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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-5232

CLIFFORD ACREE, COLONEL, et al.,
Appellees,

v.

REPUBLIC OF IRAQ, et al.,
Appellees,

UNITED STATES OF AMERICA,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE APPELLANT

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GLOSSARY

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E.O.	Executive Order
EWSAA	Emergency Wartime Supplemental Appropriations Act of 2003, Pub. L. No. 108-11, 117 Stat. 559
FSIA	Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1601-1611
JA	Joint Appendix

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In our opening brief, we demonstrated that section 1503 of the Emergency Wartime Supplemental Appropriations Act of 2003, which authorizes the President to make inapplicable to Iraq "any * * * provision of law that applies to countries that have supported terrorism," by its terms encompasses 28 U.S.C. § 1605(a)(7), which abrogates foreign sovereign immunity for certain claims against any country "designated as a state sponsor of terrorism." We also demonstrated that the district court erred in refusing to give immediate effect to Presidential Determination No. 2003-23, through which the President exercised the full extent of his authority under section 1503, to bar the

entry of future terrorism-based judgments against Iraq. And we demonstrated that the district court erred in denying the United States' motion to intervene, within the period specified under Fed. R. Civ. P. 59, for the sole purpose of contesting subject-matter jurisdiction.

In response, plaintiffs abandon the district court's reasoning on jurisdiction. That court recognized that section 1503 encompasses terrorism-based provisions such as 28 U.S.C. § 1605(a)(7), see Acree v. Snow, 276 F. Supp. 2d 31, 32-33 (D.D.C.), aff'd on other grounds, 2003 WL 22335011 (D.C. Cir. 2003), but asserted four grounds for nonetheless exercising jurisdiction in this case: that Iraq had waived its foreign sovereign immunity; that statutes ousting the federal courts of jurisdiction are inapplicable to pending cases absent a clear statement to the contrary; that only Iraq could raise the jurisdictional defense of foreign sovereign immunity; and that section 1503 does not affect claims against either Iraqi government agencies or Iraqi officers sued in their official capacity. JA 412-15. We have shown that each of these rationales is unsustainable, and plaintiffs do not even acknowledge, much less attempt to defend, any of them.

Instead, plaintiffs attack the district court's conclusion that section 1503 encompasses terrorism-based provisions such as 28 U.S.C. § 1605(a)(7), they assert alternative retroactivity-

based arguments for not applying section 1503 to this case, they challenge the constitutionality of section 1503, and they contend that the district court's intervention ruling is both correct and dispositive of this appeal. As explained below, none of these arguments has merit.

I. THE UNITED STATES MAY PROPERLY APPEAL THE DISTRICT COURT'S EXERCISE OF SUBJECT-MATTER JURISDICTION

Plaintiffs err in contending that the district court's intervention ruling was both correct and dispositive.

A. The District Court Erred In Denying The United States' Motion To Intervene

As explained in our opening brief, the only consequence of our attempted intervention was to induce the district court to consider, within the time for altering or amending a judgment, whether it had subject-matter jurisdiction to enter judgment, and the only consequence of granting intervention would have been to facilitate this Court's review of that determination. Nonetheless, plaintiffs argue that the attempted intervention was untimely and unsupported by any government interest.

1. The Motion To Intervene Was Timely

The government filed its motion to intervene 75 days after the Presidential Determination became effective. Plaintiffs do not dispute that such a period ordinarily does not justify the denial of intervention as untimely. See, e.g., National Wildlife Federation v. Burford, 878 F.2d 422, 433-34 (D.C. Cir. 1989) (73

days), rev'd on other grounds sub nom. Lujan v. National Wildlife Federation, 497 U.S. 871 (1990); Fund for Animals v. Norton, 322 F.3d 728, 734-35 (D.C. Cir. 2003) (two months). A fortiori, such a period did not justify the denial of intervention here, where the putative intervenor was the United States, which is not usually expected to act as quickly as private parties, see, e.g., Fed. R. Civ. P. 12(a)(3)(A) (United States afforded three times as long to answer a complaint); Fed. R. App. P. 4(a)(1)(B) (twice as long to file a notice of appeal); Fed. R. App. P. 40(a)(1) (three times as long to file rehearing petition); where the question presented required consultation among the Departments of Justice, State, Defense and Treasury, among others; where the government was understandably preoccupied with managing operations on the ground in Iraq; where the magnitude of this case, relative to the various terrorism-based cases pending against Iraq, did not become fully apparent until after the announcement and entry of the nearly billion-dollar judgment; and where, despite plaintiffs' erroneous suggestion that only the government could "make the jurisdictional arguments" (Br. 12), the district court had an independent obligation to address subject-matter jurisdiction, and plaintiffs' counsel had a "professional obligation to assist" the court in so doing, see Minority Police Officers Ass'n v. City of South Bend, 721 F.2d 197, 199 (7th Cir. 1983).

