No. 08-539

IN THE

Supreme Court of the United States

REPUBLIC OF IRAQ, et al.,

Petitioners,

v.

ROBERT SIMON, 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 PETITIONERS

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REPLY BRIEF FOR PETITIONER

Respondents contend that the question in this case, which is also presented in the *Beaty* case, raises no important issues worthy of this Court's review. But the United States Government, the authoritative voice on this nation's foreign policy, disagrees. In its recent brief in *Beaty* recommending a grant of certiorari, the United States stated that the question "is of exceptional importance to the foreign relations of the United States and the imperative foreign policy objective of fostering a stable, democratic government in Iraq." Brief for the U.S. as Amicus Curiae 22, *Rep. of Iraq* v. *Beaty*, No. 07-1090 (filed Dec. 5, 2008) ("U.S. *Beaty* Amicus Br."). The United States further stated that the erroneous *Acree*

decision—which was followed and expanded upon in this case—"threatens important national priorities with respect to the reconstruction of Iraq" and that "[t]he significant threat posed to Iraq's stability and redevelopment by terrorism-related lawsuits and enforcement actions has not diminished in the intervening years since the *Acree* decision." *Id.* at 17.

Thus, the nations whose foreign relations will be affected by the failure to recognize Iraq's sovereign immunity—Iraq and the United States—agree that the issue is exceptionally important to those relations and should be resolved by this country's highest court. Against that agreement, respondents' arguments seeking to belittle the foreign policy significance of this case ring hollow.

Respondents' attempts to defend the merits of the D.C. Circuit's rulings similarly fail. On the EWSAA issue, the United States thoroughly refutes their arguments, correctly stating that certiorari is warranted in light of the D.C. Circuit's "grave error" that "overturn[ed] the considered judgment of the President under an express grant of authority by Congress." *Id.* at 17 n.1, 1. Respondents likewise fail to justify the D.C. Circuit's ruling that former Section 1605(a)(7)—assuming *arguendo* it was not previously rendered inapplicable—can be the basis for subject matter jurisdiction even though the NDAA expressly *repealed* it. Although the United States finds it unnecessary to reach this issue, it is a jurisdictional issue encompassed by the question presented in both this case and *Beaty*. Therefore, that issue will be before this Court, whether in this case or *Beaty*, in the event it is necessary to reach it to decide the question presented.

Whether Iraq's sovereign immunity has been restored in Saddam-era state sponsor of terrorism cases like this is an exceptionally important question affecting critical U.S. foreign policies and the crucial U.S.-Iraq relationship. Certiorari is warranted.

I. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT.

The petition explains that the decision below will adversely affect the foreign policy of the United States and its relations with Iraq. Respondents argue that this statement (as they mischaracterize it) is "contrived and farcical" because Iraq purportedly "can find not a single authority" supporting its view. Opp. 8-9. Respondents, however, ignore that the petition itself reflects the considered views of the sovereign foreign government whose relations are directly affected. And the highest "authority" on U.S. foreign policy—the United States Government—has now confirmed that the question presented "is of exceptional importance to the foreign relations of the United States" and that the D.C. Circuit's erroneous resolution of it "threatens important national priorities with respect to the reconstruction of Iraq." U.S. *Beaty* Amicus Br. 22, 17. Respondents are in no position to second-guess the reasoned foreign policy determinations made by either government.

Subjecting a friendly foreign ally to coercive lawsuits based on the misdeeds of a deposed regime is unprecedented, and threatens to unravel the very fabric of international relations. Reciprocity is the basis for sovereign immunity: if the United States subjects a friendly allied nation to lawsuits in its own courts, it can expect the same treatment abroad. Pet. 21-22. And in these particular circumstances, the United States has potentially much to lose in

that bargain. It is principally for this reason that claims between formerly hostile, but now allied, nations have always been resolved diplomatically, through state-to-state negotiations.

Respondents' own arguments reinforce this point. They allege that the Government of Iraq sought compensation for some of the damage inflicted on Iraqi civilians by the United States. Opp. 15-16. But this is how claims of this sort have always been handled—through negotiations between nations rather than by haling a sovereign nation into a foreign nation's court at the behest of private plaintiffs. If Iraq is improperly denied its sovereign immunity in contravention of a Presidential determination, it would not be unreasonable to expect the Iraqi Government to legislate equivalent jurisdiction for Iraq courts, and thereby accord reciprocal treatment to the United States.

