No. 07-1090

In the Supreme Court of the United States

REPUBLIC OF IRAQ, PETITIONER

v.

JORDAN BEATY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Republic of Iraq continues to be amenable to suit under the exception to foreign sovereign immunity contained in 28 U.S.C. 1605(a)(7).

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INTEREST OF THE UNITED STATES

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the Court should grant the petition for a writ of certiorari.

STATEMENT

1. Congress has adopted numerous sanctions that apply to countries that have supported international terrorism. In Section 620A of the Foreign Assistance Act of 1961 (FAA), 22 U.S.C. 2371, and in Section 6(j) of the Export Administration Act of 1979 (EAA), 50 U.S.C. App. 2405(j), Congress has forbidden foreign assistance and restricted exports to countries that the Secretary of State has determined have "repeatedly provided support for acts of international terrorism." 22 U.S.C. 2371(a);

50 U.S.C. App. 2405(j)(1)(A). Over the years, Congress has expanded the range of legal and economic sanctions that flow from a country's designation as a state sponsor of terrorism under either FAA Section 620A or EAA Section 6(j), including denial of visas, 8 U.S.C. 1735, loss of military contracts, 10 U.S.C. 2327(b), loss of grants and fellowships to the country's nationals, 15 U.S.C. 7410(b), and loss of foreign tax credits, 26 U.S.C. 901(j)(2)(A)(iv).

In 1996, Congress adopted the sanction at issue in this case—the abrogation of designated states' immunity from suit as to certain terrorism-related claims. The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1602 *et seq.*, establishes a general rule that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States," 28 U.S.C. 1604, subject only to exceptions specifically enumerated in 28 U.S.C. 1605 and 1607. As originally enacted, the FSIA granted foreign states immunity from suit even for acts of torture or other gross violations of human rights. See *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 362-363 (1993). In 1996, Congress abrogated that immunity for claims involving "personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, [or] hostage taking," against any foreign state that was designated by the Secretary of State under EAA Section 6(j) or FAA Section 620A "as a state sponsor of terrorism" at the time the act occurred or later as a result of that act. 28 U.S.C. 1605(a)(7). The amendment applied to any claim "arising before, on, or after the date of" the amendment. Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132, § 221(c), 110 Stat. 1243.

2. In September 1990, Iraq, then ruled by Saddam Hussein, was designated a state sponsor of terrorism by the Secretary of State pursuant to EAA Section 6(j). 55 Fed. Reg. 37,793. As a consequence, Iraq became subject to the full panoply of sanctions identified above, including, after 1996, the abrogation of Iraq's immunity from claims within the scope of Section 1605(a)(7).

On November 5, 1990, Congress independently determined, using the same language as EAA Section 6(j)(1)(A), that Iraq had "repeatedly provided support for acts of international terrorism." Iraq Sanctions Act of 1990 (ISA), Pub. L. No. 101-513, § 586F(c)(1), 104 Stat. 2051. The ISA mandated that certain enumerated provisions of law, including FAA Section 620A, "and all other provisions of law that impose sanctions against a country which has repeatedly provided support for acts of international terrorism * * * shall be fully enforced against Iraq." *Ibid.* A separate provision of the ISA imposed additional sanctions against Iraq that were not specifically tied to Iraq's designation as a sponsor of international terrorism. § 586G, 104 Stat. 2051-2052.

In subsequent years, Congress directed that further sanctions be applied against Iraq as well. See Iran-Iraq Arms Non-Proliferation Act of 1992, Pub. L. No. 102-484, § 1602(b), 106 Stat. 2571; Act of Apr. 30, 1994, Pub. L. No. 103-236, § 431(a)(1), 108 Stat. 459 (amending FAA Section 307, 22 U.S.C. 2227 (2000), to withhold United States' share of funding to certain international organizations for those organizations' programs in Iraq).

3. On March 19, 2003, a United States-led coalition began military operations to disarm Iraq and remove the Hussein regime from power. By May 1, 2003, major combat operations against the Iraqi army had ended. On December 13, 2003, Hussein himself was captured.