In response to all of this, plaintiffs cite cases for the undisputed proposition that post-judgment intervention is "'usually'" inappropriate where the putative intervenor has foregone "'a clear opportunity for pre-judgment intervention.'" Associated Builders & Contractors, Inc. v. Herman, 166 F.3d 1248, 1257 (D.C. Cir. 1999) (quoting Dimond v. District of Columbia, 792 F.2d 179, 193 (D.C. Cir. 1986)). Those cases do not suggest (contrary to National Wildlife Federation and Fund For Animals) that a two-month period before judgment is sufficient opportunity to justify the denial of intervention. To the contrary, the proceedings in Associated Builders had been pending for well over three years (see 166 F.3d at 1251), and the specific case in which intervention was sought had been pending for almost one year (see id. at 1253-53). Nor did plaintiffs' authorities involve any of the particular exigent circumstances set out above. And, perhaps most importantly, they did not involve purely legal objections to subject-matter jurisdiction, which remained subject to challenge within the Rule 59 period. See, e.g., Smoke v. Norton, 252 F.3d 468, 471 (D.C. Cir. 2001) (timeliness turns in part on "probability of prejudice" to existing parties); Dimond, 792 F.2d at 193 (reversing denial of post-judgment intervention and stating: "Since State Farm seeks to intervene only to participate at the appellate stage * * * its intervention will not prejudice any existing parties.")

Plaintiffs alternatively suggest (Br. 11-13) that the government deliberately delayed intervention in order to avoid discovery regarding its transfer of vested assets to Iraq. That speculation is entirely baseless. On March 20, 2003, the President vested nearly $2 billion in former Iraqi assets and quite publicly committed those assets to the reconstruction of Iraq. See E.O. 13290, 68 Fed. Reg. 14307. The ensuing transfers were widely reported, see, e.g., U.S. Delays Timeline for Iraqi Government, Washington Post, A1 (May 22, 2003), and plaintiffs' counsel apparently recognized that this would "prevent former POWs and their families from collecting damages from the $1.7 billion in Iraqi assets in U.S. banks." U.S. Seizure of Iraqi Assets Casts Doubt on POWs' Suit, Philadelphia Inquirer, A9 (March 29, 2003) (citing Stephen Fennell). In any event, plaintiffs suffered no conceivable prejudice because, even if the government had intervened prior to judgment, it could not have been subject to discovery in aid of execution of a then-nonexisting judgment.

2. The Government Had Ample Interest To Intervene

We have shown that the United States has weighty interests, more than sufficient to support intervention, in the enforcement of the executive agreements and orders through which the President conducts the foreign policy of this Nation. See, e.g., Roeder v. Islamic Republic of Iran, 333 F.3d 228, 232-33 (D.C.

Cir. 2003); Persinger v. Islamic Republic of Iraq, 729 F.2d 835, 836-38 (D.C. Cir. 1984).

In response (Br. 14-15), plaintiffs object that the particular foreign policy interests at issue here were not contemporaneously recorded in any Executive Branch records. That contention is irrelevant, for the President is not an agency subject to general duties of articulated decisionmaking. See Franklin v. Massachusetts, 505 U.S. 788, 796-801 (1992). In any event, it is also erroneous because the President did explain, in his message to Congress regarding Presidential Determination No. 2003-23 and Executive Order 13303, that the "threat of attachment or other judicial process" against major Iraqi assets "obstructs the orderly reconstruction of Iraq" and thereby constitutes an "unusual and extraordinary threat * * * to the national security and foreign policy of the United States." See 39 Weekly Comp. Pres. Doc. No. 21, at 647-48. Plaintiffs perhaps disagree with that judgment, but they cannot gainsay its importance.

As alternative grounds for affirmance, plaintiffs contend that the Presidential Determination is unauthorized by section 1503 or, alternatively, that section 1503 is unconstitutional. Those contentions only underscore the weighty government interests at issue. See, e.g., 28 U.S.C. § 2403(a) (government has statutory intervention right to defend constitutionality of federal statutes); Legal Aid Society of Hawaii v. Legal Services

Corporation, 145 F.3d 1017 (9th Cir. 1998) (government intervention to defend constitutionality of federal regulations).

B. The Government May Challenge The District Court's Jurisdiction In Any Event

Plaintiffs contend (Br. 15-19) that the denial of intervention should foreclose the government's ability to appeal the district court's assertion of subject-matter jurisdiction. Because the district court erred in denying intervention, this Court need not reach that issue. However, if it does reach the issue, it should reject the plaintiffs' contention.

As plaintiffs themselves explain (Br. 17), the "precise issue presented here" arose in Gregory-Portland Independent School District v. Texas Education Association, 576 F.2d 81 (5th Cir. 1978). In that case, the United States sought to intervene in a district court to contest jurisdiction; the district court denied intervention; and on appeal by the government, the Fifth Circuit, without reaching the question whether intervention was properly denied, reversed the district court's decision to assert jurisdiction in the underlying action. As that court explained, "[p]rior to any determination on the intervention issue, it is necessary for the [appellate] court to satisfy itself that the case was properly heard below." Id. at 82; see also id. at 83 n.1 ("It is unnecessary to address the question of whether the district court erred in denying the government's motion to

intervene * * * because, as the court lacked jurisdiction the judgment is without force and the appeal no longer exists.").