Respondents note that Iraq and the United States recently entered into a Status of Forces Agreement ("SOFA"), but misjudge its import. That agreement was negotiated against the backdrop of the U.S. Government's consistent support for Iraq's position that its sovereign immunity was restored in cases like this. And as respondents neglect to mention, the SOFA will be put to a popular referendum in Iraq by July 2009, and a vote of disapproval would void the agreement. *See* Agence France-Presse, *Iraqi Parliament Approves Landmark U.S. Military Pact* (Nov. 27, 2008) (http://news.yahoo.com/s/afp/20081127/wl_mideast_afp/iraqusmilitarywrap).

A denial of Iraq's immunity here could well affect that vote. Indeed, it was reported that opponents of the SOFA in Iraq's Parliament raised concerns about whether "Iraqi assets would continue to be protected

against claims that could not only consume billions of dollars but also make it difficult for Iraq to sell oil and move the proceeds through banks," specifically including pending claims under former Section 1605(a)(7). [1] These opponents, it was reported, sought U.S. Government assurances that Iraq's immunity would be respected. *Id.* The bilateral relationship would be complicated if claims by U.S. plaintiffs against the former Iraqi regime may proceed while reciprocal claims by Iraqis against the United States (which are numerous) may not.[2]

Respondents also point to developments involving Libya, Opp. 11 n.9, but these developments only support the petition's arguments. Although Libya was removed from the list of state sponsors of terrorism, it is far from a friendly U.S. ally. And equally important, the government that sponsored that terrorism—the Khaddafi regime—is still in power. Thus, when the Executive removed Libya from the list, it made clear that this action was expressly subject to "a confirmation from Libya" that Libya would have to respond to the legal cases against it. 71 Fed. Reg. 31,913 (2006). By contrast,

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[1] *See* James Glanz & Steven Myers, *Iraqi Foes of Security Deal Seek to Shield Assets*, N.Y. Times, Nov. 24, 2008, at A6 (concerns included claims "by Americans who were badly treated as prisoners of war or used as 'human shields' against American bombardment in the 1991 war," and claims "that Mr. Hussein was * * * behind the Oklahoma City bombing in 1995 or the World Trade Center attacks on Sept. 11, 2001"). These descriptions cover pending Section 1605(a)(7) cases against Iraq. *See* Pet. 15 n.4.

[2] Nor is it relevant that Iraq asserted unrelated claims in a case unrelated to Section 1605(a)(7). Opp. 13. Like other friendly nations, Iraq may sue (and sometimes be sued, *see* 28 U.S.C. § 1605(a)(2)) regarding commercial activities.

the current cases against Iraq seek to penalize a new, democratic government that the United States is actively supporting.

Respondents belittle the significance of the issue, claiming that potential liability against Iraq of more than $1,000,000,000 is a "negligible amount." Opp. 7. That statement is ridiculous on its face. But regardless, the Court has accepted review in cases implicating foreign policy concerns where the stakes were far lower. *See, e.g., Ministry of Defense & Support for the Armed Forces of the Islamic Rep. of Iran* v. *Elahi*, No. 07-615 (granting petition of Iran, which is not an allied nation, in case involving $2.3 million). And although respondents disparage this liability's impact on Iraq's efforts to rebuild its war-torn nation, the U.S. Government disagrees. As it reiterated only days ago, the "potentially 'crushing liability'" at issue in these cases still poses "a significant threat * * * to Iraq's stability and development," which "would seriously undermine funding for the essential tasks of rebuilding and stabilizing Iraq." U.S. *Beaty* Amicus Br. 22, 14, 17, 13 (quoting *Acree* v. *Rep. of Iraq*, 370 F.3d 41 61 (D.C. Cir. 2004) (Roberts, J., concurring)).

But the adverse foreign policy effects extend far beyond the massive dollar amounts at stake. The Saddam Hussein regime imposed incalculable damage and suffering on the Iraqi people, from whom respondents now seek further retribution. Following the regime's ouster, however, "the foreign policy of the United States changed dramatically from imposing sanctions on the Hussein regime to fostering the creation of a new, stable Iraq." *Id.* at 14. And consistent with bedrock principles of comity and reciprocity that underlie the doctrine of foreign

sovereign immunity, the President—acting with statutory authority—sought to restore Iraq to the community of democratic nations by according it the same respect as other formerly hostile, but now allied, nations.

