No. 06-948

In the Supreme Court of the United States

BERTRAM SACKS, PETITIONER

v.

OFFICE OF FOREIGN ASSETS CONTROL, DEPARTMENT OF THE TREASURY, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

This case concerns the Iraqi Sanctions Regulations, which prohibited United States persons from conducting transactions related to travel to or within Iraq from 1990 until 2003. 31 C.F.R. 575.207 (Iraq Travel Ban). In addition, a separate provision of the regulations prohibited the export of goods and services to Iraq, but excepted donated foodstuffs provided for humanitarian purposes and donated medical supplies that had been specifically licensed by the Office of Foreign Assets Control (OFAC), an agency within the Department of the Treasury. 31 C.F.R. 575.205 (Medicine Restriction). After petitioner traveled to Iraq in violation of the Iraq Travel Ban, OFAC imposed a civil penalty pursuant to its enforcement powers. 31 C.F.R. 575.701. Petitioner brought suit to challenge the Iraqi Sanctions Regulations. The petition presents the following questions:

1. Whether petitioner has standing to challenge the facial validity of the Medicine Restriction.

2. Whether the Iraq Travel Ban was a valid exercise of the President's statutory authority under the United Nations Participation Act of 1945, 22 U.S.C. 287 *et seq*.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1A-35A) is reported at 466 F.3d 764. The order of the district court (Pet. App. 36A-50A) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 10, 2006. The petition for a writ of certiorari was filed on January 8, 2007. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Following the invasion of Kuwait by the Iraqi army in August 1990, the United Nations and the United States acted quickly to sanction the then-government of Iraq.

On August 2, 1990, one day after the Iraqi army invaded Kuwait, the President signed Executive Order No. 12,722, which declared a national emergency and limited transactions with Iraq. 3 C.F.R. 294 (1991). Within four days, the United Nations Security Council passed Resolution 661, which called on all Member States to prevent their nationals from engaging in economic and financial transactions with Iraq, except for humanitarian donations of food and medical supplies. S.C. Res. 661, ¶ 3, U.N. Doc. S/RES/661 (1990).

On August 9, 1990, the President signed Executive Order No. 12,724, 3 C.F.R. 297 (1991), which superseded Executive Order No. 12,722. Executive Order No. 12,724 established detailed sanctions on the export of goods and services to Iraq, with an exception for humanitarian donations of food and medical supplies. § 2, 3 C.F.R. at 297. The order also restricted travel by United States persons to or within Iraq, although it exempted journalists, United States or United Nations officials, and persons assisting American citizens or permanent residents in fleeing Iraq. § 2(d), 3 C.F.R. at 297. Executive Order No. 12,724 authorized the Secretary of the Treasury to promulgate regulations necessary to implement and enforce its prohibitions. § 5, 3 C.F.R. at 298. As authority for the order, the President relied on the Constitution, the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1701 *et seq.*, the National Emergencies Act, 50 U.S.C. 1601 *et seq.*, Section 301 of title 3 of the United States Code, and, in light of the United Nations Security Council's adoption of Resolution 661, the United Nations Participation Act of 1945 (UNPA), 22 U.S.C. 287c. 3 C.F.R. 297 (1991).[1]

[1] Executive Order No. 12,722 cited the same authorities, with the exception of UNPA. 3 C.F.R. 297 (1991).

A month later, the United Nations Security Council passed Resolution 666, which addressed Iraq's diversion of donated humanitarian food and medical supplies to its military. Resolution 666 recommended "that medical supplies should be exported under the strict supervision of the Government of the exporting State or by appropriate humanitarian agencies." S.C. Res. 666 ¶ 8, U.N. Doc. S/RES/666 (1990).

Shortly thereafter, on November 5, 1990, Congress passed the Iraq Sanctions Act of 1990, Pub. L. No. 101-513, Tit. V, §§ 586-586J, 104 Stat. 2047-2054 (50 U.S.C. 1701 note) (Iraq Sanctions Act). That Act specifically authorized the President to "continue to impose the trade embargo and other economic sanctions with respect to Iraq * * * pursuant to Executive Order[] Numbered 12724." § 586C(a), 104 Stat. 2048. Congress also required that transactions involving "foodstuffs * * * exempted 'in humanitarian circumstances'" be conducted "consistent with United Nations Security Council Resolution 666." § 586C(b), 104 Stat. 2048.

OFAC then issued the Iraqi Sanctions Regulations (Iraqi Sanctions). 56 Fed. Reg. 2112 (1991) (31 C.F.R. 575.101 *et seq.*). Two of those provisions are at issue in this case: 31 C.F.R. 575.207 and 31 C.F.R. 575.205.

