[NOT YET SCHEDULED FOR ORAL ARGUMENT]

No. 07-5347

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

MENACHEM BINYAMIN ZIVOTOFSKY,
by his parents and guardians, ARI Z. and
NAOMI SIEGMAN ZIVOTOFSKY,

Plaintiff-Appellant,

v.

SECRETARY OF STATE,

Defendant-Appellee.

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

BRIEF FOR THE APPELLEE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici.

The plaintiff-appellant is Menachem Binyamin Zivotofsky, by his parents and guardians Ari Z. and Naomi Siegman Zivotofsky. The defendant-appellee is the United States Secretary of State. Amici curiae are American Association of Jewish Lawyers and Jurists, Anti-Defamation League, B'nai B'rith International, Hadassah, American Israel Public Affairs Committee, Jewish Counsel for Public Affairs, the Lawfare Project, National Council of Jewish Women, National Council of Young Israel, Union for Reform Judaism, Union of Orthodox Jewish Congregations of America, Women's League for Conservative Judaism, Association of Proud American Citizens Born in Jerusalem, Israel, Zionist Organization of America, and Members of the United States Senate and the United States House of Representatives.

B. Rulings Under Review.

The ruling on review is *Zivotofsky v. Secretary of State*, 511 F. Supp. 2d 97 (D.D.C. 2007) (Kessler, J.).

C. Related Cases.

This case was before this Court in *Zivotofsky v. Secretary of State*, 444 F.3d 614 (D.C. Cir. 2006), and *Zivotofsky v. Secretary of State*, 571 F.3d 1227 (D.C. Cir. 2009), *reh'g denied*, 610 F.3d 84 (D.C. Cir. 2010). The Supreme Court remanded the case on March 26, 2012. *Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012). We are unaware of any related case within the meaning of Circuit Rule 28(a)(1)(C).

/s/Dana Kaersvang
DANA KAERSVANG

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GLOSSARY

FAM	Foreign Affairs Manual
OLC	Office of Legal Counsel

No. 07-5347

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SECRETARY OF STATE,

Defendant-Appellee.

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

BRIEF FOR THE APPELLEE

STATEMENT OF JURISDICTION

Plaintiff invoked the district court's statutory jurisdiction under 28 U.S.C. §§ 1331, 1346(a)(2), and 1361. The district court dismissed the complaint for lack of subject-matter jurisdiction on September 19, 2007. Plaintiff filed a timely notice of appeal on October 18, 2007. This Court affirmed on July 10, 2009.

Plaintiff filed a petition for rehearing en banc on August 21, 2009, which was denied on June 29, 2010. Plaintiff filed a timely petition for a writ of certiorari in the Supreme Court on November 24, 2010, and the Supreme Court reversed this Court's jurisdictional ruling on March 26, 2012. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether Section 214 of the Foreign Relations Authorization Act, Fiscal Year 2003, impermissibly infringes the President's constitutional power to recognize foreign sovereigns, *see* U.S. Const. Art. II, § 3 (Reception Clause), by requiring the Secretary of State, upon request, to record "Israel" as the place of birth in specified official documents for United States citizens born in Jerusalem, contrary to longstanding U.S. foreign policy of refraining from official acts recognizing any state as having sovereignty over Jerusalem.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

Pursuant to longstanding U.S. foreign policy, the United States takes no official government action based on any recognition of a particular state as having sovereignty over the city of Jerusalem and treats the ultimate determination of the status of Jerusalem as a sensitive matter to be resolved through negotiations

between the parties. In order to implement that policy, the Secretary of State lists "Jerusalem," without any country designation, as the place of birth in passports and consular reports of births abroad of U.S. citizens born in Jerusalem.

The parents of appellant Menachem Zivotofsky, an American citizen born in Jerusalem, challenge the Secretary of State's decision to identify Zivotofsky's place of birth as "Jerusalem," rather than "Israel," on his passport. They rely upon § 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350, which states that the Secretary of State "shall, upon the request of the citizen [born in Jerusalem] or the citizen's legal guardian, record the place of birth as Israel."

The district court held that this dispute presents a non-justiciable political question and this Court affirmed. The Supreme Court reversed and remanded for a determination regarding the constitutionality of § 214(d).

STATEMENT OF FACTS

The status of the city of Jerusalem is one of the most sensitive and longstanding disputes in the Arab-Israeli conflict. For the last 60 years, the United States' consistent foreign policy has been to take no official act recognizing Israel's or any other state's claim to sovereignty over Jerusalem. The United States has thus left the status to be decided by negotiations between the relevant parties within the peace process. This policy is rooted in the Executive's

assessment that "[a]ny unilateral action by the United States that would signal, symbolically or concretely, that it recognizes that Jerusalem is a city that is located within the sovereign territory of Israel would critically compromise the ability of the United States to work with Israelis, Palestinians and others in the region to further the peace process." JA 58-59 (response to interrogatories). For parallel reasons, the Executive does not officially recognize Palestinian claims to current sovereignty in Jerusalem, the West Bank, or the Gaza Strip, pending the outcome of these negotiations.

One of the ways the State Department has implemented the United States' foreign policy concerning the status of Jerusalem is in its rules regarding place-of-birth designations in consular reports of birth abroad and passports issued to U.S. citizens born in Jerusalem. Only "Jerusalem" is recorded as the place of birth on those documents. Plaintiff challenges this policy, seeking to have "Israel" designated as his place of birth. He relies on Section 214 of the Foreign Relations Authorization Act, Fiscal Year 2003, which is entitled "United States Policy with Respect to Jerusalem as the Capital of Israel," and which, among other steps to implement that policy, purports to require the State Department to make such a designation upon request. Pub. L. No. 107-228, 116 Stat. 1350, 1365-66.

1. a. Since the creation of the state of Israel in 1948, the status and borders of Jerusalem have been a matter of controversy and disagreement between

Israel, the Palestinian people, and Israel's Arab neighbors. The United States recognizes that for any lasting peace to be established, the issue of the status of Jerusalem must be resolved by negotiations among the parties. *See* JA 57 (response to interrogatories). Hence, the United States has consistently declined to take any official act to recognize any state's sovereignty over the city. *See* JA 59.

When Israel declared independence, President Truman immediately recognized the new state. *See* Statement by the President Announcing Recognition of the State of Israel, 1948 Pub. Papers 258 (May 14, 1948). At the same time, however, the United States did not recognize Israel's sovereignty over any part of Jerusalem. That same year, the U.N. General Assembly, with United States support, passed a resolution stating that Jerusalem "should be accorded special and separate treatment" and should be placed under international control. G.A. Res. 194 (III), ¶ 8, U.N. Doc. A/PV.186 (Dec. 11, 1948). In 1949, when Israel announced its intention to convene the inaugural meeting of its Parliament in the part of Jerusalem that it controlled, the United States declined to send a representative to attend the ceremonies, noting in a State Department cable that "the United States cannot support any arrangement which would purport to authorize the establishment of Israeli . . . sovereignty over parts of the Jerusalem area." 6 Foreign Relations of the United States 1949: The Near East, South Asia, and Africa 739 (1977).

In 1967, as a result of the Six Day War, Israel acquired control over the entire city of Jerusalem. In United Nations proceedings, the United States made clear that the "continuing policy of the United States Government" was that "the status of Jerusalem . . . should be decided not unilaterally but in consultation with all concerned." U.N. GAOR, 5th Emergency Sess., 1554th plen. mtg. ¶ 99, U.N. Doc. A/PV.1554 (July 14, 1967) (statement of U.S. Ambassador to the U.N. Arthur Goldberg). Consequently, the United States emphasized that it did not "recognize" any measures taken by Israel as "altering the status of Jerusalem" or "prejudging the final and permanent status of Jerusalem." *Id.* at ¶ 100.

In 1993, with the assistance of the United States, representatives of Israel and the Palestinian people agreed that the status of Jerusalem is one of the core issues to be addressed bilaterally in permanent status negotiations. JA 57; Declaration of Principles on Interim Self-Government Arrangements, art. V, Isr.-P.L.O. team, Sept. 13, 1993, http://2001-2009.state.gov/p/nea/rls/22602.htm. Since that time, Presidential Administrations have uniformly sought to assist the parties in establishing negotiations on all outstanding issues, including the status of Jerusalem. For example, President George W. Bush encouraged negotiations that would "lead to a territorial settlement, with mutually agreed borders reflecting previous lines and current realities, and mutually agreed adjustments," including

resolution of the status of Jerusalem. President Bush Discusses the Middle East (July 16, 2007), http://georgewbush-whitehouse.archives.gov/news/releases/2007/07/20070716-7.html. President Obama has similarly explained that once the territorial outlines are agreed and security issues are resolved, "two wrenching and emotional issues will remain [to be negotiated]: the future of Jerusalem, and the fate of Palestinian refugees." Remarks by the President on the Middle East and North Africa (May 19, 2011), http://www.whitehouse.gov/the-press-office/2011/05/19/remarks-president-iddle-east-and-north-africa; Hillary Rodham Clinton, Sec'y of State, Remarks at the 2010 AIPAC Policy Conference (Mar. 22, 2010) (The status of Jerusalem is a "permanent status issue[]" that must be resolved through "good-faith negotiations [between] the parties."), http://www.state.gov/secretary/rm/2010/03/138722.htm; Remarks by President Obama in Address to the U.N. General Assembly (Sept. 21, 2011) ("[I]t is the Israelis and the Palestinians . . . who must reach agreement on . . . Jerusalem."), http://www.whitehouse.gov/the-press-office/2011/09/21/remarks-president-obama-address-united-nations-general-assembly; *see also* State Department Press Briefing, Sept. 6, 2012, http://www.state.gov/r/pa/prs/dpb/2012/09/197438.htm ("[L]ongstanding Administration policy, both in this Administration and in previous administrations across both parties, is that the status of Jerusalem is an

issue that should be resolved in final status negotiations between Israelis and Palestinians.").