In response to the dramatically changed circumstances in Iraq, Congress and the President took various steps to stabilize Iraq and reconstruct it as quickly as possible. On April 16, 2003, Congress enacted the Emergency Wartime Supplemental Appropriations Act, 2003 (EWSAA), Pub. L. No. 108-11, 117 Stat. 559. In EWSAA Section 1503, Congress authorized the President to "suspend the application of any provision of the [ISA]" and further provided, *inter alia*, that "the President may make inapplicable with respect to Iraq section 620A of the [FAA] or any other provision of law that applies to countries that have supported terrorism." 117 Stat. 579.

On May 7, 2003, the President issued Presidential Determination No. 2003-23, in which he exercised his Section 1503 authority by "suspend[ing] the application of all of the provisions" of the ISA, with the exception of penalties for embargo violators, and "mak[ing] inapplicable with respect to Iraq section 620A of the [FAA] and any other provision of law that applies to countries that have supported terrorism." 3 C.F.R. 320 (2004).

In a formal message, the President informed Congress of Presidential Determination 2003-23 and also that he had issued Executive Order No. 13,303, 3 C.F.R. 227 (2004), pursuant to his authority under the International Emergency Economic Powers Act, 50 U.S.C. 1701 *et seq.*, in order to protect Iraqi assets from "attachment or other judicial process." *Message to the Congress Reporting the Declaration of a National Emergency with Respect to the Development Fund for Iraq*, 39 Weekly Comp. Pres. Doc. 647, 647-648 (May 22, 2003). The President's Message explained that "[a] major national security and foreign policy goal of the United States" in the wake of the successful military campaign

was "to ensure that * * * Iraqi resources * * * are dedicated for the well-being of the Iraqi people, for the orderly reconstruction and repair of Iraq's infrastructure, * * * and for other purposes benefiting the people of Iraq." *Id.* at 647. His Message specified that the provisions of law that had been made inapplicable to Iraq by EWSAA Section 1503 and Presidential Determination 2003-23 "include, but are not limited to, 28 U.S.C. 1605(a)(7), 28 U.S.C. 1610, and section 201 of the Terrorism Risk Insurance Act [of 2002]" (TRIA), Pub. L. No. 107-297, 116 Stat. 2337, relating to the enforcement of terrorism-related judgments.

3. In *Acree* v. *Republic of Iraq*, 370 F.3d 41 (2004), cert. denied, 544 U.S. 1010 (2005), a divided panel of the District of Columbia Circuit ruled that the President lacked authority under EWSAA Section 1503 to make Section 1605(a)(7) inapplicable to Iraq. The majority described the question as "exceedingly close," but concluded that the power conferred on the President by Section 1503 did not encompass Section 1605(a)(7), *id.* at 51. While acknowledging that a "straightforward" reading of the phrase "any other provision of law that applies to countries that have supported terrorism" would include Section 1605(a)(7), *ibid.*, the majority held that Section 1503's authorization was implicitly limited to "provisions of law that call for economic sanctions and prohibit grants of assistance to state sponsors of terrorism," *id*. at 54. Turning to the merits, the majority determined that the *Acree* plaintiffs had failed to state a cause of action, and it dismissed the suit without leave to amend. *Id*. at 58-60.

Then-Judge Roberts concurred in the dismissal of the plaintiffs' suit, but did so on the jurisdictional grounds advanced by the United States. *Acree*, 370 F.3d

at 60. He observed that Section 1605(a)(7) is "on its face a 'provision of law that applies to countries that have supported terrorism,'" and he rejected the majority's inference of limitations to circumscribe the President's authority. *Ibid.* He would have held "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.

4. Kenneth Beaty and William Barloon are American citizens who were taken hostage and mistreated by the Hussein regime during the first Gulf War. Pet. App. 5a; *Daliberti* v. *Republic of Iraq*, 146 F. Supp. 2d 19, 25 (D.D.C. 2001). Beaty, Barloon, and their wives sued Iraq pursuant to Section 1605(a)(7), and the four were awarded and ultimately recovered more than $10 million. *Id.* at 20, 26. In 2003, respondents, who are children of Beaty and Barloon, sued Iraq under Section 1605(a)(7) for emotional distress resulting from their fathers' captivity. Pet. App. 9a. Iraq moved to dismiss for lack of subject matter jurisdiction as a result of Presidential Determination 2003-23. *Id.* at 17a-19a. After the court of appeals' *Acree* decision, the district court denied Iraq's motion. *Id.* at 22a.