The first regulation, 31 C.F.R. 575.207 (the Travel Ban), prohibited all United States persons from conducting "any transaction relating to travel by any U.S. citizen or permanent resident alien to Iraq, or to activities * * * within Iraq," except for journalists, United States or United Nations officials, and persons assisting American citizens or permanent residents in fleeing Iraq. *Ibid.*

The second regulation, 31 C.F.R. 575.205 (the Medicine Restriction), banned the export of goods, services,

and technology to Iraq. Consistent with Executive Order No. 12,724 and United Nations Security Council Resolution 666, the OFAC regulations retained an exception for "donated foodstuffs in humanitarian circumstances, and donated supplies intended strictly for medical purposes, the exportation of which has been specifically licensed [by OFAC]," 31 C.F.R. 575.205, pursuant to a licensing program established for that purpose. 31 C.F.R. 575.501; 31 C.F.R. 575.520, 575.521 (2003), repealed by 68 Fed. Reg. 61,363 (2003). OFAC's regulations provided for enforcement through an administrative process for assessment of civil penalties for violations. 31 C.F.R. 575.701-575.705.

Shortly after the liberation of Iraq in 2003, the United Nations lifted all non-weapons trade restrictions against Iraq. S.C. Res. 1483, ¶ 10, U.N. Doc. S/RES/1483 (2003). OFAC then issued a general license that permitted, on a prospective basis, substantially all Iraq-related transactions that had previously been prohibited, including unlicensed donations of humanitarian supplies. 68 Fed. Reg. 38,188, 38,189 (2003) (31 C.F.R. 575.533).

2. Petitioner Bertram Sacks, along with several other members of an unincorporated association known as Voices in the Wilderness (Voices), traveled to Iraq in November 1997 for assertedly humanitarian purposes. Pet. App. 4A-5A, 36A-37A. Following that trip, OFAC issued petitioner and Voices a Prepenalty Notice pursuant to 31 C.F.R. 575.702. Pet. App. 9A-10A, 38A. Of the ten specific violations listed, six of them accused Voices of exporting medical supplies and/or other goods "absent prior specific license or other authorization." *Id.* at 10A. Petitioner was individually charged with only one violation:

> 6. Between on or about November 21-30, 1997, Messrs. Handleman, Mullins, Sacks and Zito engaged in currency travel-related transactions to/from/within Iraq absent prior license or other authorization from OFAC. These currency transactions included, but are not limited to, the purchase of food, lodging, ground transportation, and incidentals.

Ibid.

For petitioner, the Prepenalty Notice proposed a $10,000 penalty. Pet. App. 10A, 38A. Petitioner exercised the opportunity provided in the Prepenalty Notice to respond to the charges in writing. *Ibid.* Although individually charged only with violating the Travel Ban, petitioner's written response admitted that he had violated not only the Travel Ban, but also the Medicine Restriction: "You are correct to state in your prepenalty letter (12/3/98) that I brought medical supplies and toys to Iraq absent prior OFAC approval." *Id.* at 10A.

OFAC issued a formal Penalty Notice on May 17, 2002, Pet. App. 38A, which described petitioner's written response as admitting "the Notice's allegation in Count 6 that you exported goods to Iraq absent prior OFAC approval," *id.* at 11A. Citing this willful violation of the Iraqi Sanctions, OFAC imposed a $10,000 penalty on petitioner and demanded payment within thirty days. *Id.* at 11A, 38A. After petitioner failed to pay the penalty, the Treasury Department sought to collect the debt through a contract with Ocwen Federal Bank, on behalf of the United States. *Ibid.*

3. On January 14, 2004, petitioner brought this suit in the United States District Court for the Western District of Washington against OFAC and its then-director,

Richard Newcomb (collectively OFAC).[2] He requested declaratory and injunctive relief on the theory that the Medicine Restriction and Travel Ban lacked statutory authority and violated principles of international law. Pet. App. 11A, 38A. Petitioner also alleged that OFAC's claims against him were time-barred. *Ibid.* The district court granted OFAC's motion to dismiss petitioner's complaint for failure to state a claim. *Id.* at 11A, 36A.

The district court held that the Travel Ban was validly promulgated and enforceable because Congress's enactment of the Iraq Sanctions Act "ratified the Executive Order on which the Iraq Travel Ban and Medicine Restriction were based." Pet. App. 42A. As to the Medicine Restriction, the district court agreed with the analysis in *Office of Foreign Assets Control* v. *Voices in the Wilderness*, 329 F. Supp. 2d 71 (D.D.C. 2004), holding that, regardless of whether or not petitioner had standing, this restriction constituted a "valid exercise of authority granted to OFAC through Executive Order No. 12,724 and the Iraqi Sanctions Act." Pet. App. 40A-44A. Further, the court found that international law did not provide a ground upon which to invalidate those otherwise valid regulations. *Id.* at 11A, 44A-45A.