As relevant to this case, within this "highly sensitive" and "potentially volatile" context "U.S. Presidents have consistently endeavored to maintain a strict policy of not prejudging the Jerusalem status issue and thus not engaging in official actions that would recognize, or might be perceived as constituting recognition of, Jerusalem as either the capital city of Israel, or as a city located within the sovereign territory of Israel." JA 59 (response to interrogatories). This policy is rooted in the Executive's longstanding assessment that any such action by the United States would "undercut[] and discredit[] our facilitative role in promoting a negotiated settlement," which would be "damaging to the cause of peace and . . . therefore not . . . in the interest of the United States," Letter from George P. Shultz, Sec'y of State, to Hon. Charles H. Percy (Feb. 13, 1984), in American Embassy in Israel: Hearing Before the Senate Comm. on Foreign Relations, 98th Cong., 2d Sess. 13-14 (1984) (hereinafter "Embassy Hearing"); *see also* 13 Foreign Relations of the U.S., 1958-60, 147-49 (Eisenhower Administration); 17 Foreign Relations of the U.S., 1961-63, 414-16 (Kennedy Administration); 57 Department of State Bulletin, 148-151 (July 31, 1967) (Johnson Administration); 62 Department of State Bulletin 10 (January 5, 1970) (Nixon Administration); Public Papers of the Presidents of the United States: Gerald R. Ford, 64 (Ford Administration); Letters

of September 22, 1978 from President Carter to Sadat and Begin (Carter Administration); September 1, 1982, Reagan Peace Initiative (Reagan Administration); Digest of United States Practice in International Law, 1989-1990, 266 (George H.W. Bush Administration); White House Press Statement, Oct. 24, 1995 (Clinton Administration); Presidential Speech, June 24, 2002 (G.W. Bush Administration). This assessment affects a range of United States actions. In particular, "[t]he United States, like nearly all other countries, maintains its embassy in Tel Aviv." JA 58.[1]

b. United States policy concerning the status of Jerusalem is reflected in the State Department's policies for preparing passports and reports of birth abroad of U.S. citizens born in Jerusalem. As a general rule in passport administration, the country that the United States recognizes as having sovereignty over the place of birth of a passport applicant is recorded in the passport. *See* JA 111 (7 Foreign Affairs Manual (FAM) 1383.1 (1987)). Consistent with the long-standing policy of not taking any official act speaking to the status of Jerusalem, only "Jerusalem" is recorded as the place of birth in the passports of U.S. citizens born in that city. JA 115, 127 (7 FAM 1383.5-6, exh. 1383.1). Similarly, for U.S. citizens born today in the West Bank or the Gaza Strip, State Department rules mandate

[1] No country presently maintains its embassy to Israel in Jerusalem.

recording "West Bank," "Gaza Strip," or the town of birth, not the name of any sovereign. JA 114 (7 FAM 1383.5-5).

The State Department's policy concerning the recording of Jerusalem as the place of birth reflects its determination that "U.S. national security interests would be significantly harmed at the present time were the United States to adopt a policy or practice that equated to officially recognizing Jerusalem as a city located within the sovereign state of Israel." JA 56 (response to interrogatories). Recording "Israel" as the place of birth of U.S. citizens born in Jerusalem would be perceived internationally as a "reversal of U.S. policy on Jerusalem's status" dating back to Israel's creation that "would be immediately and publicly known." JA 61. That reversal could "cause irreversible damage" to the United States' ability to further the peace process. JA 59.

2. a. The Executive Branch has consistently maintained that the President's recognition power forecloses legislative efforts to impose a different policy of recognition with regard to Jerusalem. The Constitution assigns to the President alone the authority to "receive Ambassadors and other public Ministers," U.S. Const. Art. II, § 3, a power that has been understood since the Washington administration to include the authority to decide which ambassadors the President will receive and, hence, the power to decide whether and under what terms to recognize a foreign sovereign. *See, e.g., Banco Nacional de Cuba v. Sabbatino,*

376 U.S. 398, 410 (1964); *United States v. Pink*, 315 U.S. 203, 229 (1942). In the past, Congress has occasionally considered legislation to constrain the Executive Branch's ability to implement its recognition policy with respect to Jerusalem. In 1984, Congress considered legislation that would have required the U.S. Embassy in Israel to move to Jerusalem. *See* S. 2031, 98th Cong., 2d Sess. The Reagan Administration opposed the bill on the ground that it would require the President officially to recognize Israeli sovereignty over Jerusalem, thereby harming United States interests in the region and raising "serious constitutional questions" by encroaching on "the President's exclusive constitutional power . . . to recognize and to conduct ongoing relations with foreign governments." Embassy Hearing 13-14, 58-59. The bill was not enacted.

In 1995, Congress passed the Jerusalem Embassy Act of 1995, which states that the "[p]olicy of the United States" is that "Jerusalem should be recognized as the capital of Israel," and which purports to condition a portion of State Department funding on moving the U.S. Embassy to Jerusalem. Pub. L. No. 104-45, § 3(a), (b), 109 Stat. 398-99 (enacted into law without President's signature). While Congress was considering the bill, the Secretary of State advised the Senate Majority Leader that such legislation would be unacceptable on constitutional and policy grounds, 141 Cong. Rec. 15145, 15469 (Oct. 23, 1995), and the Department of Justice's Office of Legal Counsel (OLC) advised the President that the bill

would unconstitutionally infringe the President's recognition power. *See* Bill to Relocate United States Embassy from Tel Aviv to Jerusalem, 19 Op. Off. Legal Counsel 123 (1995). As enacted after further revision, the statute contains a waiver provision that permits the President to suspend the funding restriction for six months at a time to "protect the national security interests of the United States." Pub. L. No. 104-45 § 7, 109 Stat. 400. Since the provision's enactment, Presidents Clinton, Bush, and Obama have repeatedly made the necessary finding to invoke the waiver provision and have maintained the U.S. Embassy in Tel Aviv. *See, e.g.*, 76 Fed. Reg. 35,713 (2011).

b. In 2002, Congress passed and the President signed the Foreign Relations Authorization Act. Section 214 of that Act, entitled "United States Policy with Respect to Jerusalem as the Capital of Israel," contains various provisions relating to Jerusalem. 116 Stat. 1365.

Subsection (a) "urges the President . . . to immediately begin the process of relocating the United States Embassy in Israel to Jerusalem." § 214(a), 116 Stat. 1365. Subsection (b) states that none of the funds authorized to be appropriated by the Act may be used to operate the United States consulate in Jerusalem unless that consulate "is under the supervision of the United States Ambassador to Israel." § 214(b), 116 Stat. 1365-66. Subsection (c) states that none of the funds authorized to be appropriated may be used for publication of any "official

government document which lists countries and their capital cities unless the publication identifies Jerusalem as the capital of Israel." § 214(c), 116 Stat. 1366. And Subsection (d), on which petitioner relies, states that, "[f]or purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary [of State] shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel." § 214(d), 116 Stat. 1366.

At the time of enactment, President Bush stated that if Section 214 were construed to impose a mandate, it would "impermissibly interfere with the President's constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states." Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003, 2002 Pub. Papers 1697, 1698 (Sept. 30, 2002). This signing statement made clear that "U.S. policy regarding Jerusalem has not changed." *Ibid*.

3. Plaintiff is a U.S. citizen born to two United States citizen parents in Jerusalem in 2002. JA 8-9. Plaintiff's mother filed an application for a consular report of birth abroad and a U.S. passport for plaintiff, listing his place of birth as "Jerusalem, Israel." JA 9. U.S. officials informed petitioner's mother that State Department policy required them to record "Jerusalem" as petitioner's place of

birth, which is how petitioner's place of birth appears in the documents he received. *Ibid.*

Plaintiff's parents subsequently filed this suit on his behalf against the Secretary of State seeking an order compelling the State Department to identify petitioner's place of birth as "Israel" in the official documents. JA 10; *Zivotofsky*, 571 F.3d 1227, 1230 (D.C. Cir. 2009) (noting that plaintiff now requests that his place of birth be recorded as "Israel," rather than "Jerusalem, Israel" as requested n his complaint).

The district court initially dismissed the complaint on standing and political question grounds. The court of appeals reversed and remanded, concluding that petitioner has standing and that a more complete record was needed on the foreign-policy implications of recording "Israel" as petitioner's place of birth. *Zivotofsky v. Secretary of State*, 444 F.3d 614, 619-20 (D.C. Cir. 2006).

4. On remand, the State Department explained, among other things, that in the present circumstances, if "Israel" were to be recorded as the place of birth of a person born in Jerusalem, such "unilateral action" by the United States on one of the most sensitive issues in the negotiations between Israelis and Palestinians "would critically compromise" the United States' ability to help further the Middle East peace process. JA 58-59 (response to interrogatories). The district court again dismissed on political question grounds. JA 401-23.

This Court affirmed. The majority reasoned that the fact that the recognition "power belongs solely to the President has been clear from the earliest days of the Republic," as the Supreme Court has "repeatedly and consistently" recognized. *Zivotofsky*, 571 F.3d at 1231. The majority explained that whether the claim was resolved under the political question doctrine or on the merits, "[o]nly the Executive-not Congress and not the courts-has the power to define U.S. policy regarding Israel's sovereignty over Jerusalem and decide how best to implement that policy." *Id*. at 1232. The majority concluded that the matter was nonjusticiable "because deciding whether the Secretary of State must mark a passport and Consular Report of Birth as Zivotofsky requests would necessarily draw us into an area of decisionmaking the Constitution leaves to the Executive alone." *Id.* at 1232-33.