Iraq appealed and, with the United States' support as amicus curiae, petitioned the court of appeals to grant initial en banc consideration of the Section 1503 question. The court of appeals denied the petition for initial hearing en banc, Pet. App. 94a, and, on November 21, 2007, summarily affirmed on the basis of the *Acree* decision, *id.* at 1a. Iraq seeks this Court's review of that decision.

5. On December 17, 2007, Congress passed a bill to amend the terrorism exception to foreign sovereign immunity. The bill repealed 28 U.S.C. 1605(a)(7), and re-

placed it with a new exception to immunity under the FSIA relating to support of terrorism, 28 U.S.C. 1605A. See National Defense Authorization Act for Fiscal Year 2008, H.R. 1585, 110th Cong., 1st Sess. § 1083(b)(1)(A)(iii) (*H.R. 1585*); *id*. § 1083(a). Section 1083(c)(4) of the bill purported to interpret the authority Congress had earlier provided the President in EWSAA Section 1503, stating that "[n]othing in section 1503 of [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." *H.R. 1585,* § 1083(c)(4).

On December 28, 2007, the President withheld his approval of *H.R. 1585*. Despite the fact that the bill contained important authorizations for the Department of Defense during a time of war, the President declined to sign the bill because Section 1083 "would imperil billions of dollars of Iraqi assets at a crucial juncture in that nation's reconstruction efforts and because it would undermine the foreign policy and commercial interests of the United States." *Memorandum to the House of Representatives Returning Without Approval the "National Defense Authorization Act for Fiscal Year 2008,"* 43 Weekly Comp. Pres. Doc. 1641, 1641 (Dec. 28, 2007).

The Administration and Congress reached a compromise to address the President's concerns. Congress passed a revised version of the bill that authorized the President to "waive any provision of [Section 1083] with respect to Iraq" if the President first found certain conditions met. National Defense Authorization Act for Fiscal Year 2008 (NDAA) Pub. L. No. 110-181, § 1083(d)(1), 122 Stat. 343. On January 28, 2008, the same day the President signed the amended bill into

law, he made the requisite findings and exercised his full authority under Section 1083(d) by "waiv[ing] 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.

DISCUSSION

The petition for certiorari should be granted because the court of appeals has incorrectly resolved a question of exceptional importance to the foreign relations of the United States in a manner that overturns the considered judgment of the President under an express grant of authority by Congress.

I. THE COURT SHOULD GRANT THE PETITION AND HOLD THAT THE PRESIDENT MADE SECTION 1605(a)(7) INAPPLICABLE TO IRAQ PURSUANT TO HIS AUTHORITY UNDER EWSAA SECTION 1503

A. Congress authorized the President in EWSAA Section 1503 to "make inapplicable with respect to Iraq Section 620A of the [FAA] or *any* other provision of law that applies to countries that have supported terrorism." 117 Stat. 579 (emphasis added). That provision unambiguously authorized the President to render inoperative as to Iraq any and all laws that apply specifically to countries designated as state sponsors of terrorism. See *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" (quoting *Webster's Third New International Dictionary* 97 (1976))). Section 1605(a)(7) abrogates foreign sovereign immunity for certain claims against a country "designated as a state sponsor of terrorism" under EAA Section 6(j) or FAA Section 620A. 28 U.S.C. 1605(a)(7)(A). Thus, under the plain statutory text, Section 1605(a)(7)

is one of those provisions of law that Section 1503 authorized the President to render inapplicable as to Iraq.

As then-Judge Roberts explained in his concurring opinion in *Acree*, the *Acree* decision—which was the sole basis for the court of appeals' summary affirmance in this case—incorrectly failed to give full effect to the unambiguous text of Section 1503. The *Acree* majority's conclusion that Section 1503 should be confined to a narrower set of "provisions that present obstacles to assistance and funding for the new Iraqi Government," 370 F.3d at 51, imposes an atextual and unwarranted limitation on the statute. Although the majority believed that the relevant criterion of similarity between FAA Section 620A and the "other" provisions referred to in Section 1503 was that they impose "obstacles to assistance and funding," the text of Section 1503 expressly provides a different test of similarity—namely, whether the other provision of law is one that "applies to countries that have supported terrorism." By its terms, Section 1503 has a broad reach that encompasses many sanctions that do not relate to "assistance" or "funding," including, in addition to Section 1605(a)(7), the prohibition on exports, 50 U.S.C. App. 2405(j), military contracts, 10 U.S.C. 2327(b), and the denial of visas to Iraqi nationals, 8 U.S.C. 1735. See *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212 (1998) (term "any" plainly "demonstrates breadth") (quotation marks omitted). The *Acree* majority's cramped construction erroneously excludes those provisions from the President's waiver authority.