Subsequent legal developments reinforce this holding. Although plaintiffs frame the question presented as the government's "standing" to appeal (Br. 16-17), the Supreme Court has squarely held that the question whether a litigant denied intervention "should be considered a 'party' for purposes of appealing" does "not implicate the jurisdiction of the courts under Article III of the Constitution." Devlin v. Scardelletti, 536 U.S. 1, 6-7 (2002) (emphasis added). Nor does it implicate this Court's statutory jurisdiction under 28 U.S.C. § 1291. In this case, the United States plainly satisfies the requirements for Article III standing, see Roeder, 333 F.3d at 233-34, and the judgment at issue is plainly final for purposes of statutory jurisdiction. Because appellate jurisdiction is therefore satisfied, this Court may properly address the question of district court jurisdiction. See, e.g., Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 94 (1998) ("'the first and fundamental question is that of jurisdiction, first of this court, and then of the court from which the record came'" (citation omitted)).

Moreover, Devlin held that a litigant denied intervention may sometimes appeal even the merits of the underlying decision. See 536 U.S. at 5-10. As the Second Circuit recently explained,

Devlin contemplates appeals when such a litigant has an "'interest'" sufficiently "'affected by the trial court's judgment.'" Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 313 F.3d 70, 82 (2d Cir. 2002) (citation omitted) (permitting appeal by alleged owner of property subject to garnishment); see, e.g., Hinckley v. Gilman, C. & S.R. Co., 94 U.S. 467, 469 (1877) (appeal by receiver); Blossom v. Milwaukee & Chicago R. Co., 68 U.S. (1 Wall.) 655, 656 (1864) (appeal by unsuccessful bidder in foreclosure sale); Keith v. Volpe, 118 F.3d 1386, 1389-91 (9th Cir. 1997) (appeal by nonparty precluded from obtaining billboard permits). The interests of the President, who has found that terrorism-based claims against Iraq for the misconduct of its former regime pose a threat to the national security and foreign policy of the United States, but who nonetheless is precluded under the decision below from restoring Iraq's foreign sovereign immunity for such claims, are at least as weighty, and directly affected, by the judgment at issue here.

II. PURSUANT TO SECTION 1503 OF THE EWSAA, THE PRESIDENT RENDERED 28 U.S.C. § 1605(A)(7) IMMEDIATELY INAPPLICABLE TO IRAQ

A. Section 1605(a)(7) Is A "Provision Of Law That Applies To Countries That Have Supported Terrorism"

Section 1503 of the EWSAA gave the President the authority (fully exercised through Presidential Determination No. 2003-23) 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." 117 Stat. at 579. The text of that provision is unambiguous in its application to 28 U.S.C. § 1605(a)(7): use of the word "any" signifies breadth, see United States v. Monsanto, 491 U.S. 600, 609 (1989), and 28 U.S.C. § 1605(a)(7), which abrogates foreign sovereign immunity for certain claims against countries designated by the Secretary of State as state sponsors of terrorism, is a "provision of law that applies to countries that have supported terrorism." Whatever the exact scope of section 1503, it plainly encompasses statutory provisions triggered by a formal determination that a foreign country has supported terrorism.[1]

Plaintiffs propose restricting section 1503 to statutory provisions that would otherwise prohibit assistance such as "expenditures and exports." Br. 21. Congress knew how to impose such a restriction when it wanted to. For example, in an appropriations statute enacted less than two months before section 1503, Congress referred to "section 620A of the Foreign

[1] Contrary to plaintiffs' suggestion (Br. 21 n.5), we in no way retreat from our position that section 1503 is unambiguous in its application to any such provision. At oral argument in Acree v. Snow, Judge Randolph asked whether section 1503 can be construed more broadly to encompass even statutory provisions of wholly general application. We think not, but any disagreement on that point hardly suggests that section 1503 can be restricted to cover some, but not all, provisions triggered by a formal determination that the country at issue has supported terrorism.

Assistance Act of 1961 or any comparable provision of law prohibiting assistance to countries that support international terrorism." Pub. L. No. 108-7, Div. E, § 537(c)(1), 117 Stat. 11, 196 (emphasis added); see also 22 U.S.C. § 2152c(a)(4)(B)(i) (referring to "section 2371 of [Title 22] or any comparable provision of law prohibiting assistance to countries that support international terrorism"). Nonetheless, in enacting section 1503, Congress imposed no such restriction.

In support of their proposed construction, plaintiffs invoke various rules of statutory construction. But as the Supreme Court has instructed: "canons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-254 (1992). Plaintiffs' proposed construction of section 1503 finds no support in the text of that provision, in the purposes and context of that provision, in the understanding of that provision embraced by the President, or even in the host of canons that they erroneously invoke.