By erroneously failing to recognize Iraq's immunity, the D.C. Circuit threatened both the foreign policy of the United States and its relations with a crucial ally. A decision of this magnitude warrants review by this country's highest court.

II. THE D.C. CIRCUIT'S RULING CONFLICTS WITH THIS COURT'S PRECEDENTS.

A. The Court Should Consider Both Reasons Supporting Iraq's Sovereign Immunity.

The United States notes that, while certiorari should be granted on the question presented, the Court need not decide whether the NDAA's repeal of former Section 1605(a)(7) eliminated that statute as a basis for subject matter jurisdiction in this case, because "the President's exercise of his authority under EWSAA Section 1503 had *already* permanently rendered Section 1605(a)(7) inapplicable to Iraq." U.S. *Beaty* Amicus Br. 19. Iraq agrees.

However, in the event that the Court (or one or more Justices) finds that the President's EWSAA determination does not resolve the question presented, it would become necessary to determine whether the NDAA rendered former Section 1605(a)(7) inapplicable to this case. Because that issue (like the EWSAA issue) implicates subject matter jurisdiction under 28 U.S.C. § 1330(a), it cannot be waived. Accordingly, while the Court could reverse the judgment in this case or in *Beaty*

on the basis of the EWSAA determination alone, it could not affirm either judgment without also considering the effect of the NDAA's repeal of Section 1605(a)(7).

Therefore, if certiorari is granted—whether in *Beaty*, this case, or both—Iraq will present the NDAA issue as an alternative basis for reversal so that the Court can consider it if necessary. *See* Reply Brief for Petitioner 6-10, *Beaty* v. *Rep. of Iraq*, No. 07-1090 (filed May 5, 2008) ("*Beaty* Cert. Reply Br."). Indeed, the D.C. Circuit decided the issue *sua sponte* in this case on the basis of post-argument briefing alone. And now that the D.C. Circuit has definitively resolved that pure issue of law, there is no reason for this Court to await further developments below.

The Court thus should grant certiorari in both cases or clarify that any grant of certiorari encompasses both (1) the validity of the President's EWSAA determination and (2) the effect, if any, of the NDAA's repeal of Section 1605(a)(7) and the President's waiver. But if certiorari is granted—in either or both cases—Iraq intends to present both arguments to the Court.

B. The D.C. Circuit Manifestly Erred In Invalidating The President's EWSAA Determination.

Little needs to be said about respondents' defense of the D.C. Circuit's *Acree* decision that has not already been said by the United States and Iraq. That decision was manifestly erroneous and should not stand unreviewed.

Respondents first contend that the President never understood that his EWSAA determination had removed Section 1605(a)(7) as a basis for jurisdiction

over Iraq. Opp. 23-24. But the President's own statement and those in the United States' recent brief refute that contention. *See* U.S. *Beaty* Amicus Br. 15 ("To the extent there is any doubt whether Section 1503 encompasses Section 1605(a)(7), the President has made clear his judgment that it does."); *Message to the Congress*, 39 Weekly Comp. Pres. Doc. 647-648 (May 22, 2003).

Respondents next contend that the EWSAA was intended to remove only "the most obvious statutory obstacles to providing funds and Western goods" to Iraq. Opp. 28. But the statute says nothing like that; instead, it granted the President the unfettered authority to make inapplicable as to Iraq "*any* * * * *provision of law* that applies to countries that have supported terrorism." EWSAA § 1503 (emphasis added). As the United States cogently explains, not only does this language encompass former Section 1605(a)(7), but the EWSAA's purposes show that this proviso states an independent rule that necessarily covers more than just "obstacles to assistance and funding for the new Iraqi Government." *Acree*, 370 F.3d at 51. *See* U.S. *Beaty* Amicus Br. 9. Section 1605(a)(7) was one of various sanctions that once applied to Iraq as a state sponsor of terrorism, and the EWSAA expressly authorized the President to make all of them inapplicable to Iraq. This was not an "implied repeal" of anything, Opp. 29-30, but rather an express grant of authority to the President.

Finally, respondents cite NDAA § 1083(c)(4) in passing. Opp. 29. But as both Iraq and the United States have explained, this attempt by later legislators to manufacture "subsequent history" to the EWSAA is inoperative because of the President's NDAA waiver and, in any event, cannot override the

statute's plain language as an expression of the intent of the Congress that passed it. *See* Pet. 31 n.12; *Beaty* Cert. Reply Br. 4-6; U.S. *Beaty* Amicus Br. 18 (Section 1083(c)(4) "should be afforded no weight in interpreting EWSAA Section 1503").