After determining that the collection effort was not time-barred, the district court nevertheless sua sponte interpreted OFAC's regulations as precluding recourse to a private collection agency. Pet. App. 46A-49A. The district court enjoined OFAC from using any means to collect the civil penalty other than referral to the Department of Justice for litigation in federal court. *Id.* at 11A, 49A.

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[2] Pursuant to this Court's Rule 35.3, OFAC Director Adam Szubin has been automatically substituted as a respondent.

4. Petitioner appealed the district court's dismissal, arguing that the Travel Ban and Medicine Restriction were invalidly promulgated. Pet. App. 11A-12A. The government cross-appealed the district court's determination that the Treasury Department could not use a private contractor collection agency to collect petitioner's debt. *Id.* at 12A. The court of appeals affirmed the district court's order. *Ibid.*

The court of appeals first found that petitioner had standing to challenge the Travel Ban, but not the Medicine Restriction. Pet. App. 13A-22A. The court held nonjusticiable petitioner's attack on the Medicine Restriction because he failed to allege any concrete and imminent injury-in-fact caused by that restriction. *Id.* at 15A-16A, 21A-22A. The court rejected petitioner's contention that he had been punished by OFAC for violating the Medicine Restriction, concluding that a penalty had been assessed against him only for violating the Travel Ban. The court further found that petitioner's membership in Voices did not create a "realistic danger of [his] sustaining a direct injury as a result of the statute's operation or enforcement." *Id.* at 16A-17A (quoting *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). Citing the fact that the government had never, during the prior eight years, charged or penalized petitioner for his self-confessed violation of the Medicine Restriction, the court of appeals rejected petitioner's contention that he faced imminent enforcement action for that violation. *Id.* at 17A-22A.

In upholding the Travel Ban, the court of appeals rejected petitioner's argument that Congress, in enacting IEEPA, had curtailed the President's power under UNPA to implement Security Council resolutions, finding that Congress had not intended IEEPA to limit the

President's authority under UNPA or to function as a partial, *sub silentio* repeal of that statute. Pet. App. 22A-26A. After considering the text of IEEPA and its legislative history, the court of appeals also rejected petitioner's argument that IEEPA was intended to codify certain international legal standards posited by petitioner. *Id.* at 26A-27A. The court of appeals accordingly affirmed the district court's holding that the medical supplies exception to Presidential power, embodied in IEEPA, did not limit the President's ability to ban travel pursuant to UNPA. *Id.* at 27A.

ARGUMENT

The decision below is correct and does not conflict with any decision of this Court or any other court of appeals. Moreover, because of changes in the applicable regulatory regime, the questions presented have very limited continuing relevance. Further review is therefore unwarranted.

1. Petitioner argues (Pet. 15-16) that the court of appeals' ruling on standing makes it "difficult to conceive how [OFAC's] authority to directly restrict humanitarian donations of food and medicine could ever be subjected to review." However, as this Court has made clear, the fact that there might be no plaintiff with standing does not lessen the burden of proving it in any individual case. *United States* v. *Richardson*, 418 U.S. 166, 179 (1974). In any event, even if any such concern could justify review by this Court, it is absent here. The court of appeals did not establish any novel standing requirements for challenging OFAC's authority with respect to the Iraqi Sanctions, but instead applied well-established requirements of Article III standing. Pet. App. 13A-14A. Petitioner's challenge to the Travel Ban—the provision under which he was penalized—pro-

ceeded on the merits, while his attack on the Medicine Restriction failed for lack of standing and ripeness, in light of the fact that in the eight years following petitioner's admitted violation of the restriction, he had never been penalized for it. *Id.* at 15A, 20A-21A. Should OFAC ever penalize petitioner in the future for violating the Medicine Restriction, he would obviously then satisfy the injury-in-fact requirement and have standing to challenge the legitimacy of the Medicine Restriction. *Id.* at 21A.

a. The court of appeals correctly held that petitioner's asserted fear of future penalty proceedings for violating the Medicine Restriction does not confer standing because petitioner has not alleged a concrete and imminent injury-in-fact caused by the Medicine Restriction. Pet. App. 17A-21A. By the time petitioner filed his complaint in 2004, the Medicine Restriction, for all practical purposes, had already been rescinded with respect to future transactions by OFAC's issuance of a general license in June of 2003. 68 Fed. Reg. at 38,189. Thus, any supposed threat of penalty proceedings could only relate to already completed violations and could not have served to inhibit petitioner's present or future conduct. That fact distinguishes this case from each of the cases relied upon by petitioner. See *Pennell* v. *City of San Jose*, 485 U.S. 1, 7-10 (1988); *Babbitt*, 442 U.S. at 298-300; *Doe* v. *Bolton*, 410 U.S. 179, 188-189 (1973).