Judge Edwards concurred, explaining that he would have found Section 214(d) unconstitutional. He agreed with the majority that Article II, § 3, which gives the President the sole power to "'receive Ambassadors and other public Ministers,'" confers on the Executive "exclusive and unreviewable authority to recognize foreign sovereigns." *Id.* at 1240 (Edwards, J., concurring); *see also id.* at 1231. Judge Edwards explained that, although Congress has some authority to regulate passports, "[i]t is clear . . . that Congress lacks the power to interfere with a passport policy adopted by the Executive in furtherance of the recognition

power." *Id.* at 1241 (Edwards, J., concurring). Judge Edwards concluded that "it can hardly be doubted that § 214(d) intrudes on the President's recognition power. In commanding that the Secretary *shall* record Israel as the place of birth upon the request of a citizen who is born in Jerusalem and entitled to a United States passport, the statute plainly defies the Executive's determination to the contrary." *Id.* at 1244 (Edwards, J., concurring).

5. The Supreme Court held that the political question doctrine did not apply and remanded for a determination regarding whether the statute is constitutional. 132 S. Ct. 1421, 1427-31 (2012).

SUMMARY OF ARGUMENT

The Supreme Court has long acknowledged that the Constitution grants the President plenary authority to recognize foreign sovereigns and their territorial boundaries. *See, e.g., United States v. Belmont*, 301 U.S. 324, 330 (1937); *National City Bank v. Republic of China*, 348 U.S. 356, 358 (1955). This authority is derived from the President's constitutional power to "receive Ambassadors and other public Ministers." U.S. Const. Art. II, § 3. Determining which ambassadors to receive requires a decision as to which countries with which we should establish diplomatic relations. *See, e.g., Sabbatino*, 376 U.S. at 410; *Pink*, 315 U.S. at 229. This power necessarily includes the power to determine boundaries of a sovereign

state, *Williams v. Suffolk Ins. Co.*, 38 U.S. 415, 420 (1839), and other questions of U.S. policy regarding the state, *Pink*, 315 U.S. at 229.

The President's exclusive recognition is confirmed by long-standing historic practice. From the Washington administration to the present, Presidents have consistently exercised sole recognition authority. Similarly, prior to the enactment of legislation regarding Jerusalem, Congress consistently acknowledged the President's exclusive recognition power. *See Mistretta v. United States*, 488 U.S. 361, 401 (1989) ("[T]raditional ways of conducting government give meaning to the Constitution.") (internal marks omitted).

Plaintiff cites to Congress's authority to regulate passports in furtherance of its enumerated powers. That power to regulate form and content, more generally, does not allow Congress to infringe upon or usurp the Executive's recognition power. And that is what is at issue here. Congress is seeking to force the President to recognize sovereignty of Israel over Jerusalem in all "official government document[s]." § 214(c). Section 214(d) purports to require the Secretary of State to adopt an official policy on the status and boundaries of Jerusalem in conflict with the constitutional allocation of authority in this area of foreign policy. It is thus an unconstitutional encroachment on the President's sole authority to recognize foreign sovereigns.

Plaintiff further argues that the President's signing statement regarding § 214(d) was unconstitutional, but the validity of the President's signing statement is not before this Court.

ARGUMENT

I. THE CONSTITUTION GRANTS THE PRESIDENT THE EXCLUSIVE POWER TO RECOGNIZE FOREIGN SOVEREIGNS AND THEIR TERRITORIAL BOUNDARIES, AND TO DETERMINE THE CONTENT OF OFFICIAL DOCUMENTS INSOFAR AS IT REFLECTS SUCH RECOGNITION DETERMINATIONS

The Supreme Court has long recognized that the President has sole authority under the Constitution to recognize foreign states and their governments. *See, e.g.*, *Sabbatino*, 376 U.S. at 410; *Pink*, 315 U.S. at 229. Centuries-long Executive Branch practice, congressional acquiescence, and decisions by the Supreme Court have solidified the understanding that the President's constitutional power to receive ambassadors includes the exclusive power to recognize foreign governments, to determine the policies that govern recognition questions, and, for purposes of U.S. law, to determine the territorial boundaries of foreign states. Indeed, any other approach, would, as a legal and practical matter, make it impossible for the United States to speak with a single and coherent voice on matters vital to advancing U.S. foreign relations and policy interests. *See Belmont*, 301 U.S. at 330 ("Executive had authority to speak as the sole organ of [the national] government" with regard to recognition).

A. The courts have long acknowledged the Executive's exclusive power to recognize foreign sovereigns

1. The Constitution distributes the powers over external affairs between the Executive and Legislative Branches. Those branches exercise some foreign-affairs powers jointly. For example, the Constitution grants the President the power to make treaties and appoint ambassadors, subject to the advice and consent of the Senate. U.S. Const. Art. II, § 2, Cl. 2. The Constitution assigns other such powers to Congress, including the powers to regulate foreign commerce and the value of foreign currency, *id*. Art. I, § 8, Cls. 3, 5, and the power to declare war, *id*. § 8, Cl. 11.

The Constitution assigns a broad range of foreign-affairs powers, however, to the President alone. Article II provides that "[t]he executive Power shall be vested in a President of the United States of America." *Id*. Art. II, § 1. "[T]he historical gloss on the 'executive Power' . . . has recognized the President's 'vast share of responsibility for the conduct of our foreign relations.'" *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-611 (1952) (Frankfurter, J., concurring)).

In addition, and of particular relevance to this case, the Constitution assigns to the President alone the authority to "receive Ambassadors and other public Ministers." U.S. Const. Art. II, § 3. That power includes the authority to decide which ambassadors the President will receive and, hence, the power to decide with

which countries to establish diplomatic relations. *See, e.g., Sabbatino*, 376 U.S. at 410; *Pink*, 315 U.S. at 229. As diplomatic relations can only be established with entities recognized as states, the recognition power is "vested solely in the President." *Zivotofsky*, 571 F.3d at 1240 (Edwards, J., concurring).

The Supreme Court addressed the President's sole recognition power in a series of cases arising out of the President's recognition of the Soviet Union. *See United States v. Bank of New York & Trust Co.*, 296 U.S. 463 (1936); *Belmont*, 301 U.S. 324; *Guaranty Trust Co. v. United States*, 304 U.S. 126 (1938); *Pink*, 315 U.S. 203. The Court "accept[ed] as conclusive . . . the determination of our own State Department" as to what government represents "the Russian State." *Guaranty Trust*, 304 U.S. at 138; *Pink*, 315 U.S. at 230 ("We would usurp the executive function if we held that [the recognition] decision was not final and conclusive in the courts."); *Belmont*, 301 U.S. at 330. The Court further held that the recognition authority gave the President power to enter into an agreement with the Soviet Union to resolve all claims between the two nations. *See Pink*, 315 U.S. at 229-230; *Belmont*, 301 U.S. at 326-327.

Since that time, the Supreme Court and the courts of appeals have often reaffirmed that the recognition power is exclusively vested in the Executive. *See, e.g., National City Bank v. Republic of China*, 348 U.S. 356, 358 (1955) ("The status of the Republic of China in our courts is a matter for determination by the

Executive and is outside the competence of this Court."); *Sabbatino*, 376 U.S. at 410 ("Political recognition [of a foreign government] is exclusively a function of the Executive.")[2]; *Baker v. Carr*, 369 U.S. 186, 212 (1962); *United States v. Lara*, 541 U.S. 193, 218 (2004) (Thomas, J., concurring in the judgment); *see also Goldwater v. Carter*, 617 F.2d 697, 707-08 (D.C. Cir. 1979) ("It is undisputed that the Constitution gave the President full constitutional authority to recognize the PRC and to derecognize the ROC."), *vacated*, 444 U.S. 996 (1979); *Am. Int'l Group, Inc. v. Islamic Republic of Iran*, 657 F.2d 430, 438 (D.C. Cir. 1981) (Supreme Court has recognized the "President's plenary power to recognize foreign sovereigns"); *Can v. United States*, 14 F.3d 160, 163 (2d Cir. 1994) ("It is firmly established that official recognition of a foreign sovereign is solely for the President to determine.").

The President has been understood to have sole recognition authority from the earliest days of our nation. Both Chief Justice Marshall and Justice Story, sitting as Circuit Justices, recognized this presidential power. The issue came

[2] Amicus Curiae American Association of Jewish Lawyers and Jurists errs in arguing (Br. 12) that the Supreme Court subsequently recognized Congress's authority to override the Executive in this case on recognition policy or any other issue. The statute relied on by Amicus created an exception to the judicially created and administered act of state doctrine, not to an Executive branch recognition determination. Furthermore, the statute provided that the Executive could override its provisions. *See Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 171-72 (2d Cir. 1967); 22 U.S.C. § 2370(e)(2).

before Chief Justice Marshall in a piracy case in which the defendant argued that he had acted under a commission from the government of Buenos Ayres. *United States v. Hutchings*, 26 F. Cas. 440 (C.C.D. Va. 1817). Chief Justice Marshall rejected this argument, holding that, "as our executive had never recognized the independence of Buenos Ayres, it was not competent to the court to pronounce its independence." *Id.* at 442. Justice Story faced the issue in deciding an insurance dispute that turned on sovereignty over the Falkland Islands. He concluded that "[i]t is very clear, that it belongs exclusively to the executive department of our government to recognise, from time to time, any new governments." *Williams v. Suffolk Ins. Co*, 29 F. Cas. 1402, 1404 (1838), *aff'd* 38 U.S. 415, 420 (1839).