The majority's engrafted limitation is particularly unwarranted in light of the fact that another statute enacted just two months before EWSAA demonstrates that "Congress knows how to use more limited language

along the lines of the majority's construction when it wants to." *Acree*, 370 F.3d at 60 (Roberts, J., concurring) (citing Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, Div. E, § 537(c)(1), 117 Stat. 196 (provision easing restriction on assistance to nongovernmental organizations in foreign countries inapplicable "with respect to section 620A of the [FAA] or any *comparable* provision of law *prohibiting assistance* to countries that support international terrorism") (emphases added)).

The *Acree* majority relied on the canons of *noscitur a sociis* and *ejusdem generis* and a presumption that "where statutory language is phrased as a proviso, * * * its scope is confined to that of the principal clause to which it is attached," which, in this case, grants the President authority to suspend the ISA. 370 F.3d at 52-53 (citing *United States* v. *Morrow*, 266 U.S. 531, 534-535 (1925)). Applying those canons, the court determined that the several provisos to Section 1503, including the second proviso at issue here, were merely "responsive to a specific aspect of the ISA or other statutes that are implicated by the suspension authority granted in § 1503." *Id.* at 53. Relying on that understanding, the majority concluded, *id.* at 54, that the second proviso in Section 1503 is "responsive" to ISA Section 586F(c), which mandated enforcement against Iraq of five enumerated provisions of law, including FAA Section 620A, as well as "all other provisions of law that impose sanctions against a country which has repeatedly provided support for acts of international terrorism." ISA § 586F(c)(1) and (2), 104 Stat. 2051. After determining that the statutes enumerated in ISA Section 586F(c)(2) all "deal with restrictions on assistance to state sponsors of terrorism," the court concluded that the "all other

provisions" language of Section 586F(c)(1) must be limited in that fashion and that that limitation must be carried over to the "any other provision of law" language of EWSAA Section 1503, even though Section 1503 does not contain the same list of enumerated statutes as Section 586F(c)(2). *Acree*, 370 F.3d at 54-55.

The majority's attempt to shoehorn each of the Section 1503 provisos into an ISA-centered framework cannot be squared with the text or purpose of Section 1503. Although provisos are sometimes dependent on a preceding clause, this Court has recently emphasized that "it is also possible to use a proviso to state a general, independent rule." *Alaska* v. *United States*, 545 U.S. 75, 106 (2005). Section 1503 is such a statute. The court of appeals' analysis cannot, for example, account for the fourth proviso in Section 1503, which provides that "section 307 of the [FAA] shall not apply with respect to programs of international organizations for Iraq." 117 Stat. 579. Section 307 specifies certain countries, including Iraq at that time, as to which the United States will withhold funding for international organizations' programs. 22 U.S.C. 2227 (2000). Section 307 was made applicable to Iraq by that provision's own force, see Act of Apr. 30, 1994, Pub. L. No. 103-236, § 431(a)(1), 108 Stat. 459, and its application to Iraq would not have been affected by the ISA's suspension. It was instead the fourth proviso in Section 1503 that rendered that provision immediately inapplicable to Iraq, without regard to any action the President might take under his authority in Section 1503's principal clause to suspend the ISA.