C. A Repealed Statute Does Not Confer Jurisdiction Over This Case.

Respondents also mischaracterize what Congress did in NDAA § 1083. They contend that the normal rule that jurisdictional repealers apply to pending cases cannot apply here because the repeal of Section 1605(a)(7) purportedly removed jurisdiction and left plaintiffs no alternative forum. Opp. 17. But that is not what the NDAA did: Congress simultaneously *replaced* Section 1605(a)(7) with a new jurisdictional provision. As respondents do not dispute, *every* pending case under former Section 1605(a)(7) was made cognizable under new Section 1605A(a)(1), provided plaintiffs follow transitional re-filing rules.

Of course, the President's NDAA waiver had the effect of restoring Iraq's sovereign immunity by eliminating the replacement provision, new Section 1605A(a)(1), as to Iraq. Respondents, however, confuse *Congress's* action in repealing and replacing former Section 1605(a)(7) with the *President's* action in waiving its replacement. In NDAA § 1083(d)(2), Congress expressly authorized the President to issue the waiver and unambiguously provided that it would apply to pending cases.

Thus, the question is whether *Congress's* repeal of Section 1605(a)(7)—which applies to many nations, not just Iraq—is subject to the usual rule that jurisdictional repealers apply to pending cases. Even under respondents' characterization of the law, the

usual rule applies: far from leaving plaintiffs with no other forum as a result of Section 1605(a)(7)'s repeal, Congress simultaneously bestowed a replacement jurisdictional provision that encompasses all pending claims.

Nor is this case like *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 576-77 (2006), which held that a limited divestment of habeas jurisdiction did not apply to pending cases because Congress expressly provided that two accompanying jurisdictional provisions applied to pending cases, thus demonstrating a different intent as to the third. The NDAA evidences no such intent. Respondents' parrot the D.C. Circuit's reliance on NDAA § 1083(c)(3). Opp. 19-20. But this section shows no intent to apply a repealed provision to pending cases. Rather, it allows plaintiffs (who may not have known of the NDAA) to re-file under new Section 1605A after their Section 1605(a)(7) cases are dismissed or, if necessary, after they obtain final judgment in a case involving alternative jurisdictional grounds in addition to Section 1605(a)(7). *See* Pet. 27 n.9.

III. CERTIORARI SHOULD NOT BE DENIED BASED ON ARGUMENTS NOT CONSIDERED BELOW.

Respondents also raise constitutional arguments involving separation-of-powers and the alternative "pocket veto" of the original NDAA bill. Because these arguments were not addressed below, they are no basis for denying certiorari. But they are also meritless.

1. Far from violating separation-of-powers, the EWSAA and NDAA involve the exercise of a power the Executive has long possessed. Prior to the FSIA,

the Executive solely determined whether a nation possessed foreign sovereign immunity, and a court was required to "surrender its jurisdiction" based on that determination. *Rep. of Mexico* v. *Hoffman*, 324 U.S. 30, 35 (1945). *See Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 488-90 (1983). This case involves a limited restoration of that traditional authority, which lies at the core of the Executive's broad foreign affairs powers. Indeed, the Executive has the power to compromise claims implicating foreign nations even *without* statutory authority. *See* Pet. 34.

2. Respondents' "pocket veto" argument can have no effect on this case. First, the repeal of Section 1605(a)(7) and waiver of Section 1605A were effected under a valid statute—the post-veto NDAA—that was passed by Congress and signed by the President. The President's alternative pocket veto of the original NDAA would only have mattered had Congress voted to override that veto, because the only difference between a pocket veto and a regular "return" veto is that a pocket veto cannot be overridden. Opp. 34 n.37. But rather than even attempt an override, Congress enacted a new statute that is now law.

Second, the President executed a valid return veto. "[T]o avoid unnecessary litigation," he returned the bill to the House of Representatives with a statement of objections—within the ten days provided by the Constitution—"to leave no doubt that the bill [was] being vetoed." *Memorandum to the House of Representatives*, 43 Weekly Comp. Pres. Doc. 1641, 1642 (Dec. 28, 2007). That is all the Constitution requires for a valid return veto. *See* U.S. Const. art.

I § 7 ("he shall return [the bill], with his objections to that House in which it shall have originated").

CONCLUSION

The petition should be granted.

Respectfully submitted,

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