Plaintiffs misunderstand Justice Story's *Commentaries on the Constitution of the United States* in suggesting (Br. 34) that he espoused the opposite view in that treatise. Justice Story noted in the treatise, that "it is said" that Congress may override the President's recognition decision. Joseph Story, *Commentaries on the Constitution*, 416-17 (1833). Justice Story, however, did not endorse that view or the notion that it was supported by the Constitution. He explained that such a situation had not arisen and "[t]he constitution has expressly invested the executive with power to receive ambassadors, and other ministers. It has not expressly invested congress with the power, either to repudiate, or acknowledge them." *Ibid.*

Plaintiff suggests that Chief Justice Marshall reversed his position in *United States v. Palmer*, 16 U.S. 610 (1818). But that case did not involve the recognition power. Pirates operating out of U.S. ports at the time threatened to embroil the country in the conflict between Spain and its South American colonies, despite the fact that President Madison had declared U.S. neutrality in 1815. Congress thus enacted a Neutrality Act in March 1817 at Madison's request. 3 Stat. 370-71. In effectuating this policy of neutrality, the political branches had afforded belligerent status to the colonies, thereby absolving the defendants in the case of criminal piracy charges. *Palmer*, 16 U.S. at 643-44. The Supreme Court reasoned that "when a civil war rages in a foreign nation, one part of which separates itself from the old established government, and erects itself into a distinct government, the courts of the union must view such newly constituted government as it is viewed by the legislative and executive departments of the government of the United States." *Id.* at 643. The Court thus concluded that "[i]f the government of the union remains neutral, but recognizes the existence of a civil war, the courts of the union cannot consider as criminal those acts of hostility, which war authorizes, and which the new government may direct against its enemy." *Id.* at 643-44.

2. Plaintiff also erroneously contends that dicta in Supreme Court opinions assign the recognition power jointly to the President and to Congress. Pet. Br. 42-43. The decisions on which plaintiff relies do not involve the power to recognize

foreign governments. These cases concern the status of different territories controlled or acquired by the United States, a matter over which Congress has authority under Article IV of the Constitution. *See* U.S. Const. Art. IV, § 3, Cl. 2 (power to legislate regarding "the Territory or other Property belonging to the United States."); Henkin, *Foreign Affairs and the U.S. Constitution*, 72 (1996) ("Henkin"). Thus, in *Jones v. United States*, 137 U.S. 202 (1890), the Court observed that whether certain islands were "in the possession of the United States" was a determination for the "legislative and executive departments." *Id*. at 212, 216-217. In *Vermilya-Brown Co. v. Connell*, 335 U.S. 377 (1948), the Court observed that whether the United States exercised sovereignty within a leasehold in British territory depended on action by the "legislative and executive departments." *Id.* at 378, 380-381. In *Boumediene v. Bush*, 553 U.S. 723, 753 (2008), the Court discussed the United States' plenary control over territory at Guantanamo Bay, observing that "questions of sovereignty are for the political branches to decide." *See also Pearcy v. Stranaham*, 205 U.S. 257 (1907) (considering whether territory in Cuba became part of the United States by the terms of the peace treaty with Spain). The Court's acknowledgment of Congress's role in determining the United States' sovereignty over its territories has no bearing on the Executive's authority

to determine whether to recognize a foreign state or its sovereignty over particular territory when the United States claims no property interest in the land.[3]

Congress has historically acquiesced in the President's exercise of the sole recognition authority. Thus, courts have not had occasion to address specifically the constitutionality of a statute that would purport to override the President's recognition decision. But that does not render insignificant the Court's repeated statements that the President had "sole" authority to recognize a foreign government, *Belmont*, 301 U.S. at 330, and that such action is "conclusive" on the courts, *Guaranty Trust*, 304 U.S. at 138.

B. The President's recognition power includes the authority to determine the territorial limits of foreign states

The recognition power encompasses a number of distinct but related questions under international and domestic law, all of which must be answered consistently to allow an effective and coherent conduct of our nation's foreign policy. These issues include, among others: (1) Whether a foreign entity is to be

[3] To be sure, the Supreme Court later quoted *Jones* in a case involving the government of Mexico for the general proposition that the determination of sovereignty "by the legislative and executive departments of *any* government conclusively binds the judges," but the Supreme Court did not hold that Congress has recognition authority under the United States' Constitution. *See Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918) (emphasis added). Indeed, the Court relied on recognition decisions made by the Executive and made no mention of Congress's abortive attempt to overrule the Executive's determination regarding the government of Mexico. *Id.* at 301.

regarded as a sovereign state; (2) Whether particular institutions or individuals are to be regarded as the government of a foreign state; (3) Whether certain individuals are to be regarded as having diplomatic or official status as representatives of a foreign state; and (4) Whether certain territory belongs to a particular foreign state or possesses some other status.

In this case, Congress, through § 214, sought to force the President to change longstanding U.S. policy and decide the borders of Israel and Jerusalem in a particular way. It has long been understood, however, that "under the recognition power, the President has the sole authority to make determinations regarding the sovereignty of disputed territories." *Zivotofsky*, 571 F.3d at 1240 (Edwards, J., concurring) (citing *Williams*, 38 U.S. at 420 and *Baker*, 369 U.S. at 212); *see also* Henkin 43; 1 Digest of Int'l Law § 66, at 446-447 (Green Haywood Hackworth ed., 1940) (Hackworth). The effective exercise of the recognition power and the power to conduct diplomacy requires the authority to determine the parameters of foreign states.

Justice Story first recognized this principle in 1838, when adjudicating a dispute that turned on which country had sovereignty over the Falkland Islands. *Williams*, 29 F. Cas. at 1404. The Supreme Court, addressing the same issue, held that "when the executive branch of the government, which is charged with our foreign relations, shall in its correspondence with a foreign nation assume a fact in

regard to the sovereignty of any island or country, it is conclusive on the judicial department." *Williams*, 38 U.S. at 420. As a result, the Executive's determination that the islands were not part of Buenos Ayres was "obligatory on the people and government of the Union." *Ibid*. Since *Williams*, courts have consistently held that Executive Branch determinations of foreign territorial boundaries are binding as a matter of U.S. law. *See, e.g.*, *Kennett v. Chambers*, 55 U.S. 38, 50-51 (1852); *Baker*, 369 U.S. at 212; *Wang v. Masaitis*, 416 F.3d 992, 995 (9th Cir. 2005). The Executive Branch's decision not to take a position on a contested foreign boundary is likewise binding. *See Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum*, 577 F.2d 1196, 1203-04 (5th Cir. 1978), *cert. denied*, 442 U.S. 928 (1979) ("Just as the judiciary will follow an executive determination as to which nation has sovereignty over a disputed area, *United States v. Klintock*, 5 Wheat. 144, 149, 5 L.Ed. 55 (1820), so must the judiciary refuse to decide the dispute in the absence of executive action because of that absence of direction.").

Indeed, determination of territorial sovereignty is an essential component of the recognition power and may have foreign policy consequences fully as significant as the determination whether to recognize the state itself. Some

boundary determinations are made at the highest level by the President and the Secretary of State. But all boundary determinations can be politically sensitive.[4]

Weighing the foreign policy consequences of these determinations is part of "the historic conception of the powers and responsibilities of the President in the conduct of foreign affairs." *Pink*, 315 U.S. at 230; *cf.* Sen. Hale, Memorandum upon Power to Recognize Independence of a New Foreign State, 29 Cong. Rec. 663, 672 (1897) (Hale Memorandum). The Supreme Court explained that the President's authority to recognize foreign governments includes the authority to take actions without which "the power of recognition might be thwarted." *Pink*, 315 U.S. at 229-230. Thus, the President's recognition power is "not limited to a determination of the government to be recognized." *Id.* at 229. Rather, it

[4] Recognizing the sensitivity of the subject-matter, the Executive Branch expends considerable effort and care recognizing boundaries. For example, the Federal Geographic Data Committee, established by Office of Management and Budget Circular A-16, coordinates the collection and use of geographic information and related spatial data activities across the federal government. *See* OMB Circular A-16. The State Department is specifically designated as the lead agency for international boundaries recognition, and its frequently updated Large Scale International Boundaries website depicts official United States policy regarding borders recognition. *See* https://hiu.state.gov/data/data.aspx#. Other examples of federal agencies engaged in such activities include the Navy Judge Advocate General's Maritime Claims Reference Manual, *see* http://www.jag.navy.mil/organization/code_10_mcrm.htm (describing country-by-country maritime claims and, in many cases, US non-recognition of those claims); and the US Freedom of Navigation Program, *see* http://policy.defense.gov/OUSDPOffices/ASDforGlobalStrategicAffairs/CounteringWeaponsofMassDestruction/FON.aspx (DOD Operational Assertions challenging excessive maritime claims of other countries, FY 2000 to 2011).

"includes the power to determine the policy which is to govern the question of recognition" and the power to ensure that recognition policy is consistent with the United States' foreign-policy interests. *Ibid*. For Congress to enact a statute that purported to set different territorial boundaries than those recognized by the Executive would undermine the exercise of the recognition power and the Executive's ability to conduct diplomacy and "speak as the sole organ of [the national] government" with regard to recognition. *See Belmont*, 301 U.S. at 330.

C. The Executive Branch has consistently exercised sole authority to recognize foreign states, governments and their territorial sovereignty

Long historical practice further demonstrates a consistent common understanding that the President's recognition authority is exclusive. United States Presidents from the earliest days of our nation have exercised their constitutional authority to decide whether and how to recognize another sovereign. As the Supreme Court and the Executive Branch have often recognized, this longstanding governmental practice can play a significant role in establishing the contours of the constitutional separation of powers. *See Mistretta*, 488 U.S. at 401.