Like the fourth proviso, the second proviso in Section 1503, at issue here, has significance independent of the President's authority to suspend the ISA. As noted above, even before Congress adopted the ISA, the Sec-

retary of State had designated Iraq a state sponsor of terrorism, a designation that carried with it numerous sanctions, including those in FAA Section 620A and, after 1996, application of the FSIA's terrorism exception. All of those provisions would have continued to apply to Iraq due to the independent legal effect of the Secretary's designation, regardless of whether the ISA was suspended. Thus, the second proviso does not merely "make[] clear" the President's authority to suspend the ISA, as the *Acree* majority believed, 370 F.3d at 54, but rather was independently essential to effectuating Congress's purpose for Section 1503. As previously discussed, Section 1605(a)(7) is without question a "provision of law that applies to countries that have supported terrorism," and accordingly is within the scope of the second proviso. Thus, even assuming that the majority's restrictive reading of the "all other provisions of law" language in ISA Section 586F(c)(1) were a correct interpretation of *that* statute, it would in no way warrant the court's importation of that limitation into the second proviso in Section 1503, which does not cross-reference Section 586F and does not contain the same set of enumerated statutes as Section 586F(c)(2).

In any event, Section 1605(a)(7) *is* a statute that, to use the words of the *Acree* majority, "present[s] obstacles to * * * funding for the new Iraqi Government." 370 F.3d at 51. As his Message to Congress explained, the President concluded that the "threat of attachment or other judicial process" against Iraqi assets necessary to stabilize and rebuild Iraq posed an "unusual and extraordinary threat * * * to the national security and foreign policy of the United States." 39 Weekly Comp. Pres. Doc. at 647. It was for this reason that the President singled out Sections 1605(a)(7) and 1610 of the

FSIA and Section 201 of the TRIA, all of which pertain to the entry and execution of judgments against terrorist states, as among those rendered inapplicable to Iraq by the President's exercise of his authority under the second proviso in Section 1503. Thus, even under the majority's implied limitation on the scope of Section 1503, it erred in refusing to defer to the President's determination that the prospect of billions of dollars in judgments would seriously undermine funding for the essential tasks of rebuilding and stabilizing Iraq.

B. The *Acree* majority indicated that questions regarding Section 1503's temporal application also weighed against construing it to reach Section 1605(a)(7). 370 F.3d at 56-57. But those concerns are misplaced. The majority believed that Section 1503's sunset provision would render inoperative Presidential Determination 2003-23 and revive Section 1605(a)(7). *Id.* at 57. But the phrase "make inapplicable" in the second proviso connotes a *permanent* effect of the President's action. See H.R. Conf. Rep. No. 337, 108th Cong., 1st Sess. 59 (2003) (stating, in connection with extending Section 1503's authorities, that Presidential Determination 2003-23 had made terrorism-related laws "permanently inapplicable to Iraq"). Moreover, Section 1503's sunset provision provided that the President's "authorities" under the provision would expire, not that the President's *exercise* of those authorities within the requisite period would cease to have legal effect. When Congress wishes to eliminate not only a grant of authority, but also the consequences of any valid exercise of that authority, Congress does so expressly. See, *e.g.*, Department of Defense Appropriations Act, 2000, Pub. L. No. 106-79, § 9001(a) and (c), 113 Stat. 1283 (providing for expiration of waiver authority and separately providing that "any

waiver previously issued * * * shall cease to apply," upon the occurrence of a specified condition).

Nor, contrary to the *Acree* majority's suggestion (see 370 F.3d at 56), is it surprising that the President's exercise of his Section 1503 authority with respect to Section 1605(a)(7) would have an immediate effect on pending lawsuits against Iraq, in contrast to the terms of Section 1605(a)(7) itself, which provides that, when a country's designation is rescinded, courts retain jurisdiction over claims that accrued during the time a country was designated. 28 U.S.C. 1605(a)(7)(A). The President's exercise of his Section 1503 authority responded to an unprecedented situation in which the regime of a designated state sponsor of terrorism had been removed by United States-led military operations. Practically overnight, 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. As this Court has recognized, the decision to afford immunity to foreign sovereigns "reflects current political realities and relationships," and the courts therefore give effect "to the most recent such decision." *Republic of Austria* v. *Altmann*, 541 U.S. 677, 696 (2004). Given the seismic shift in the United States' political relationship with Iraq in early 2003, it is unremarkable that the specific decision to restore Iraq's immunity, rather than subject the new Iraq to crushing liability in U.S. courts for the wrongs of the Hussein regime, would be given immediate effect with respect to existing and prospective claims notwithstanding the general rule in Section 1605(a)(7)(A). Cf. Libyan Claims Resolution Act, Pub. L. No. 110-301, § 5(a)(1), 122 Stat. 3000 (rendering Sections 1605(a)(7) and 1605A immediately inapplicable to Libya upon Secretary of State's

certification of receipt of funds sufficient to pay certain pending claims).