1. Plaintiffs first suggest (Br. 22-23) that section 1503 should be restricted to federal spending because it is contained

in an appropriations statute. But section 1503 itself says nothing about the appropriation or expenditure of federal funds. Instead, in authorizing the President to make defined statutes "inapplicable with respect to Iraq," section 1503 expressly addresses substantive law, as do various other provisions in the EWSAA. See, e.g., EWSAA § 2105, 117 Stat. at 589 (amending 7 U.S.C. § 6506 to allow labeling of wild seafood as "organic"); EWSAA § 2503, 117 Stat. at 599 (amending 20 U.S.C. § 6537(3) to change definition of "low-income individual").

For that reason, Building & Construction Trades Department v. Martin, 961 F.2d 269, 273 (D.C. Cir. 1992), and Calloway v. District of Columbia, 216 F.3d 1, 9 (D.C. Cir. 2000), are plainly inapposite. Those cases involved appropriations riders restricting the expenditure of funds for particular programs, and this Court merely declined to construe such statutes as implicitly repealing the entire underlying program. Plaintiffs err in suggesting that there is any broader rule implicit in UDC Faculty Association v. D.C. Financial Responsibility & Management Assistance Authority, 163 F.3d 616 (D.C. Cir. 1998). That case merely held, in addressing the statutory powers of a Control Board, that a statute's "cryptic direction to 'take such steps as are necessary' surely does not give the Control Board unlimited authority." Id. at 623.

In any event, appropriations statutes "can substantively change existing law," Bldg. & Constr. Trades Dep't, 961 F.2d at 273, and whether they do is a straightforward question of statutory interpretation. As explained by the General Accounting Office – "whose accumulated experience and expertise in the field of government appropriations give special weight to its opinions," Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Donovan, 746 F.2d 855, 861 (D.C. Cir. 1984) – courts should discount "the occasional sweeping statement such as 'appropriations acts cannot change existing law.' Such statements can be misleading, and should be read in the context of the facts of the particular case." 1 GAO, Principles of Federal Appropriations Law, 2-56 (2d ed. 1991).

2. Plaintiffs next attempt to characterize the operative language of section 1503 as a "subordinate proviso." Br. 23-25. Plaintiffs contend that, because the words "Provided that" introduce the clause authorizing the President to make certain statutes inapplicable to Iraq, that authority can operate only as an exception to the antecedent clause authorizing the President to "suspend the application of any provision of the Iraq Sanctions Act of 1990" (117 Stat. at 579). However, a clause beginning with the words "Provided that" is not necessarily restrictive. In United States v. Morrow, 266 U.S. 531 (1925), the Supreme Court emphasized that such a clause is "sometimes

used to introduce independent legislation," and that courts must look to "[t]he entire context" of the statute to determine whether it is used for that purpose. Id. at 535; see also 2A Norman J. Singer, Sutherland's Statutes & Statutory Construction, § 47:08, at 235-236 (6th ed. 2000) (provisos "are construed using the same general criteria of decision applied to other kinds of provisions").

The clause at issue here, which authorizes the President to make inapplicable to Iraq section 620A of the Foreign Assistance Act or any other provision of law that applies to countries that have supported terrorism, necessarily operates independently of the authority to "suspend the application of any provision of the Iraq Sanctions Act of 1990." The Iraq Sanctions Act, passed nearly two months after the Secretary of State designated Iraq as a state sponsor of terrorism (see 55 Fed. Reg. at 37,793), independently required the complete enforcement against Iraq of various specified statutes, including but not limited to the Foreign Assistance Act. Pub. L. No. 101-513, § 568F(c)(1). Because the Iraq Sanctions Act and the Foreign Assistance Act thus operated independently of one another, so too did the respective section 1503 powers to make those statutes inapplicable to Iraq. Of the two section 1503 clauses at issue, it is simply not possible to construe either as wholly dependent on the other.

Plaintiffs also claim support (Br. 25-26) from the various other clauses in section 1503. In fact, the breadth and variety of those clauses undercuts their argument even further. Section 1503 contains nine different clauses, the last eight of which are introduced by the words "Provided" or "Provided further." Moreover, these clauses address a wide range of topics, including but not limited to the Iraq Sanctions Act, the Iran-Iraq Arms Non-Proliferation Act of 1992, various provisions of the Foreign Assistance Act, voting provisions, notice provisions, and sunset provisions. This pattern underscores that the words "Provided" or "Provided further" serve merely to separate dissimilar independent clauses, and that section 1503 addresses no predominant topic that would permit its broader clauses to be artificially restricted.