Notably, in 1793, following the French revolution, President Washington had to decide whether to receive an ambassador from the new government of France. This decision was significant, in part, because officially receiving a diplomat amounts to recognition of the sending state or government. 1 Moore Intl.

L. Dig. § 27 at 73 (Recognition "may be implied, as when a state . . . receives [diplomatic] agents officially."). President Washington and his cabinet unanimously decided that the President could do so without first consulting Congress. George Washington to the Cabinet, in 25 *The Papers of Thomas Jefferson* 568-569 (John Catanzariti ed. 1992); Thomas Jefferson, Notes on Washington's Questions on Neutrality and the Alliance with France, in *id.* 665-666.

Alexander Hamilton and Thomas Jefferson were both members of Washington's cabinet and considered this issue at the time. Hamilton recognized that the Constitution grants the President the power to "receive Ambassadors and other public Ministers." U.S. Const. Art. II, § 3. Although he had previously viewed this power as inconsequential, *see* Federalist 69, the experience with the French ambassador caused him to revise his view and argue that this power necessarily "includes th[e power] of judging, in the case of a revolution of government in a foreign country, whether the new rulers are competent organs of the national will and ought to be recognised, or not." *See* Alexander Hamilton, *The Letters of Pacificus and Helvidius*, Pacificus No. 1 at 12 (June 29, 1793) (Gideon ed. 1845) (*Pacificus*). Jefferson traced the Executive's foreign affairs power to the clause vesting the "executive Power" in "a President of the United States of America." U.S. Const. Art II, § 1; *see* 5 T. Jefferson, *Writings* 162 (Ford ed. 1852)

(quoted in Henkin 337 n.11 ("The transaction of business with foreign nations is *Executive altogether*. It belongs, then, to the head of that department except as to such portions of it as are specially submitted to the Senate. *Exceptions are to be construed strictly*." (emphasis in original))).

President Washington's Cabinet unanimously agreed that the President could exercise this power by receiving the French ambassador without any noted controversy. Hamilton noted that "[n]o objection has been made to the president's having acknowledged the republic of France, by the reception of its minister, without having consulted the senate." *See Pacificus* 13-14.[5]

Plaintiff seeks to dismiss this evidence of early practice on the basis that President Washington believed that the Unites States was required by international law to recognize the new French government. *See* Pl. Br. 39. But the question of whether international law requires recognition is separate from the question of

[5] Plaintiff notes (Br. 41) that Jefferson wrote to Madison that the President was "uneasy" about certain doctrines espoused by Hamilton writing as Pacificus, but there is no reason to believe that President Washington's concerns related to the recognition power. The subject of these letters was the lawfulness of the President's declaration of neutrality in the Franco-British War, and Hamilton's discussion of the recognition power was only by way of example. *See generally*, *Pacificus*; *see also* 25 *Papers of Thomas Jefferson*, *supra*, at 571, 597-602 (explaining that agreement to recognize the minister was unanimous but that the Cabinet was bitterly divided regarding whether treaties made with the prior French government—including treaties of mutual defense—could or should be revoked.) The fate of the treaties with France was addressed at length by "Pacificus" and President Washington adopted Jefferson's views over Hamilton's in at least some respects. *See ibid.*

which branch has the power to grant that recognition under our constitutional scheme. And it is clear that in the immediate aftermath of the ratification of the Constitution, it was widely agreed that the power resides in the Executive.[6]

Since then, the Executive Branch has routinely, consistently, and unilaterally recognized foreign states and governments along with their sovereign boundaries. For instance, in 1824, after consulting with his cabinet, President Monroe determined that "no message to Congress would be necessary" before the President recognized Brazil, because "the power of recognizing foreign Governments was necessarily implied in that of receiving Ambassadors and public Ministers." 6 *Memoirs of John Quincy Adams* 329, 348, 358-359 (Charles Francis Adams ed. 1875) (*Memoirs*); James Monroe to the Members of the Cabinet (October 15, 1817), *in* 6 *The Writings of James Monroe* 31 (Hamilton ed. 1902).[7] In 1948,

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[6] Amicus American Jewish Committee notes that President Washington later asked Jefferson to "draft a message to Congress" giving Congress the opportunity to object before he removed the diplomatic authority of France's foreign minister, Mr. Genet. Br. 9. However, after considering the subject, President Washington decided to dismiss Mr. Genet without consulting Congress. He explained to his cabinet that the "Duties of his Station required of him the exercise of this power, in the immediate dismission of Mr. Genet." Proposed Presidential Message to Congress Concerning Revocation of Edmond Charles Genet's Diplomatic Status, January 6-13, 1794, editorial note 1, 15 *The Papers of Alexander Hamilton* 626 (Syrett ed. 1969). In any event, consultation would not transform the recognition power into a shared power. *See supra* Section I.D.3.

[7] Amicus curiae American Jewish Committee quotes in part a message from President Monroe to Congress to suggest that President Monroe believed the recognition power to be shared. Br. 12. But President Monroe wrote to Congress

Continued on next page.

President Truman recognized the creation of the State of Israel and its provisional government minutes after Israel declared independence. *See* Statement by the President Announcing Recognition of the State of Israel, 1948 Pub. Papers 258 (May 14, 1948). And in July 2011, Secretary of State Clinton announced that "until an interim authority is in place, the United States will recognize the [Transitional National Council] as the legitimate governing authority for Libya." Hillary Clinton, Remarks on Libya and Syria (July 15, 2011), http://www.state.gov/secretary/rm/2011/07/168656.htm. There are myriad other examples throughout our history.[8] Even the few scholars cited by plaintiff acknowledge that the existence of the sole Executive recognition power is well-established. *See* Robert J. Reinstein, *Recognition: A Case Study on the Original Understanding of Executive Power*, 45 U. Rich. L. Rev. 801, 801-02 (2011); David

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suggesting that "there may be such cooperation between [Congress and the Executive] as their respective rights and duties may require" and suggesting that Congress appropriate funds. James Monroe to the Senate and House of Representatives (March 8, 1822) *in* 6 *The Writings of James Monroe* 207, 211 (Hamilton ed. 1902).

[8] *See, e.g.*, Ulysses S. Grant, *Second Annual Message to Congress*, December 5, 1870, 9 Comp. Messages & Papers of the Presidents 4050, 4050 (n.s. 1897); 1 Hackworth 195-222 (documenting early twentieth century Executive Branch recognition of foreign states of Afghanistan, Albania, Bulgaria, Czechoslovakia, Egypt, Estonia, Finland, Iceland, Iraq, Latvia, Lithuania, Poland, Saudi Arabia, and Yugoslavia); *id.* at 222-318 (documenting Executive Branch recognition of numerous foreign governments during the same period).

Gray Adler, *The President's Recognition Power*, in *The Constitution and the Conduct of American Foreign Policy*, at 133-34 (Adler & George eds. 1996).

D. Congress has acknowledged the President's sole recognition power

1. The fact that the recognition power resides exclusively with the Executive had been long acknowledged by Congress prior to the enactment of Section 214. For example, the Immigration and Naturalization Act provides that if the Secretary of State recognizes a "change in the territorial limits of foreign states," she shall "issue appropriate instructions." 8 U.S.C. § 1152(d). Likewise, the Federal Reserve Act provides that the determination of the Secretary of State regarding whether an individual is authorized to withdraw state property from a Federal Reserve bank is conclusive. 12 U.S.C. § 632(1)-(3). Both the House and Senate reports on the Federal Reserve Act explained that "[a]ny question as to which is the government of a foreign country recognized by our Government and who is entitled to act for such government is a question for determination by the State Department." S. Rep. No. 77-133 at 2; H.R. Rep. No. 77-349 at 2.

"Congress has exhibited little inclination to contest the prerogative" of the President to recognize foreign states "solely on his own responsibility." 1 Hackworth § 31, at 162; *see* Hale Memorandum, 29 Cong. Rec. at 672 ("The number of instances in which the Executive has recognized a new foreign power without consulting Congress . . . has been very great. No objection has been made

by Congress in any of these instances. The legislative power has thus for one hundred years impliedly confirmed the view that the right to recognize a new foreign government belonged to the Executive."). And to our knowledge, apart from § 214, Congress has never enacted any binding legislation usurping the Executive's exclusive constitutional power to determine boundaries of a foreign sovereign (which, as we explained, is a critical aspect of the recognition authority, *see supra* Section I.B).

2. On a few occasions, Members of Congress have proposed legislation that would have created a role for the Legislative Branch in the recognition of foreign states and governments. But the Executive Branch opposed the bills, and past legislation was either rejected in Congress as an inappropriate incursion into the Executive Branch's constitutional authority or modified to address these concerns.

For example, in 1818, Speaker of the House Henry Clay attempted to encourage recognition of independence from Spain of certain South American provinces. Hale Memorandum, 29 Cong. Rec. at 673. He proposed appropriating funds to send a diplomatic minister to those provinces, but the bill was opposed on the ground that it interfered with a power constitutionally assigned to the President. *See* 32 Annals of Congress 1468-1469 (1817-1818); *id*. at 1539 (statement of Rep. Smith) (Congress should permit the President to "exercise the powers vested in him by the Constitution"); *id*. at 1570 (statement of Rep. Smyth) ("[T]he

acknowledgment of the independence of a new Power is an exercise of Executive authority; consequently, for Congress to direct the Executive how he shall exercise this power, is an act of usurpation."). Clay subsequently modified his proposal to acknowledge the President's authority to decide whether to send diplomats to the provinces. 32 Annals of Cong. 1500. Nevertheless, the proposal was overwhelmingly defeated. *Id*. at 1646.

