purportedly did not include Section 1605(a)(7). 370 F.3d at 55.[4] Second, the majority relied on the absence of any reference to the FSIA or to federal court jurisdiction in the EWSAA legislative history—which the majority itself admitted was "sparse" and "not conclusive"—to conclude that "the general reference in § 1503 to 'other provisions of law that apply to countries that have supported terrorism' embraces only those provisions of law that constitute legal restrictions on assistance to and trade with Iraq." *Id.* at 55, 56.

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[4] In fact, Section 1605(a)(7) readily falls within the majority's own characterization of laws covered by Section 1503 of the EWSAA, since Section 1605(a)(7) was a form of sanction imposed on nations that sponsored terrorism.

Then-Judge Roberts cogently explained the majority's key errors. He noted that the expansive language of the EWSAA should be accorded "'broad, sweeping application,'" particularly given that Congress had recently passed a similar appropriations statute with a narrower scope, thus showing that "Congress knows how to use more limited language * * * when it wants to." *Id.* at 60 (citation omitted). He also noted that the majority erred in relying on the *absence* of specific references in the legislative history to limit the reach of the statute, stating that "the party seeking to narrow the application of the statute must demonstrate that Congress intended something less than what the law on its face says." *Id.* at 62 (citations omitted). Because the legislative history gives no indication "that Congress did *not* intend to include Section 1605(a)(7) of the FSIA among the 'any other' provisions that the President could render inapplicable to Iraq," Judge Roberts correctly concluded "that the President was authorized to—and did, with the Presidential Determination—oust the federal courts of jurisdiction over Iraq in Section 1605(a)(7) cases." *Id.* at 63.

The *Acree* panel also erred in suggesting, in dicta, that its decision was supported by the limited duration of the President's EWSAA authority to act. 370 F.3d at 56-57. Section 1503 provides that the "*authorities* contained in this section shall expire" if not renewed. Pub. L. No. 108-11, § 1503 (emphasis added). It does not provide that the effect of the President's *actions* would expire where, as here, those actions were taken when the statutory authority was in effect. That is the Executive's understanding, *see* Brief for United States as Amicus

Supporting Initial Hearing En Banc at 12-14, and it is correct. The President's 2003 Determination rendering Section 1605(a)(7) inapplicable to Iraq was clearly authorized by an existing statute and was thus fully effective.[5]

Nor is it "perplexing," *Acree*, 370 F.3d at 56, that Congress would authorize the President to restore Iraq's immunity for acts done while designated as a state sponsor of terrorism, while Section 1605(a)(7) denies immunity in such situations for other nations. As Judge Roberts explained, "[g]iven the broad language of the EWSAA and the circumstances surrounding its enactment, it is entirely possible—and surely not 'perplexing'—that Congress in 2003 made an *ad hoc* decision to strike a different balance in favor of the new government of Iraq." *Id.* at 61. Indeed, Congress made the same determination in the recent NDAA after the President objected to a lack of any exception for Iraq. The law as enacted imposes onerous provisions on state sponsors of terrorism while expressly authorizing the President to waive those provisions, including the new jurisdictional exception to sovereign immunity in 28 U.S.C. § 1605A(a)(1), as to Iraq.

Even the *Acree* majority found the issue an "exceedingly close question," 370 F.3d at 51, and its analysis has been rejected by two judges (then-Judge Roberts in *Acree* and Judge Bates in this case) and apparently questioned by two others (Judges Kavanaugh and Brown, who dissented from the denial of *en banc* reconsideration). A decision of such debatable merits and unquestionable importance warrants this Court's review.

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[5] The meaning of the EWSAA sunset provision was never briefed by either party in *Acree*.

B. The D.C. Circuit's Decision Conflicts With This Court's Precedents.

As Judge Roberts concluded in *Acree*, the D.C. Circuit's holding that the President exceeded his authority under Section 1503 of the EWSAA also contravenes this Court's precedents. The *Acree* majority failed to follow the fundamental rule of statutory construction that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-54 (1992). In particular, where, as in Section 1503, a statute uses the expansive term "any," the Court has consistently given that word the broadest possible sweep. *See, e.g., United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) ("[T]he word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'"); *United States* v. *Monsanto*, 491 U.S. 600, 609 (1989) ("The statutory provision at issue here is broad and unambiguous, and Congress' failure to supplement [the statute's] comprehensive phrase—'any property'—with an exclamatory 'and we even mean assets to be used to pay an attorney' does not lessen the force of the statute's plain language."); *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 589 (1980) ("[T]he phrase, 'any other final action,' in the absence of legislative history to the contrary, must be construed to mean exactly what it says"); *see also United States* v. *Ballistrea*, 101 F.3d 827, 836 (2d Cir. 1996) ("'[I]t is unnecessary to go beyond the plain language of the statute. 'Any means any.'") (citations omitted).