With respect to petitioner's past violations, OFAC has taken no action to charge petitioner during the last eight years, despite his admission that he violated the Medicine Restriction numerous times. Pet. App. 19A-20A. Petitioner relies (Pet. 19) on OFAC's 2004 reservation of the right to act "in response to [petitioner's] eight other trips to Iraq." But that statement did not mention

the Medicine Restriction at all, and said nothing about whether petitioner violated the Medicine Restriction between 1999 and 2003, the only period in which the Medicine Restriction was in effect and as to which the limitations period had not expired at the time of the statement. Pet. App. 20A-21A; see 28 U.S.C. 2462. As the court of appeals noted (Pet. App. 21A), petitioner's complaint did not allege that he violated the Medicine Restriction during that time. The mere existence of a generalized possibility of future enforcement does not satisfy the Article III case or controversy requirement. *O'Shea* v. *Littleton*, 414 U.S. 488, 494-495 (1974); *Thomas* v. *Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc), cert. denied, 531 U.S. 1143 (2001).

b. Petitioner's other theories of standing also fail. The court of appeals properly rejected petitioner's contention (Pet. 16-17) that he has standing to challenge the Medicine Restriction because the particular Travel Ban violation for which he was penalized happened to involve the delivery of medicine. The court correctly recognized that OFAC had imposed a penalty for violation of the Travel Ban, not the Medicine Restriction. Pet. App. 16A. Although it is true that OFAC imposed the travel sanction on the basis of petitioner's admitted travel for the purpose of delivering food and medicine (as well as toys), that does not change the legal basis of the penalty. *Id.* at 16A, 43A n.3. The Travel Ban and Medicine Restriction proscribe different types of conduct, and a penalty imposed for violating one does not confer standing to challenge the other. *Id.* at 43A n.3; cf. 31 C.F.R. 575.205, 575.207.

Nor, as the court of appeals recognized, does petitioner's membership in Voices confer standing. Pet.

App. 16A-17A. Because nothing in the Amended Complaint or record indicates that petitioner has any financial responsibility for the fine imposed on Voices, petitioner's membership alone does not create a realistic danger of direct injury to him as a result of the Medical Restriction's enforcement against Voices. *Ibid.*

2. a. With respect to the merits, the court of appeals' opinion in this case is the only appellate decision to address the issues presented by the petition. Moreover, the court of appeals' decision and that of the district court are consistent with the only other district court decision on point, *Office of Foreign Assets Control* v. *Voices in the Wilderness*, 329 F. Supp. 2d 71 (D.D.C. 2004), in which the District Court for the District of Columbia held that the Iraqi Sanctions were a valid and enforceable exercise of the President's authority under UNPA, *id.* at 76-78. There is therefore no conflict among the lower courts for this Court to resolve.

In addition, questions regarding the validity of the Travel Ban and Medicine Restriction lack ongoing significance. Shortly after the liberation of Iraq, OFAC issued a general license permitting, on a prospective basis, substantially all Iraq-related transactions that had been previously prohibited. 68 Fed. Reg. at 38,189 (codified at 31 C.F.R. 575.533). Executive Order No. 13,350, 3 C.F.R. 196 (2005), terminated the national emergency declared by Executive Order No. 12,722, and revoked Executive Order No. 12,724. While Executive Order No. 13,350 explicitly reserved the government's right to bring proceedings based on violations committed before the Iraqi Sanctions expired, § 1, 3 C.F.R. at 197 (2005), the number of such violations for which the questions presented may have any significance is quite limited. Because the statute of limitations for bringing

such actions is five years, enforcement is now possible only for violations that occurred between 2002 and 2003. See 28 U.S.C. 2462; Pet. App. 9A, 21A.