In 1821, Speaker Clay introduced a nonbinding resolution expressing the House of Representatives' "deep interest" in the "success of the Spanish provinces of South America which are struggling to establish their liberty and independence" and relaying the House's readiness to "give its Constitutional support to the President of the United States, whenever he may deem it expedient to recognise the sovereignty and independence of any of the said provinces." 37 Annals of Cong. 1082. That nonbinding resolution, which acknowledged the President's authority to recognize foreign states and governments, passed the House but not the Senate. *Id*. at 1091-1092.

Throughout this period, Secretary of State John Quincy Adams argued that the recognition decision rests exclusively with the Executive and he declined to receive an emissary from Buenos Ayres on the ground that doing so would have the effect of recognizing the government. 4 *Memoirs* 88, 204-07; *see also id*. at

166-168. The President did not recognize an independent South American state until 1822, four years after Clay's original proposal. *See* 6 *Memoirs* 23.

Similar situations have arisen regarding Mexico and Cuba. In 1864, the House of Representatives passed a resolution asserting that the United States did not acknowledge Archduke Ferdinand Maximilian von Habsburg as the Emperor of Mexico. Cong. Globe, 38th Cong. 1st Sess. 1408 (1864). The Senate did not take up the bill, *id*. 2d Sess. 48, and the Secretary of State immediately sent a letter to the U.S. Minister to France, explaining that the position of the United States had not changed and that the recognition authority is "purely executive" and belongs "not to the House of Representatives, nor even to Congress, but to the President." *Id*. 1st Sess. 2475. The sponsor of the initial resolution subsequently introduced a resolution asserting Congressional recognition authority, but the Senate did not take up the issue. *Id*. 2d Sess. 48.

Likewise, in 1896, prior to United States' involvement in the Spanish-American War, the Senate Foreign Relations Committee reported to the Senate a joint resolution purporting to recognize "the independence of the Republic of Cuba." 29 Cong. Rec. 326, 332 (1896). In response, the Secretary of State publicly stated that "'[t]he power to recognize the so-called Republic of Cuba as an independent State rests exclusively with the Executive,'" and that any joint resolution would have the effect only of "'advice of great weight.'" Congress

Powerless, N.Y. Times, Dec. 19, 1896 (quoting statement). The Senate did not act on the joint resolution.

When Congress later considered authorizing military intervention in Cuba's fight against Spain, it again proposed to recognize the independence of the Republic of Cuba and its government. *See* 31 Cong. Rec. 3988 (1898). In response, President McKinley sent a message to Congress noting that Congress had previously left recognition to the discretion of the Executive and explaining that recognition of the Cuban government would not be "wise or prudent." William McKinley, Message to Congress, April 11, 1898, 13 *Comp. Messages & Papers of the Presidents* 6281, 6288 (n.s. 1909). Congress subsequently dropped from the joint resolution the language concerning Cuba's independence and government, choosing instead to express Congress's view that the "people" of Cuba were independent. Joint Resolution For the recognition of the independence of the people of Cuba, 30 Stat. 738 (Apr. 20, 1898); *see also* 31 Cong. Rec. at 3902 (1898) (statement of Sen. Stewart).

Similarly, in 1919, the Senate considered a proposed resolution recommending "the withdrawal of the recognition" of the existing government in Mexico. Statement, reprinted in S. Doc. No. 285, 66th Cong., 2d Sess. 843D. President Wilson wrote to Congress that the resolution would "constitute a reversal of our constitutional practice which might lead to very grave confusion in regard to

the guidance of our foreign affairs," and that "the initiative in directing the relations of our Government with foreign governments is assigned by the Constitution to the Executive, and to the Executive, only." Letter from Woodrow Wilson to Sen. Albert B. Fall (Dec. 8, 1919), in S. Doc. No. 285, 66th Cong., 2d Sess. 843D. Shortly thereafter, the Senate dropped the resolution. *See* Wilson Rebuffs Senate on Mexico, N.Y. Times, Dec. 8, 1919.

Thus, it has been commonly understood since President Washington's Administration that "[u]nder the Constitution of the United States, the President has exclusive authority to recognize or not to recognize a foreign state or government." Restatement (3d) of Foreign Relations Law § 204; *see also id*. comment a ("The President's determinations and actions within the scope of this section, if they accord with the Constitution in other respects, are binding on Congress and the courts."). "Congress cannot itself (and cannot direct the President to) recognize foreign states or governments, . . . though it may express its 'sense', and can request or exhort the President." Henkin 88; *see Mistretta*, 488 U.S. at 401 ("[T]raditional ways of conducting government give meaning to the Constitution.") (internal marks omitted).

3. Although the President has occasionally consulted with Congress regarding recognition, this practice of cooperation and coordination does not change the distribution of power set out in the Constitution. *See* John Bouvier and

Francis Rawle, 1 Bouvier's Law Dictionary 1130 (1914) ("Every approach to it hitherto has resulted, after discussion, in the recognition by congress of the right of the executive to full control of foreign relations and to the initiative in the practical recognition of a new foreign power, and, on the other hand, by a prudent disposition on the part of the executive not to act in a doubtful case or one likely to create a *casus belli* without ascertaining the disposition of congress."). Plaintiff points to two such instances in which presidents, concerned with the effect of an exercise of the recognition authority, expressed a desire to work together with Congress. But in both cases it was the President, not Congress, who actually exercised the recognition authority.

When Texas asserted its independence from Mexico during the Jackson administration, there were serious concerns that the recognition of Texas could lead to war with Mexico. President Jackson expressed a desire to "unite" with Congress on this issue, explaining: "It will always be considered consistent with the spirit of the constitution, and most safe, that [the recognition power] should be exercised when probably leading to war, with a previous understanding with that body by whom war can alone be declared, and by whom all the provisions for sustaining its perils must be furnished." Cong. Globe, 24th Cong., 2d Sess. 44

(1837) (Message from the President (Dec. 22, 1836)).[9] In response, Congress appropriated money for a "diplomatic agent to be sent to the Republic of Texas, whenever the President of the United States . . . shall deem it expedient to appoint such minister." 5 Stat. 170 (1837). Thus, Congress affirmed that, even when consulted by the President, the sole and ultimate recognition power resides with the President.

President Lincoln's administration asserted the President's sole recognition authority, *see supra* 37 (discussing Mexico), but nevertheless sought congressional support in one instance. In the case of Liberia and Haiti, Lincoln expressed a desire to coordinate with Congress and asked Congress to use its appropriations authority to endorse recognition. The United States' policy regarding recognition of these states, populated by former slaves, had been a matter of much controversy in the years leading up to the Civil War. Even during the Civil War, there was some concern that recognition of these countries might push the remaining slave-holding states to leave the Union. President Lincoln never suggested that he

[9] Amicus Curiae American Jewish Committee quotes President Jackson's letter in part to suggest that President Jackson "was 'disposed to concur' with the view that 'recognizing the independence of Texas should be left to the decision of congress.'" Br. 14-15. The sentence in full reads: "In this view, on the ground of expediency, I am disposed to concur; and do not, therefore, consider it necessary to express any opinion as to the strict constitutional right of the Executive, either apart from or in conjunction with the Senate, over the subject." Cong. Globe, 24th Cong., 2d Sess. 44 (1837) (Message from the President (Dec. 22, 1836)).

lacked the *authority* to recognize these nations in the face of congressional disagreement. Rather, he told Congress that because he was "[u]nwilling . . . to inaugurate a novel policy in regard to [Liberia and Haiti] without the approbation of Congress, I submit for your consideration the expediency of an appropriation for maintaining a chargé d'affaires near each of those new States."[10] Lincoln's First Annual Message to Congress (Dec. 3, 1861). In response, Congress authorized funds for the appointment of diplomatic representatives to Liberia and Haiti. 12 Stat. 421. Even in this instance, however, Congress did not require the President to recognize Liberia or Haiti; it merely authorized funds for diplomatic representatives.

Plaintiff also argues that President Taylor believed that he lacked the power to recognize Hungary in 1849. Plaintiff's claim that President Taylor did not believe he had the constitutional power to recognize a country is simply wrong.

[10] Congress cannot use the appropriations power to control a Presidential power that is beyond its direct control. *See* Presidential Certification Regarding the Provision of Documents to the House of Representatives Under the Mexican Debt Disclosure Act of 1995, 20 Op. O.L.C. 253, 267 (1996). Attorney General Cushing had previously interpreted as permissive, rather than mandatory, a statute providing that the "President of the United States shall, by and with the advice of the Senate, appoint consuls for the United States, to reside at the following places," including Port-au-Prince. *Appointment of Consuls,* 7 U.S. Op. Atty. Gen. 242, 243 (1855). Attorney General Cushing explained that appointing a consul would be an act of recognition and the "act cannot be reasonably construed as intending to require the President to do what the Constitution, on considerations of public policy, has entrusted to the sole discretion of the Executive." *Id.* at 250.