Just four weeks ago, this Court construed a similar provision in *Ali* v. *Federal Bureau of Prisons*, 128 S.

Ct. 831, 835 (2008). *Ali* turned on whether the United States held sovereign immunity against a prisoner's claim for damages arising from a detention of property under a statute providing that the United States is immune to any claim arising from "detention of any goods, merchandise, or other property by any officer of customs or excise or *any other law enforcement officer.*" *Id.* (*citing* 28 U.S.C. s. 2680(c)) (emphasis added). This Court held that the provision included Bureau of Prisons officers—foreclosing the prisoner's claim—because "[t]he phrase '*any* other law enforcement officer' suggests a broad meaning." *Id.* (emphasis in original). "Congress' use of 'any' to modify 'other law enforcement officer' is most naturally read to mean law enforcement officers of whatever kind." *Id.* at 836. Likewise, Congress' use of the term "any" to modify "other provision of law" must mean all kinds of provisions of law.

Indeed, as Judge Roberts noted, 370 F.3d at 62, the D.C. Circuit's decision in *Acree* runs counter to this Court's decision in *Harrison*, *supra*, where the Court refused to construe the statutory term "any other final action" to encompass only actions that were "similar to the actions under the specifically enumerated provisions that precede that catchall phrase in the statute." 446 U.S. at 587. Holding that the canon of construction allowing inferences from nearby terms applies only where there is uncertainty, the Court in *Harrison* "discern[ed] no uncertainty in the meaning of the phrase, 'any other final action.'" *Id.* at 588. The Court held that, in the absence of legislative history to the contrary, that phrase "must be construed to mean exactly what it says, namely, *any other* final action." *Id.* at 589. (emphasis in original). Moreover, the Court also

rejected the argument, based on "scant" legislative history, that Congress could not have intended to affect the jurisdiction of the courts without discussion of the matter, holding that "[i]n ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark." *Id.* at 592 *See Acree*, 370 F.3d at 63 (Roberts, J.).

The D.C. Circuit in this case did what *Harrison* and *Ali* say it should not. It held that the broad statutory phrase "any other provision of law" is to be read narrowly to encompass only "legal restrictions on assistance and funding for the new Iraqi Government," 370 F.3d at 57, based on the nature of the one law specifically listed in Section 1503 and the fact that the "sparse" and "inconclusive" legislative history did not specifically refer to federal court jurisdiction or the FSIA. The court should have given effect to the words of the statute rather than rewriting it. *See PGA Tour, Inc.* v. *Martin*, 532 U.S. 661, 689 (2001) ("[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.") (quoting *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212 (1998)).

Moreover, and in any event, the D.C. Circuit's cabining of the President's broad statutory authority cannot be squared with this Court's holdings that the President has inherent authority—even *without* express statutory authorization—to compromise the claims of U.S. nationals to further foreign policy interests. *See Amer. Ins. Ass'n.* v. *Garamendi*, 539 U.S. 396, 414 (2003) ("[I]n foreign affairs the President has a degree of independent authority to act."); *Dames & Moore* v. *Regan*, 453 U.S. 654, 679-80

(1981) (President possesses inherent Article II authority to settle or compromise claims in exercise of foreign policy). This case squarely implicates a critically important foreign policy interest of the United States: this country's support for and relations with the new democratic government of Iraq. Under the cited cases, the President possesses the inherent authority to nullify the claims at issue in order to further that foreign policy. The President must necessarily have possessed the lesser ability to withdraw a judicial forum while still preserving the claims for diplomatic negotiation, given that Congress expressly authorized him to make inapplicable any law that was based on Iraq's former status as a state sponsor of terrorism.

Section 1503, and the President's Determination made under it, implement the dramatic change in U.S. foreign policy away from imposing sanctions on Iraq based on its status as a former sponsor of terrorism—including the penalty inflicted by Section 1605(a)(7)'s abrogation of immunity—and in favor of supporting Iraq's reconstruction and its new, democratic government. The D.C. Circuit's contrary decision rewrites the statute, undermines that foreign policy, threatens the U.S.-Iraqi alliance, and should not stand unreviewed by this Court.

II. THIS CASE INVOLVES AN ISSUE OF EXCEPTIONAL NATIONAL AND INTERNATIONAL IMPORTANCE.

The national and international importance of this case is undeniable. The United States is presently engaged in an ongoing military operation with the purpose of supporting and strengthening the new democratic government of Iraq and the reconstruction of its country. In the view of both Iraq and the

United States, subjecting the sovereign nation of Iraq to lawsuits based on the misdeeds of its prior regime would severely hinder that foreign policy goal and threaten the critical U.S.-Iraqi alliance.