C. 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. The President fully exercised his Section 1503 authority in Presidential Determination No. 2003-23, in which he made inapplicable to Iraq FAA Section 620A "and any other provision of law that applies to countries that have supported terrorism." 3 C.F.R. at 320. In his formal report to Congress, the President explicitly stated his conclusion that both Section 1503 and the Presidential Determination encompass "28 U.S.C. 1605(a)(7)." 39 Weekly Comp. Pres. Doc. at 647-648. Indeed, the President specifically referred to only three provisions as among the "other provision[s] of law" rendered inapplicable by his determination: Section 1605(a)(7); the FSIA's attachment provision, 28 U.S.C. 1610; and Section 201 of TRIA, 116 Stat. 2337, which creates especially favorable rules for the execution of judgments issued under Section 1605(a)(7). 39 Weekly Comp. Pres. Doc. at 647-648.

Because Congress entrusted implementation of Section 1503 to the President, and because the President has independent constitutional authority in the area of foreign affairs, the *Acree* majority erred in failing to accord any deference to his construction of that provision. The majority recognized that 28 U.S.C. 1605(a)(7) falls within the literal terms of EWSAA Section 1503, 370 F.3d at 52, and believed that the case presented "an exceedingly close question," *id.* at 51. In such circumstances, as then-Judge Roberts observed, well-established principles of judicial deference to the Executive's construction of ambiguous statutes should make this "an easy case." *Id.* at 64 n.2 (concurring). The majority,

however, gave no such deference to the President's construction of Section 1503, apparently because there is some question in the District of Columbia Circuit as to "[t]he applicability of *Chevron* to presidential interpretations," as opposed to those made by his subordinates, which would undoubtedly have been entitled to deference. *Ibid.* (citing *Chamber of Commerce* v. *Reich*, 74 F.3d 1322, 1325 (D.C. Cir. 1996)). But there is no sound basis to refuse deference to the President's reasonable exercise of a statutory authority entrusted to him, especially in the foreign affairs context, where the President generally enjoys great leeway under our Constitution and laws. See *Jama* v. *ICE*, 543 U.S. 335, 348 (2005) (noting the Court's "customary policy of deference to the President in matters of foreign affairs"); *Dames & Moore* v. *Regan*, 453 U.S. 654, 668 (1981) (Presidential action in foreign affairs context, authorized by Congress, "would be supported by the strongest of presumptions and the widest latitude of judicial interpretation") (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

D. The Court should grant the petition for a writ of certiorari to resolve the EWSAA's effect on the continued availability of Section 1605(a)(7) as a basis for jurisdiction over claims against Iraq. The EWSAA reflected the dramatic changes in the United States' foreign policy with respect to Iraq following the successful removal of the Hussein regime. The President determined that the threat of litigation seeking to hold post-Saddam Iraq liable for billions of dollars in damages attributable to Hussein's support of terrorism presented a grave threat to the reconstruction of Iraq and establishment of a new, stable government and society, which are critically important foreign policy interests of the United States. 39

Weekly Comp. Pres. Doc. at 647-648. Therefore, in the exercise of authority granted him by the plain language of Section 1503, the President rendered Section 1605(a)(7) inapplicable to Iraq. The *Acree* majority's holding that the President's action was *ultra vires* is contrary to the statute's plain text and fails to accord the President the great deference he is due in the exercise of statutory authority conferred on him in connection with the conduct of the Nation's foreign affairs. Moreover, that decision threatens important national priorities with respect to the reconstruction of Iraq.