Hungary's independence movement was defeated, and the United States had no opportunity to recognize Hungary at that time, but President Taylor repeatedly asserted his authority to do so in communications to Congress. S. Exec. Doc. 31-1 at 5 (1849) (State of the Union address) ("I thought it my duty, in accordance with the general sentiment of the American people, . . . to stand prepared, upon the contingency of the establishment by her of a permanent government, to be the first to welcome independent Hungary into the family of nations."); S. Exec. Doc. 31-43 at 1 (1850) (letter to Congress) ("My purpose, as freely avowed in this correspondence, was to have acknowledged the independence of Hungary, had she succeeded in establishing a government *de facto* on a basis sufficiently permanent in its character to have justified me in doing so, according to the usages and settled principles of this government."). Moreover, the very letter quoted by plaintiff gives the U.S. envoy authority to present himself officially and "full powers for concluding a commercial convention," which would amount to an act of recognition. S. Exec. Doc. 31-43 at 5-6 (1850). *See also* 1 Moore Intl. L. Dig. § 75 at 246 (explaining that the President was moving forward with an exchange of ambassadors and had that exchange been completed, "it does not appear what would have been wanting, from the international point of view, to the recognition by the United States of Hungarian independence."). Even if President Taylor had been mistaken about the recognition authority, however, this would not alter the

otherwise consistent historical practice and certainly does not by itself cede this exclusive presidential power to Congress for all time.

In sum, the longstanding practice is consistent with the Supreme Court's repeated recognition that "[p]olitical recognition [of a foreign government] is exclusively a function of the Executive." *Sabbatino*, 376 U.S. at 410. Since the earliest days of this nation, the Executive has exercised the recognition authority and Congress has acquiesced in this practice.

This practice reflects a shared understanding by the political branches, as well as the courts, of the practical need for Executive oversight of U.S. recognition policy in all its dimensions. The United States must be able to speak with one voice on such issues as whose consent is necessary before entering foreign territory, who can bind a foreign country internationally, what is the proper disposition of its assets in the United States, and who can speak for the country in United States courts. The United States must also be able to act quickly to adjust recognition decisions as situations evolve. As the courts have recognized, "in the chess game that is diplomacy only the executive has a view of the entire board and an understanding of the relationship between isolated moves." *Spacil v. Crowe*, 489 F.2d 614, 619 (5th Cir. 1974).

E. The Executive has inherent constitutional authority to determine the content of passports to implement foreign policy

Plaintiff and his amici mistakenly argue that Congress can force recognition of Israel's sovereignty over Jerusalem and require the President to delineate the borders of Jerusalem as "appropriate passport legislation." Br. 24-27. Congress, of course, has the constitutional authority to generally regulate the form and content of passports in furtherance of its enumerated powers, including its powers over immigration and foreign commerce. *Haig v. Agee*, 453 U.S. 280, 294 (1981); U.S. Const. Art. I, § 8, Cls. 3, 4. Section 214, however, is specifically intended to alter the recognition policy of the United States regarding the status and boundaries of Jerusalem, as is clear from its title, its other provisions (including on consular reports of birth abroad), and its legislative history. Congress does not have the authority to trench on the Executive's plenary recognition power merely because the legislation applies to documents that could be subject in other ways to the exercise of Congress's enumerated powers. Rather, "[i]t is clear . . . that Congress lacks the power to interfere with a passport policy adopted by the Executive in furtherance of the recognition power." *Zivotofsky*, 571 F.3d at 1241 (Edwards, J., concurring).

Passport legislation enacted pursuant to Congress's enumerated powers is usually uncontroversial and does not encroach on executive authority. Amici members of Congress cite examples of passport-related statutes, all aimed at

controlling or facilitating foreign commerce and the protection of the United States' borders. *See* Br. 11-16.[11] Congress has also enacted passport legislation that recognizes the Executive's authority to issue passports and assists the Executive in implementing its power. *See* U.S. Const. Art. I, § 8, Cl. 14. For instance, Congress has prohibited the issuance of passports by anyone but the Secretary of State, 22 U.S.C. § 211a, required notification for passports issued abroad, 22 U.S.C. § 218, required verification of passport applications, 22 U.S.C. § 213, and regulated fees, 22 U.S.C. §§ 214 and 214a, 10 U.S.C. § 2602, and time limits, 22 U.S.C. § 217a. It has also limited imposition of geographic travel restrictions in passports to implement provisions of the Helsinki Accords, which

[11] Pursuant to Congress's authority to control the United States' borders under its powers over foreign commerce and the exclusion of aliens, it has enacted travel control statutes that require U.S. citizens to have passports for certain travel. 8 U.S.C. § 1185(b) (Supp. I 2007); *see, e.g.*, Act of Feb. 4, 1815, ch. 31, § 10, 3 Stat. 199; Act of May 22, 1918, ch. 81, §§ 1, 2, 40 Stat. 559. Similarly, Congress has used its foreign commerce power, among others, to restrict the ability of U.S. citizens who have been convicted of certain sexual tourism and drug trafficking offenses, or who are delinquent in child support payments, to obtain passports, in order to control their travel outside of the United States. 22 U.S.C. § 212a (Supp. II 2008), 2714; 42 U.S.C. § 652(k). Congress has also limited the issuance of passports to aliens abroad in aid of its control over immigration and naturalization. Act of Feb. 28, 1803, ch. 9, § 8, 2 Stat. 205; *see* 22 U.S.C. § 212. Finally, Congress has historically criminalized violations of passports and safe conducts in aid of its authority to "define and punish . . . Offences against the Law of Nations." U.S. Const. Art. I, § 8, Cl. 10; *see* Act of Apr. 30, 1790, ch. 9, § 28, 1 Stat. 118. None of these statutes encroaches upon the Executive's authority to determine passports' content in furtherance of the United States' foreign policy interests and Executive branch recognition policy.

President Ford signed on behalf of the United States. 22 U.S.C. § 211a; *see* Foreign Relations Authorization Act, Fiscal Year 1979, Pub. L. No. 95-426, § 124, 92 Stat. 963, 971 (1978).

But the Executive Branch has independent authority to issue passports, and that authority is at its height where the passport regulation has foreign policy implications, including as to recognition. *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (the President is the sole "representative of the nation" in foreign affairs). The Executive's power over passports is derived from the "generally accepted view that foreign policy was the province and responsibility of the Executive," *Agee*, 453 U.S. at 293-94. Although a passport functions on one level as a "travel control document," it is also an instrument of diplomacy that is "addressed to foreign powers." *Agee*, 453 U.S. at 292-93 (quoting *Urtetiqui v. D'Arcy*, 9 Pet. 692, 698 (1835); 3 Hackworth § 268, at 499 ("[T]he passport is a request for the good offices of the foreign government.")); *see also Shachtman v. Dulles*, 225 F.2d 938, 942 (D.C. Cir. 1955) ("the issuance of passports throughout our history has been left to the judgment of the Secretary of State under Presidential regulation, and is subject only to constitutional safeguards. And even these must be defined with cautious regard for the responsibility of the Executive in the conduct of foreign affairs.").

The Executive Branch's independent authority over passports has been undisputed since the earliest days of our nation's history. The Department of State routinely issued passports to citizens and determined the content of the passports it issued, even though no statute addressed the Executive Branch's authority to do so until 1856. *See, e.g.*, Department of State, The American Passport 8-21, 77-86 (1898) (American Passport) (collecting examples); *Urtetiqui*, 34 U.S. (9 Pet.) at 699. When Congress enacted the first Passport Act in 1856, it did so not to provide authority that was previously lacking, but rather to "confirm[] an authority already possessed and exercised by the Secretary of State" and to establish that the Secretary's authority was exclusive of local governments. Staff Report of Senate Comm. on Gov't Operations, 86th Cong., 2d Sess., Reorganization of the Passport Functions of the Dep't of State 13 (Comm. Print 1960); *Agee*, 453 U.S. at 294 & n.27. The sponsor of the 1856 bill explained that it was intended to leave the diplomatic power over passports "exclusively to the Executive, where we consider the Constitution has placed it." *Agee*, 453 U.S. at 294 (quoting Statement of Senator Mason).

"'[F]rom the outset, Congress [has] endorsed not only the underlying premise of Executive authority in the areas of foreign policy and national security, but also its specific application to the subject of passports.'" *Zivotofsky*, 571 F.3d at 1241 (Edwards, J., concurring) (quoting *Agee*, 453 U.S. at 294). On only a few

occasions, Congress has enacted legislation that encroaches on the President's constitutional authority over the issuance and content of passports as it relates to the conduct of diplomacy. When that has happened, the Executive Branch has declined to enforce the offending provision.

In 1991, for example, Congress enacted legislation purporting to prohibit the State Department's policy of issuing two passports to United States government officials traveling in the Middle East. Foreign Relations Authorization Act, Fiscal Years 1992 and 1993, Pub. L. No. 102-138, § 129(d) and (e), 105 Stat. 647, 661-662 (1991); Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1992, Pub. L. No. 102-140, § 503, 105 Stat. 782, 820 (1991). The State Department had adopted that policy in response to the practice of many Arab League nations of denying entry to persons with passports indicating travel to Israel. *Ibid*. In signing the legislation, President Bush issued a statement explaining that it could interfere with the Executive's sole constitutional authority to conduct the Nation's diplomacy. Statement on Signing, Pub. Papers 1344-1345 (Oct. 28, 1991). Subsequently, in a formal opinion, OLC concluded that the provisions purporting to limit the issuance of duplicate passports impermissibly infringed, among other things, the Executive's exclusive "authority over issuance of passports for reasons of foreign policy or national security." *See* Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports,

16 Op. Off. Legal Counsel 18, 22 (1992). OLC accordingly advised the President that he was constitutionally authorized to decline to implement the relevant provisions. *Id*. at 26-28; 31-37; *see id*. at 19 n.2.

Plaintiff argues (Br. 49), relying on Justice Jackson's concurring opinion in *Youngstown*, that Section 214(d) is constitutional because the President's power is "at its lowest ebb" when he "takes measures incompatible with the expressed or implied will of Congress." 343 U.S. at 637-638. But as Justice Jackson explained, Congress may not act upon a subject that the Constitution commits exclusively to the President. *Ibid*. In such situations, the President may rely on his "exclusive power" notwithstanding Congress's contrary views. *Id.* at 638 n.4. Congress's authority to generally regulate passports does not allow it to usurp or infringe upon the President's recognition decision to undermine the ability of the Executive to speak with one voice for the nation in foreign affairs. *See Belmont*, 301 U.S. at 330. And, as we detail below, that is precisely is what Congress is attempting to do in Section 214.