The issue of Iraq's sovereign immunity for the misdeeds of the deposed Saddam Hussein regime is of great importance to the Republic of Iraq because it threatens Iraq's fundamental sovereignty and potentially impacts at least seven other pending cases against Iraq involving well over $1 billion in asserted liability.[6] The issue will also have a continuing impact far into the future. Iraq was not delisted as a state sponsor of terrorism until October 2004. Because there is a generous ten-year statute of limitations for cases brought under former Section 1605(a)(7), *see* 28 U.S.C. § 1605(f), if Iraq remains subject to the jurisdiction of United States courts pursuant to that provision it will be vulnerable to claims through at least October 2014, ten years after that delisting. This would include claims involving actions by the Saddam Hussein regime during and after the 2003 coalition invasion.

The issue is also of exceptional importance to the United States, as the *Acree* ruling has compromised what may be the most important U.S. foreign policy goal today: U.S. support for the reconstruction of

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[6] *See Vine* v. *Rep. of Iraq*, No. 01-2674 (D.D.C.) (claims for $400 million); *Simon* v. *Rep. of Iraq*, No. 06-7175 (D.C. Cir.) and *Seyam* v. *Rep. of Iraq*, No. 06-7178 (D.C. Cir.) (consolidated) (claims for over $243 million); *Acree* v. *Rep. of Iraq*, Nos. 02-632, 06-723 (D.D.C.) (renewed complaint and Rule 60(b) motion seeking to reinstate claims for $959 million); *Lawton* v. *Rep. of Iraq*, No. 02-474 (D.D.C.); *In re Terrorist Attacks on September 11, 2001*, MDL-1570 (S.D.N.Y.) (asserted liability against all defendants of more than $1 trillion).

Iraq and its new democratic government.[7] As noted, the United States stated below that the Determination invalidated in *Acree* seeks to remove "a serious threat to the crucial foreign policy goal of promptly rebuilding Iraq into a democratic, self-sustaining nation." U.S. Statement of Interest 12.

More recently, the President underscored the enormous importance of these issues when he took the extraordinary step of vetoing a massive omnibus defense appropriations bill solely because of the deleterious foreign policy consequences one provision would have had on this and similar lawsuits, and then subsequently waived new Section 1605A as to Iraq. Just last month, the President determined that "exposing Iraq or its agencies or instrumentalities to liability in United States courts and * * * entangling their assets in litigation" would "undermine the national security and foreign policy interests of the United States," would have "serious implications for U.S. troops in the field," will "hurt the interests of the United States by unacceptably interfering with political and economic progress in Iraq that is critically important to bringing U.S. troops home," would "redirect financial resources from the continued reconstruction of Iraq and would harm Iraq's stability, contrary to the interests of the United States," and would threaten "[t]he economic

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[7] *See, e.g.*, Amy Falls, *Acree* v. *Republic of Iraq: Holding a Fragile, U.S.-Backed Government Civilly Liable for the Wrongdoings of the Previous, Ousted Regime*, 73 Geo. Wash. L. Rev. 880, 893-95 (2005) (the "regrettable" decision in *Acree* "lead[s] to truly bizarre and perplexing results, subjecting a country devastated by the U.S. military to potentially billions of dollars of liability in U.S. courts," and thus "directly contradicts current U.S. foreign policy").

security and successful reconstruction of Iraq." 73 Fed. Reg. 6571, 6571-74 (Feb. 5, 2008).

U.S. foreign policy is thus undermined by the specter of imposing "crushing liability," *Acree*, 370 F.3d at 61 (Roberts, J.), on an allied nation the United States is actively seeking to rebuild and support. But the diplomatic harms go beyond that.[8] Iraq is aware of no other friendly U.S. ally that has ever been subjected to liability in U.S. courts for the alleged misdeeds of a formerly hostile prior regime. Indeed, similar attempts to subject Germany and Japan to lawsuits for their World War II actions have uniformly been rejected.[9] Iraq should be treated no differently than those formerly hostile and now allied nations.

Reciprocity is a key basis of foreign sovereign immunity. *See Nat'l City Bank of N.Y.* v. *Rep. of China*, 348 U.S. 356, 362 (1955). In other words, how the United States treats a foreign nation in U.S. courts is fair game for how that nation treats the United States in its courts. U.S. involvement in Iraq is now far greater than any involvement of the Saddam Hussein regime with U.S. citizens. Just as the United States undoubtedly would expect that its

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[8] *See* Falls, *supra*, at 893 (noting that *Acree* holding "could potentially devastate the already precarious foreign relationship between the United States and Iraq" as "[m]any Iraqis will likely be skeptical of trusting a foreign government that claims to be committed to developing a new and vibrant economy and government in Iraq, yet refuses to forgive that new government and economy from civil liability for the transgressions committed by the previous regime").