To be sure, some of the clauses do simply cabin the scope of authority granted to the President in another clause. For example, suspension of the application of the Iraq Sanctions Act, together with a decision to make inapplicable to Iraq section 620A and other laws restricting exports to Iraq, would allow the export of military equipment, but the fourth clause of section 1503 continues to prohibit the export of military equipment. Other clauses, however, clearly serve a different purpose. For example, the fifth clause of section 1503 provides that section 307 of the Foreign Assistance Act (22 U.S.C. § 2227) "shall not

apply with respect to programs of international organizations for Iraq." 117 Stat. at 579. Like the first and third clauses of section 1503, this provision removes a freestanding legal sanction imposed on Iraq by name (not on the basis of the Secretary of State's designation of Iraq as a state sponsor of terrorism). These clauses cannot be characterized as merely implementing or constraining the authority to suspend application of the Iraq Sanctions Act.

3. Plaintiffs next invoke the interpretive presumption that "where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." Br. 26 (internal quotations omitted). Plaintiffs err, however, in contending that this canon supports their proposed construction of section 1503. In authorizing the President to make inapplicable to Iraq section 620A of the Foreign Assistance Act and "any other provision of law that applies to countries that have supported terrorism," Congress itself specified the relevant criterion of similarity between section 620A and "other" provisions encompassed by section 1503. Like section 620A, 28 U.S.C. § 1605(a)(7) is a "provision of law that applies to countries that have supported terrorism." These provisions are thus "similar in nature" in the only sense deemed relevant by Congress. Under these circumstances, the canon

invoked by plaintiffs simply does not advance their proposed construction. See, e.g., Norfolk and Western Ry. Co. v. American Train Dispatchers Ass'n, 499 U.S. 117, 1163-64 (1991) (ejusdem generis "does not control * * * when the whole context dictates a different conclusion").

4. Plaintiffs finally contend that, because 28 U.S.C. § 1605(a)(7) specifies its own temporal application (to misconduct that occurred when a foreign government was designated as a state sponsor of terrorism), that "specific" provision is presumptively not subject to the assertedly more "general" provision of section 1503. Br. 27-29. That analysis is mistaken. The cases cited by plaintiffs address the question how to reconcile competing statutory provisions or schemes when each is silent about its effect on the other. See, e.g., Radzanower v. Touche Ross & Co., 426 U.S. 148, 153 (1976). Here, however, there is no question regarding how to reconcile competing statutes. Congress itself specified that section 1503 – a provision narrowly addressed to changed circumstances in Iraq – qualifies any "provision of law that applies to countries that have supported terrorism." Because 28 U.S.C. § 1605(a)(7) is clearly such a provision, section 1503 authorized the President to make it inapplicable to Iraq. In other words, Congress explicitly specified that section 1503, a provision specific to Iraq, qualifies 28 U.S.C. § 1605(a)(7), a provision specific to terrorism. The only further

question presented is the temporal scope not of section 1605(a)(7), but of the Presidential Determination that made that provision inapplicable to Iraq.[2]

B. The Presidential Determination Immediately Deprived The District Court Of Jurisdiction

In our opening brief, we demonstrated that the text of section 1503 and the Presidential Determination, insofar as they apply to 28 U.S.C. § 1605(a)(7), are best construed to govern the entry of future judgments in pending cases. We explained that, under settled precedent, statutes that "oust jurisdiction" require the immediate dismissal of pending cases, absent an express reservation to the contrary, "whether or not jurisdiction lay when the underlying conduct occurred or when suit was filed." Landgraf v. U.S.I. Film Products, 511 U.S. 244, 273 (1994). We also explained that the district court erred in adopting precisely the opposite interpretive presumption for jurisdiction-ousting statutes, particularly in the context of claims by United States citizens against foreign governments.

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[2] Amici make an additional argument (Amicus Br. 23-27), not raised by plaintiffs, that restoring Iraq's sovereign immunity would violate international obligations not to absolve another country of liability for its mistreatment of POWs. However, this Court and others have rejected the contention that international law requires countries to afford a domestic judicial forum for resolving such claims. See, e.g., Princz v. Federal Republic of Germany, 26 F.3d 1166, 1176-75 & n.1 (D.C. Cir. 1994); Sampson v. Federal Republic of Germany, 250 F.3d 1145, 1152 (7th Cir. 2001).

In response, plaintiffs do not contend that section 1503 and the Presidential Determination, insofar as they make 28 U.S.C. § 1605(a)(7) inapplicable to Iraq, are best construed to contain an express or implied exception for pending cases. Instead, relying on Hughes Aircraft Co. v. United States ex rel. Schumer, 520 U.S. 939 (1997), plaintiffs seek to impose a clear statement rule against giving immediate effect to jurisdiction-ousting statutes in pending cases, at least where no state-court or federal administrative tribunal is compelled to consider the underlying claim, and to do so through what plaintiffs describe as "rule-bound decisionmaking" (Br. 38). Plaintiffs then seek to apply this putative requirement of "rule-bound decisionmaking" to claims by United States citizens against foreign sovereigns. All of this is error.