As demonstrated by the President's recent and extraordinary decision to withhold his approval of the initial version of the entire NDAA because of Section 1083 of that bill, the 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. See 43 Weekly Comp. Pres. at 1641. Indeed, numerous suits asserting billions of dollars in damages against Iraq from the Hussein era remain pending in light of the *Acree* decision. See Pet. 23 & n.6. Because the *Acree* plaintiffs' claims were dismissed on other grounds, the government was not in a position to seek review of the majority's erroneous construction of EWSAA in that litigation. The present case provides an appropriate opportunity for the Court to review and correct the deeply flawed decision in *Acree*, because the District of Columbia Circuit summarily resolved this case on the basis of *Acree*. Pet. App. 1a.[1]

[1] There is no circuit conflict on the question presented, and ordinarily that might counsel against certiorari. In view of the importance of the exceptional question presented and the grave error in the *Acree* court's

II. THE NDAA HAS NO EFFECT ON THE COURTS' JURISDICTION OVER RESPONDENTS' CLAIMS

A. The sole reason respondents give for denying certiorari is their contention that "Congress and the President have recognized the propriety of the *Acree* decision by establishing in federal law that § 1503 of the EWSAA of 2003 *did not* grant the President the authority to remove the jurisdiction of any court of the United States." Br. in Opp. 7. In support of that assertion, respondents cite (*id.* at 9) NDAA Section 1083(c)(4), which states that "[n]othing in section 1503 of [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." § 1083(c)(4), 122 Stat. 343. Respondents' reliance on Section 1083(c)(4) is mistaken. Section 1083(c)(4), which was adopted by a different Congress five years after the President exercised his authority under EWSAA Section 1503 and after the provision had expired, and which was immediately waived by the President, should be afforded no weight in interpreting EWSAA Section 1503.

This Court has frequently explained that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 355 (1998) (quotation marks omitted); see *Pension Benefit Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 650 (1990); *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 170 (1968). Moreover, Section 1083(c)(4) does not create or modify any substantive law because the authorities contained in

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analysis, however, the United States believes that certiorari is warranted at this time.

Section 1503 *expired* on September 30, 2005. EWSAA, 117 Stat. 579 ("authorities" expire on September 30, 2004, unless extended); Act of Nov. 6, 2003, Pub. L. No. 108-106, § 2204(2), 117 Stat. 1230 (extending the authorities contained in Section 1503 to September 30, 2005). Section 1083(c)(4) therefore is merely a statement through which the 110th Congress sought to give its gloss on a no-longer-effective statute enacted five years earlier by a different Congress. But even assuming that Section 1083(c)(4) as conceived had some substantive effect, it does not "establish[] * * * federal law" (Br. in Opp. 7) because it applies only to Iraq and the President immediately waived it, along with the rest of Section 1083, as to Iraq.

B. In its reply brief (at 9), Iraq urges the Court to consider as well whether the courts lack jurisdiction over respondents' claims for the independent reason that Section 1083 of the NDAA, combined with the President's waiver under that provision, deprived the courts of jurisdiction. The NDAA, however, has no effect on the courts' jurisdiction over respondents' claims. For the reasons stated above, the President's exercise of his authority under EWSAA Section 1503 had *already* permanently rendered Section 1605(a)(7) inapplicable to Iraq. To the extent NDAA Section 1083 purported to allow those claims to be asserted against Iraq under the newly enacted Section 1605A, the President's exercise of his waiver authority under Section 1083(d) precludes that course as well. See Presidential Determination No. 2008-9, 73 Fed. Reg. at 6571.

Because of the President's waiver, NDAA Section 1083 does not affect the legal status quo with regard to Iraq in place prior to the NDAA's enactment in any way—that is, Section 1083 has no effect on the availabil-

ity *vel non* of Section 1605(a)(7) jurisdiction over respondents' claims against Iraq. The President immediately waived the application to Iraq of "all provisions" of Section 1083 (necessarily including both its adoption of the new 28 U.S.C. 1605A and its repeal of 28 U.S.C. 1605(a)(7)), pursuant to the authority specially granted to the President in response to his withholding of his consent to *H.R. 1585*. See Presidential Determination No. 2008-9, 73 Fed. Reg. at 6571 ("waiv[ing] all provisions of section 1083 of the Act with respect to Iraq"). The President and Members of Congress who were the leading proponents of the NDAA reached a compromise to enable the rapid enactment of the NDAA. Under the compromise, it was understood that the President would exercise his waiver authority under Section 1083(d), and claims against Iraq would be left in the same position as they were in before the NDAA first passed Congress. The NDAA contained hundreds of pages of other time-sensitive national security and defense authorities. The full effect of Section 1083 on Iraq received high-level scrutiny only very late in the process of passing and considering whether to sign into law *H.R. 1585.* 43 Weekly Comp. Pres. Doc. at 1641 (Section 1083's "full impact on Iraq and on our relationship with Iraq has become apparent *only in recent days*. Members of my Administration are working with Members of Congress to fix this flawed provision *as soon as possible after the Congress returns*." (emphases added)). The compromise permitted the expeditious passage of the broader NDAA, days after the return of Congress following the President's disapproval of *H.R. 1585*, without the delay that would have accompanied consideration of whether or how to adjust the legal status quo with regard to Iraq.