In addition, the unique situation that resulted in the United Nations Resolutions, Executive Orders, Iraq Sanctions Act, and OFAC regulations is unlikely to recur. Although the pre-2003 Iraqi Sanctions may be similar in some respects to restrictions against other foreign states (Pet. 22-23), any future claims will necessarily arise out of the relationship between specific administrative regulations and Executive Orders, and will need to be assessed in light of their own particular factual circumstances.

b. In any event, the decisions of the lower courts upholding the Travel Ban's validity, Pet. App. 22A-27A, 39A-42A, are correct. As the court of appeals correctly held, IEEPA's medical supplies exception to Presidential power does not limit the President's power under UNPA to enact the Travel Ban. *Id.* at 22A-27A. First, the IEEPA medical supplies exception, by its terms, applies only to 50 U.S.C. 1702 (2000 & Supp. III 2003), see 50 U.S.C. 1702(b)(2), and so does not alter the President's authority under UNPA or the Iraq Sanctions Act. Second, even if IEEPA did apply in this case, that statute would not limit enforcement of the Travel Ban because a general prohibition against travel-related transactions is not an indirect regulation on the importation or exportation of goods. See *Walsh* v. *Brady*, 927 F.2d 1229 (D.C. Cir. 1991).

Petitioner argues (Pet. 27-28) that the Executive Order authorizing the Travel Ban is incompatible with the expressed or implied will of Congress. As the lower courts explained, however, Executive Order No. 12,724 was adopted and approved by Congress with the pas-

sage of the Iraq Sanctions Act. Pet. App. 22A-27A, 39A-40A. That Act specifically provided that the exemptions in Resolution 661 "shall be limited to foodstuffs that are to be provided consistent with United Nations Security Council Resolution 666 (1990) and other relevant Security Council resolutions." § 586C(b), 104 Stat. 2048. Security Council Resolution 666 recommended "that medical supplies should be exported under the strict supervision of the Government of the exporting State or by appropriate humanitarian agencies." S.C. Res. 666 ¶ 8, *supra*. Thus, Congress clearly contemplated the adoption of an administrative scheme like that established by the OFAC Iraqi Sanctions in order to implement the relevant U.N. resolutions. § 586C, 104 Stat. 2048.

c. While not raised before the court of appeals (and thus waived in this Court), petitioner's argument that the Medicine Restriction and Travel Ban violate international law was fully considered and properly rejected by the district court. Pet. App. 44A-45A.

Petitioner's reliance (Pet. 23) on customary international law is misplaced. This Court's reliance on the "customs and usages of civilized nations" in *The Paquete Habana*, 175 U.S. 677, 700 (1900), was predicated on the absence of any treaty, "controlling executive or legislative act or judicial decision," *ibid.* In this case, there is no occasion to refer to customary international law because UNPA and the Iraq Sanctions Act of 1990, in conjunction with Executive Order No. 12,724, address the same subject and specifically authorize the Travel Ban and Medicine Restriction. See *Munoz* v. *Aschcroft*, 339 F.3d 950, 958 (9th Cir. 2003) ("'in enacting statutes, Congress is not bound by international law; if it chooses to do so, it may legislate contrary to the limits posed by

international law,' so long as the legislation is constitutional") (quoting *United States* v. *Aguilar*, 883 F.2d 662, 679 (9th Cir. 1989), cert. denied, 498 U.S. 1046 (1991)).

The district court also correctly held that the sources of international law relied upon by petitioner (Pet. 23-27) do not create legal rights that petitioner can invoke. Pet. App. 44A-45A. The Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810, at 71 (1948), "does not of its own force impose obligations as a matter of international law." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 734 (2004). The Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, does not provide privately enforceable rights. Cf. *Johnson* v. *Eisentrager*, 339 U.S. 763, 789 n.14 (1950); *Hamdan* v. *Rumsfeld*, 126 S. Ct. 2749, 2794 (2006) (accepting the assumption that the enforcement scheme of the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, "would, absent some other provision of law, preclude [petitioner's] invocation of the Convention's provisions as an independent source of law binding the Government's actions and furnishing petitioner with any enforceable right"). And the United States has not ratified, although it has signed, the United Nations Convention on the Rights of the Child, *adopted* Nov. 20, 1989, 1577 U.N.T.S. 3. See Office of the United Nations High Commissioner on Human Rights, *Convention on the Rights of the Child* <http://www.ohchr.org/english/countries/ratification/11.htm> (status of ratification).[3]

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[3] Petitioner's reliance (Pet. 26) on the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, *adopted* May 25, 2000, S. Treaty Doc. No. 106-37, 2173 U.N.T.S. 236, is particularly misplaced. That protocol does not address

In any event, the requirement—in conformity with United Nations Security Council Resolution 666—that humanitarian supplies be provided pursuant to the oversight of OFAC does not violate any of those international agreements.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2007

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sanctions adopted pursuant to a Security Council Resolution, but instead refers to the measures that ratifying members should take to assure that their armed forces do not have members younger than eighteen.