1. The rule that jurisdiction-stripping statutes must be given immediate effect follows from the principle that the courts have only that "[j]urisdiction * * * conferred by an act of Congress, and when that act of Congress [is] repealed the power to exercise such jurisdiction is withdrawn." The Assessors v. Osbornes, 76 U.S. (9 Wall.) 567, 575 (1869). Without a jurisdiction-conferring statute, "the court cannot proceed at all." Ex parte McCardle, 74 U.S. (7 Wall.) 506, 514 (1868); see Bruner v. United States, 343 U.S. 112, 116 (1952) ("when the jurisdiction of a cause depends upon a statute the repeal of the

statute takes away the jurisdiction"); Bird v. United States, 187 U.S. 118, 125 (1902) ("as the jurisdiction depended upon the statute, it was taken away by the repeal of the statute").[3]

This rationale explains why, in the absence of a savings clause, jurisdiction-ousting statutes are uniformly given immediate effect, whereas jurisdiction-granting provisions are subject to a case-by-case retroactivity analysis. Cf. Lindh v. Murphy, 521 U.S. 320, 342-43 & n.3 (1997) (Rehnquist, C.J., dissenting). Where the statutory basis for jurisdiction has been repealed, the court is powerless to act because the source of its authority no longer exists. See, e.g., The Assessors, 76 U.S. at 575. In contrast, where Congress confers new jurisdiction that would alter the parties' substantive rights, there is no anomaly in construing the new provision to govern only disputes arising from post-enactment conduct. See, e.g., Hughes, 520 U.S. at 950-52; Joo v. Japan, 332 F.3d 679, 684-85 (D.C. Cir. 2003).

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[3] Plaintiffs cite Dole Food Co. v. Patrickson, 538 U.S. 468 (2003), for the proposition that "subject matter jurisdiction is determined according to the circumstances prevailing at the time an action is brought." Br. 33. In so doing, plaintiffs confuse the distinct issues of intervening factual changes and intervening legal changes. It is well-established that the relevant jurisdictional facts (such as the citizenship of the parties or amount in controversy) are those that exist when a suit is filed. See, e.g., Republic National Bank v. United States, 506 U.S. 80, 88 (1992). Dole Food's invocation of that rule does not undermine the equally well-established principle, discussed above, that elimination of the statutory basis for jurisdiction requires the immediate dismissal of pending cases.

Plaintiffs' position is inconsistent with Hallowell v. Commons, 239 U.S. 506 (1916), and LaFontant v. INS, 135 F.3d 158, 162, 164-65 (D.C. Cir. 1998), the decisions from the Supreme Court and this Court most directly on point. In Hallowell, the Supreme Court gave immediate effect, in a pending case, to a jurisdiction-ousting statute addressed to certain claims respecting the allocation of an Indian decedent's property. See 239 U.S. at 508-09. Similarly, in LaFontant, this Court gave immediate effect to a jurisdiction-ousting statute addressed to review of certain deportation orders. See 135 F.3d at 159, 164-65. In neither case, despite plaintiffs' suggestion to the contrary (Br. 36), was the litigant left with anything more than the opportunity to seek discretionary relief from the Executive Branch. In Hallowell, the Secretary of the Interior had "considerable discretion" as to the determinations at issue. 239 U.S. at 508; see 36 Stat. 855-56 (authorizing Secretary to adopt "such rules as he may prescribe," and providing that exercise of "his discretion" "shall be final and conclusive"). Similarly, in LaFontant, the governing statutes afforded the Attorney General largely unfettered "discretion" to adjust an alien's status (8 U.S.C. § 1255(a) (1995)) and "discretion" to waive inadmissibility (id. § 1282(c)). Contrary to plaintiffs' suggestion (Br. 38-39), this Court's holding did not turn on the fact that the Attorney General typically delegated his authority

to the Board of Immigration Appeals, because that too was simply a matter of discretion. See 8 C.F.R. § 3.1(h) (1995) (Attorney General may direct the Board to refer to him any matter, for his independent exercise of discretion).

Plaintiffs cite Matthews v. Kidder, Peabody & Co., 161 F.3d 156 (3d Cir. 1998), and Scott v. Boos, 215 F.3d 940 (9th Cir. 2000), as holding that, under Hughes, the elimination of a judicial forum impacts substantive rights and is thus presumptively inapplicable to disputes arising from pre-enactment conduct. However, Matthews and Scott involved the restriction not of jurisdiction, but of a cause of action. The statute at issue in both cases eliminated securities fraud "as a predicate act for a private cause of action" under RICO. Matthews, 161 F.3d at 157. The courts acknowledged a contention that the governing language (that "any person * * * may sue * * * in any appropriate United States district court") was "allegedly jurisdictional" (id. at 163, 166), but held that this language in fact created "the federal cause of action" at issue (id. at 162). See also Scott, 215 F.3d at 947 (statute at issue "eliminates RICO as a cause of action"). Because subject-matter jurisdiction over a RICO cause of action is provided by 28 U.S.C. § 1331, see, e.g., Sabo v. Metropolitan Life Ins. Co., 137 F.3d 185, 187 (3d Cir. 1998), neither Matthews nor Scott exercised jurisdiction pursuant to a repealed statute. Here, by contrast, 28 U.S.C. §

1605(a)(7) does "confe[r] subject matter jurisdiction on the federal courts," but does "not create a private right of action." Cicippio-Puleo v. Islamic Republic of Iran, 353 F.3d 1024, 1031-34 (D.C. Cir. 2003) (emphasis added). Plaintiffs' reliance on Matthews and Scott is thus unavailing.