C. The question of the NDAA's effect on respondents' lawsuit was not addressed by the court of appeals in this case because the NDAA was enacted after the court of appeals' decision. In *Simon* v. *Republic of Iraq*, 529 F.3d 1187 (D.C. Cir. 2008), petition for cert. pending, No. 08-539 (filed Oct. 22, 2008), the court of appeals did address that issue and held, as a matter of statutory construction, that the NDAA's repeal of Section 1605(a)(7) was not intended to deprive the courts of jurisdiction over pending cases. See *id.* at 1192-1193 (relying on NDAA § 1083(c)(1), 122 Stat. 342, which provides that Section 1083 applies only to "any claim arising under section 1605A," and NDAA 1083(c)(3), 122 Stat. 343, which permits plaintiffs with pending 1605(a)(7) cases to refile a "[r]elated action[]" within 60 days of the later of "the date of the entry of judgment in the original action" or the date of the NDAA's enactment). For the reasons stated above, however, whether the *Simon* court correctly resolved the applicability of NDAA Section 1083 to pending cases as a general matter (*e.g.*, for suits against other defendant countries) is irrelevant with respect to this suit or any other against Iraq, because the President waived Section 1083 in its entirety with respect to Iraq.

* * * * *

As discussed in Part I, above, when Congress enacted the NDAA in 2008, the courts had already been deprived of jurisdiction over respondents' claims by the President's 2003 exercise of his authority under the EWSAA. Congress's enactment and the President's immediate waiver of NDAA Section 1083 with respect to Iraq ultimately have no effect on that issue. The court of appeals' erroneous invalidation of the President's action under EWSAA Section 1503 warrants this Court's review because it exposes Iraq to potentially "crushing liability for the actions of its renounced predecessor," *Acree*, 370 F.3d at 61 (Roberts, J., concurring), and therefore 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.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

Emergency Wartime Supplemental Appropriations Act, 2003, Pub. L. No. 108-11, 117 Stat. 559, 579 (2003)

* * * * *

SEC. 1503. The President may suspend the application of any provision of the Iraq Sanctions Act of 1990: *Provided*, That nothing in this section shall affect the applicability of the Iran-Iraq Arms Non-Proliferation Act of 1992 (Public Law 102-484), except that such Act shall not apply to humanitarian assistance and supplies: *Provided further*, That the President may 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: *Provided further*, That military equipment, as defined by title XVI, section 1608(1)(A) of Public Law 102-484, shall not be exported under the authority of this section: *Provided further*, That section 307 of the Foreign Assistance Act of 1961 shall not apply with respect to programs of international organizations for Iraq: *Provided further*, That provisions of law that direct the United States Government to vote against or oppose loans or other uses of funds, including for financial or technical assistance, in international financial institutions for Iraq shall not be construed as applying to Iraq: *Provided further*, That the President shall submit a notification 5 days prior to exercising any of the authorities described in this section to the Committee on Appropriations of each House of the Congress, the Committee on Foreign Relations of the Senate, and the Committee on International Relations of the House of Representatives: *Provided further*, That not more than 60 days after enact-

ment of this Act and every 90 days thereafter the President shall submit a report to the Committee on Appropriations of each House of the Congress, the Committee on Foreign Relations of the Senate, and the Committee on International Relations of the House of Representatives containing a summary of all licenses approved for export to Iraq of any item on the Commerce Control List contained in the Export Administration Regulations, 15 CFR Part 774, Supplement 1, including identification of end users of such items: *Provided further*, That the authorities contained in this section shall expire on September 30, 2004, or on the date of enactment of a subsequent Act authorizing assistance for Iraq and that specifically amends, repeals or otherwise makes inapplicable the authorities of this section, whichever occurs first.