[9] *See, e.g.*, *Hwang Geum Joo* v. *Japan*, 413 F.3d 45 (D.C. Cir. 2005); *Princz* v. *Fed. Rep. of Germany*, 26 F.3d 1166 (D.C. Cir. 1994).

accountability for acts involving Iraqi citizens, if any, be addressed through diplomatic negotiations, the President made a reasoned determination—amply supported by broad statutory authority—that claims involving the Saddam Hussein regime should be addressed diplomatically as well.

This case asks whether the President has the power to implement what may be the nation's most important foreign policy, pursuant to broad statutory authority whose plain language readily encompasses that action. The deeply flawed *Acree* decision—adhered to in this case—threatens both that foreign policy and the crucial U.S.-Iraqi alliance. An issue of such extraordinary international importance warrants review by this nation's highest Court.

III. AT A MINIMUM, THE COURT SHOULD REMAND FOR FURTHER CONSIDERATION IN LIGHT OF SECTION 1083 OF THE NDAA.

As shown above, the issue decided by the D.C. Circuit in *Acree* and adhered to in this case independently warrants this Court's review. If that decision is reversed, then there will no statutory basis for jurisdiction in this case or similar cases brought under former Section 1605(a)(7), regardless of the effect of the recent repealer of that provision.

The need for this Court's review of this jurisdictional question is also unaffected by the fact that Iraq may have other defenses in this or other cases. Decisions on foreign sovereign immunity are subject to immediate appeal under the collateral order doctrine because the right sought to be vindicated—immunity from the burdens of litigation—would be compromised if it could not be

finally adjudicated on appeal as a threshold matter. *See, e.g., Jungquist* v. *Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1026 (D.C. Cir. 1997) ("the order denying dismissal for immunity is effectively unreviewable on appeal [from final judgment] because "'sovereign immunity is an immunity from trial and the attendant burdens of litigation, and not just a defense to liability on the merits.'"") (citations omitted). Thus, requiring Iraq to litigate fully its alternative defenses before reaching the jurisdictional question of sovereign immunity would effectively nullify the right Iraq seeks to vindicate.[10]

The recent enactment of Section 1083 of the NDAA and the President's waiver as to Iraq has only underscored the need for this Court's review. Section 1083 expressly repealed former Section 1605(a)(7) and replaced that provision with a new jurisdictional exception to immunity, 28 U.S.C. § 1605A(a)(1), which the President then expressly waived as to Iraq pursuant to the authority given him by Congress.[11]

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[10] Similarly, Iraq's immunity would be effectively lost if the Court were to await the possible occurrence of a direct split in the circuits before resolving this question of national importance. Because of the FSIA's venue provision, *see* 28 U.S.C. § 1391(f)(4), virtually all cases against current and former state sponsors of terrorism must be brought in the District of Columbia. Iraq is presently defending only one case outside of the District of Columbia, *see supra* n. 6, and that case is still in its very early stages as to Iraq. It is therefore very unlikely that a circuit split would develop in the foreseeable future.

[11] Congress, moreover, expressly granted the President the authority to waive Section 1083(c)(4), which had purported to express the current Congress's views as to the meaning of Section 1503 the EWSAA. The President did so, thereby repudiating any conceivable effect of that language on Iraq.

Nevertheless, the D.C. Circuit has not yet considered the effect of Section 1083 and the President's waiver on Iraq's claim to sovereign immunity. In a different case involving Iraq, the D.C. Circuit recently ordered briefing, *sua sponte*, as to whether cases against Iraq can be maintained on the basis of Section 1605(a)(7) after the enactment of Section 1083 and the President's waiver. *See* Order of Feb. 4, 2008, *Simon* v. *Republic of Iraq*, Nos. 06-7175, 06-7178 (consolidated). Iraq has not yet filed its brief in response to that order.

Accordingly, if the Court is not inclined at this time to consider the sovereign immunity issue presented in this petition, it should at a minimum vacate the D.C. Circuit's judgment in this case and remand for further consideration in light of this intervening legislative development. *See, e.g.*, *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) ("Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is * * * potentially appropriate."). Such an order would ensure that any decision in this case will have the benefit of the D.C. Circuit's full consideration of all potentially relevant issues.

CONCLUSION

For the foregoing reasons, the petition should be granted and the judgment below reversed. In the alternative, the Court should grant the petition, vacate the judgment, and remand for further

consideration in light of the enactment of Section 1083 of the NDAA and the President's waiver executed thereunder.

Respectfully submitted,

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