We recognize that Abrams v. Societe Nationale des Chemins de Fer Francais, 332 F.3d 173 (2d Cir. 2003), did apply Hughes to a jurisdiction-ousting statute, but its analysis is flawed and inconsistent with decisions of this Court. Abrams does not discuss Hallowell or any of the numerous other Supreme Court decisions giving immediate effect to jurisdiction-ousting provisions; and, in LaFontant, this Court squarely held that those decisions retain vitality after Hughes. See 135 F.3d at 164-65. Moreover, Abrams expressly rejected this Court's recognition, in Princz v. Federal Republic of Germany, 26 F.3d 1166, 1175-76 (D.C. Cir. 1994), that "the basis for federal subject matter jurisdiction must be found among the jurisdiction-conferring statutes in effect at the time of the lawsuit." See Abrams 332 F.3d at 183-84. Although Joo subsequently rejected Princz's further suggestion that a jurisdiction-creating provision might always presumptively apply to future cases, see 332 F.3d at 683-85 (citing Hughes), it in no way suggested that courts may continue to exercise jurisdiction under repealed statutes. To the contrary, Joo analyzed World War II-era claims

solely within the framework of the FSIA, without any hint that subject-matter jurisdiction might continue to rest on the repealed provision of 28 U.S.C. § 1332 that, prior to 1976, had conferred jurisdiction over claims by United States citizens against foreign sovereigns. See Joo, 322 F.3d at 682-86 (analyzing possible retroactive effects of FSIA); 28 U.S.C. § 1332(a)(2) (1970) (granting jurisdiction over cases between "citizens of a State, and foreign states"), repealed by Pub. L. No. 94-583, § 3, 90 Stat. 2891 (1976) (FSIA).

2. As explained in our opening brief, plaintiffs' claim of frustrated expectations is particularly implausible in the context of the specific claims that they seek to litigate against Iraq. Plaintiffs here invoke a jurisdictional grant that did not exist when the primary conduct at issue occurred, see Pub. L. No. 104-132, § 221(c), 110 Stat. 1214, 1243 (1996), and a cause of action that this Court recently held does not exist, either then or now, see Cicippio-Puleo, 353 F.3d at 1031-34. Moreover, the Supreme Court has counseled against application of clear statement rules to frustrate American foreign policy in war-related matters of "great national concer[n]," United States v. The Schooner Peggy, 5 U.S. (1 Cranch) 103, 110), and this case surely satisfies that description. And to the extent plaintiffs had been able to litigate any claims against Iraq in United States courts prior to the enactment of section 1503 and the

promulgation of the Presidential Determination, those claims were always subject to being compromised or extinguished – without plaintiffs' consent – through executive action by the President. Despite plaintiffs' suggestion to the contrary, such actions have occurred frequently throughout American history, with repeated judicial approval, both before and after the enactment of the FSIA. See, e.g., American Insurance Ass'n v. Garamendi, 123 S. Ct. 2374, 2387 (2003) (claims arising from Holocaust) ("[m]aking executive agreements to settle claims of American nationals against foreign governments is a particularly longstanding practice, the first example being as early as 1799"); Dames & Moore v. Regan, 453 U.S. 654, 684 (1981) ("since 1952 there have been at least 10 claims settlements by executive agreement"); United States v. Pink, 315 U.S. 203 (1942) (Litvinov Assignment, claims settlement as part of recognition of USSR); Roeder, 333 F.3d at 235 (agreement extinguishing claims of American embassy hostages against Iran); Joo, 332 F.3d at 684–85 (1951 Treaty of Peace with Japan). Given this legal and historical backdrop, plaintiffs' assertion of any reasonable expectation to be able to litigate to judgment their war- and terrorism-based claims against Iraq is singularly implausible. And given the President's unquestioned ability to extinguish their claims on the merits, plaintiffs afford no justification for artificially restricting, through judge-made clear statement rules, his

congressionally-granted power to restore Iraq's sovereign immunity without compromising their claims.

C. Section 1503 Does Not Offend The Separation Of Powers

Plaintiffs finally contend (Br. 48-52) that section 1503 improperly delegates legislative power by authorizing the President to repeal or amend laws. It does not. Rather, it grants the President discretion to waive application of a narrow range of laws, in a particular set of circumstances, and in an area where he enjoys independent constitutional authority.

1. The enactment, repeal, or amendment of statutes requires bicameral action by Congress and presentment to the President. See, e.g., Clinton v. City of New York, 524 U.S. 417, 444 (1998). Plaintiffs argue that the effect of the Presidential Determination was to amend section 1605(a)(7) "as it relates to Iraq," in violation of the Presentment Clause. Br. 50. Plaintiffs confuse waiver with amendment.

A vast array of statutes empower federal agencies to waive their application in certain circumstances. See, e.g., 42 U.S.C. § 7545(k)(2)(B) (EPA may waive, in a limited geographical area, requirement regarding oxygen content of gasoline). Other statutes authorize the President to waive application of provisions related to his constitutional powers. See, e.g., 22 U.S.C. § 7207(a)(3) (President may waive prohibition on assistance for commercial exports to Iran, Libya, North Korea, or

Sudan, "to the degree the President determines that it is in the national security interest of the United States to do so, or for humanitarian reasons"). Every such provision could be recharacterized as one permitting amendment of the statute "as it relates" to the subject of the waiver. Yet it would be absurd to suggest that every time an agency waives a statutory provision pursuant to express congressional authorization, it thereby impermissibly amends the statute. Plaintiffs cite no court that has so held.

Like other waiver provisions, section 1503 authorizes the President to make inapplicable a limited number of statutes (those that "apply to countries that have supported terrorism") in a limited range of circumstances (insofar as they apply "with respect to Iraq"). These statutes remain valid law and are fully applicable to all other designated state sponsors of terrorism. Section 1503 operates no differently than does, for example, an EPA waiver of the oxygen content requirement for some but not all geographic areas. Neither constitutes a statutory amendment.

2. The crux of plaintiffs' argument is that Congress failed to cabin the President's discretion concerning when and how to effect a waiver. Plaintiffs argue that Clinton established three independent requirements for a permissible delegation of power to the President: the delegation must depend on a condition not existing at the time of its enactment; the President must be

required to act upon the condition's occurrence; and the President must be implementing congressional policy. Br. 48. The Supreme Court, however, nowhere suggested that these considerations are necessary to sustain any delegation of power to the President. Rather, it simply held them sufficient to distinguish the Line Item Veto Act struck down in Clinton from the delegation upheld in Field v. Clark, 143 U.S. 649 (1892). See Clinton, 462 U.S. at 443-44.

In any event, whatever Clinton might have held with respect to domestic affairs, it did not purport to disturb the Court's prior holding that Congress may authorize the President to act "in respect of subjects affecting foreign relations, which either leave the exercise of the power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs." United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 324 (1936). Moreover, after Clinton, the Supreme Court again confirmed that "the same limitations on delegation do not apply where the entity exercising the delegated authority itself possesses independent authority over the subject matter," Loving v. United States, 517 U.S. 748, 772 (1996) (quotation omitted), as the President obviously does with respect to foreign affairs. See, e.g., Garamendi, 123 S. Ct. at 2386. Accordingly, the Supreme Court has never struck down a delegation of foreign

affairs power to the President, and it has acknowledged the "unwisdom" of attempts to restrict the President's discretion in this context, because it is the President, "not Congress, [who] has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war." Curtiss-Wright, 299 U.S. at 321, 320.

Plaintiffs' constitutional challenge is particularly misguided because section 1503, insofar as it applies to 28 U.S.C. § 1605(a)(7), simply restores to the President (with respect to Iraq alone) a specific power that the Executive Branch had exercised for nearly two centuries, without any delegation from Congress and without even a hint of constitutional difficulty. Prior to the FSIA's enactment in 1976, the Executive Branch determined whether foreign sovereigns should be accorded immunity from suit on a case-by-case basis, and the courts were bound to accept those determinations and "surrender [their] jurisdiction." Republic of Mexico v. Hoffman, 324 U.S. 30, 35 (1945); see Verlinden v. Cent. Bank of Nigeria, 461 U.S. 480, 488-90 (1983). Section 1503 is nothing more than a limited restoration of that traditional Executive Branch power.[4]

[4] The longstanding historical pedigree of the specific practice at issue also refutes plaintiffs' claim (Br. 51) that section 1503 impermissibly interferes with the power of Congress to define federal-court jurisdiction. Prior to the enactment of the FSIA, courts "consistently * * * deferred" to the foreign sovereign immunity determinations of the Executive Branch, without express guidance from Congress. See Verlinden, 461 U.S.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's denial of the United States' motion to intervene and, in any event, vacate the default judgment and remand with instructions to dismiss for lack of jurisdiction.

Respectfully submitted,

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at 486-87. There is no constitutional impediment for Congress to restore, with respect to Iraq, this traditional Executive Branch power.

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C), I certify that this brief was prepared using WordPerfect 9 in a monospaced typeface (Courier New) with 10 characters per inch, and contains 6,776 words.

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February 18, 2004

CERTIFICATE OF SERVICE

I hereby certify that I have, this 18th day of February, 2004, served two copies of the foregoing Reply Brief For The Appellant on the counsel listed below by United States mail.

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