II. SECTION 214(d) IMPERMISSIBLY INFRINGES THE PRESIDENT'S POWER TO RECOGNIZE FOREIGN SOVEREIGNS AND THEIR ATTENDANT BORDERS

Section 214(d) is an unconstitutional encroachment on the President's sole authority to recognize foreign sovereigns. As we have detailed (pp. 3-10), the longstanding policy of the United States is to avoid any official acts that would

amount to recognizing sovereignty over Jerusalem or defining its borders. Section 214, however, seeks to overturn that exercise of the recognition power by forcing the President to recognize Israeli sovereignty over Jerusalem in all official documents and publications (§ 214(c)), and specifically in passports and consular reports of birth abroad (§ 214(d)). Thus, the provision at issue here, Section 214(d), is an unconstitutional effort by Congress to usurp powers allocated by the constitution to the President and cannot stand.

The State Department's decision to record a place of birth in a particular way on an official document in this context is an exercise of the President's recognition power. The decision to do so on a passport, an instrument of diplomacy that is "'addressed to foreign powers,'" *Agee*, 453 U.S. at 292-93 (quoting *Urtetiqui*, 9 Pet. at 698); *see also United States v. Laub*, 385 U.S. 475, 481 (1967), is a particularly sensitive exercise of this power.

The Secretary's passport regulations are written to ensure that place of birth designations on passports accurately reflect the United States' positions on recognition and borders. 7 FAM 1330 Appx. D Current Sovereignty Rule (a). While the "general rule" is to list the "country that currently has sovereignty over the actual place of birth," *id.* (b), country names are not recorded if the United

States does not recognize their sovereignty over the place of birth.[12] In no case does the Secretary allow recording of a location name that the United States views as inaccurate. When questions arise as to the location of a particular place of birth, such questions are to be referred to the U.S. Office of the Geographer. JA 155.

The State Department's policy to designate "Jerusalem" as the place of birth in passports and on consular reports of birth abroad is a specific—and particularly sensitive—application of the Executive's foreign policy and recognition decisions. The United States has consistently refrained from taking any official act recognizing sovereignty over Jerusalem, leaving the status to be decided by negotiations between the relevant parties within the peace process. The State Department has determined that listing "Israel" as the place of birth would constitute "an official decision by the United States to begin to treat Jerusalem as a city located within Israel." JA 56. This, in the view of the Secretary, would be an official act of recognition of Israel's sovereignty over Jerusalem contrary to United States' policy and "represent a dramatic reversal of the longstanding foreign policy of the United States for over half a century." *Ibid*. Section 214(d) is thus not "appropriate passport legislation," as petitioner argues (Br. 24-27), because it seeks

[12] Thus, for example, because the United States never recognized the annexation of Latvia, Lithuania, and Estonia by the U.S.S.R., the "United States did not authorize entry of 'U.S.S.R.' or the 'Soviet Union' as a place of birth" for people born in these areas. 7 FAM 1340 Appx. D, Successor State Issues (c).

to force the Executive Branch to engage in an official act of recognition regarding sovereignty over Jerusalem and to define the borders of Jerusalem.

Plaintiff fundamentally misunderstands the State Department policy regarding place of birth designations in arguing that the place of birth designation does not represent a determination of sovereignty because the Foreign Affairs Manual provides for the listing of localities that are not sovereignties. *See* Br. 45-46. As explained above, the government's policy is to list an accurate description of the location pursuant to United States policy, not to list a sovereign under all circumstances. JA 18 (7 FAM 1383.5-2). This may mean sometimes listing "city or area," rather than a country. *Ibid.* Although the State Department strives to give citizens flexibility to choose between valid descriptors, however, it never allows for a place name to be recorded on a passport that does not reflect U.S. policy or is inaccurate per the Office of the Geographer.[13]

[13] Because the State Department requires that the recorded place of birth accurately reflect U.S. policy and the determination of the Office of the Geographer, amici are incorrect in arguing that recording Israel would be "self-identification." Members of Congress Br. 23. Although the place-of-birth entry on a passport or a report of birth abroad is part of the identifying description in the passport, JA 70; *see* Pl. Br. 9, the decision as to how to describe the place of birth operates as an official statement of whether the United States recognizes a state's sovereignty over a territorial area. *See* JA 61. For this reason, an official decision to record Israel on the passport of any individual born in Jerusalem would constitute an act of recognition, regardless of whether some passports continued to say Jerusalem, *see* AAJL Br. 23, or whether a foreign customs official would know that a particular U.S. traveler with his place of birth listed as Israel had been born in Jerusalem.

Plaintiff also contends that Section 214(d) "remedies" the State Department's discrimination against supporters of Israel. Br. 56. However, plaintiff's complaint asserts no discrimination claim. *See* JA 8-10. A discrimination inquiry would be inappropriate in the context of this sensitive foreign policy determination. In any event, the policy permitting the "city or area of birth" to be displayed where territory is disputed is neutral and applied uniformly throughout the world. JA 113 (7 FAM 1383.5-2). Thus, if any person living in the West Bank objects to displaying "West Bank" on his passport, *see* JA 114 (7 FAM 1383.5-5), he can request that the town of birth be displayed instead. What he cannot do is record on his passport that he was born in a location that is inaccurate per U.S. policy and the Office of the Geographer. There can be no serious dispute that the Executive Branch has refrained from recognizing any nation's sovereignty over Jerusalem not to discriminate, but to permit Israel and the Palestinian people jointly to determine the status of that city through negotiations. *See, e.g.*, JA 57, 59.

The listing of "Palestine" on passports of people born before May 14, 1948 is an application of these general principles. "'Palestine' was the name of the territory under British mandate until 1948." JA 48. Thus, Palestine would have been the individual's "area of birth," which can be written in a passport under 7 FAM 1383.5-2. Recording it on a passport is not an assertion that an independent

country of Palestine existed prior to 1948. People born in Jerusalem, the West Bank, or Gaza today are not allowed to record Palestine on their passports any more than they are allowed to record Israel.

The State Department policy of listing Taiwan upon request is consistent with this overarching policy of describing place of birth using a geographic "area" whose designation does not conflict with the United States' recognition policies. *See* JA 18 (7 FAM 1383.5-2). The State Department began listing Taiwan only after determining that doing so would be consistent with the United States' recognition that the People's Republic of China is the "sole legal government of China" and acknowledgement of the Chinese position that "Taiwan is a part of China." JA 142-43. Accordingly, although the State Department permitted listing "Taiwan," it directed that "[p]assports may not, repeat NOT, be issued showing place of birth as 'Taiwan, China'; 'Taiwan, Republic of China'; or 'Taiwan, ROC'" because such designations would suggest a political status of Taiwan inconsistent with U.S. recognition policy. *Ibid*. As is demonstrated by the care taken in addressing the Taiwan question and by the detailed regulations regarding place names throughout the world, a determination as to whether use of a place name is consistent with United States' policy involves quintessential foreign-policy judgments based on the respective facts of each situation. *See Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

Plaintiff argues that recording Israel on passports for people born in Jerusalem would have no possible foreign policy consequences. The President's recognition power, however, "includes the power to determine the policy which is to govern the question of recognition." *Pink*, 315 U.S. at 229. It is not dependent on a showing that a particular recognition policy is necessary to avoid adverse foreign-policy consequences. In any event, plaintiff's "attempt to downplay the significance of a passport is futile." *Zivotofsky*, 571 F.3d at 1242 (Edwards, J., concurring). As the district court noted, the State Department has determined otherwise, and plaintiff cannot supplant the Executive's foreign-policy judgments with his own. *See, e.g.*, *Regan v. Wald*, 468 U.S. 222, 242-43 (1984). In the view of the State Department, the reversal of the United States' longstanding passport policy regarding Jerusalem "could provoke uproar though the Arab and Muslim world and seriously damage our relations with friendly Arab and Islamic governments, adversely affecting relations on a range of bilateral issues, including trade and treatment of Americans abroad." JA 61. Moreover, in application of Section 214(d), the Secretary would be required to decide where to draw the boundaries of Jerusalem in relation to its political status, which of course is a contested issue between Israel and the Palestinians – one that the President and prior administrations have said must be decided by the parties through negotiations.

Plaintiff maintains that no adverse consequences have followed when State Department officials mistakenly list "Israel" as the place of birth in passports and reports of birth of U.S. citizens born in Jerusalem, as occasionally happens. Br. 53; *see* Zionist Org. of Am. Amicus Br. (documenting erroneous references to "Jerusalem, Israel" by Executive Branch agencies). A mistake is not, of course, a change in policy amounting to an official recognition of the status of Jerusalem. JA 420 ("clerical errors . . . did not constitute official statements of United States policy."). When the State Department becomes aware of such errors, it seeks to correct them. As Amicus Curiae Zionist Organization of America acknowledges (Br. 4), the government has been actively correcting such errors when it becomes aware of them.

The longstanding policy of the United States is to avoid any official acts that would amount to recognizing sovereignty over Jerusalem or defining its borders. Plaintiff argues (Br. 50), that the President's concerns could more appropriately be addressed by undertaking such acts but accompanying them with a public statement. But this decision is for the President to make. *See Curtiss-Wright*, 299 U.S. at 319-320. Plaintiff's disagreement with the manner in which the Executive Branch conducts foreign affairs provides no basis to reject the President's decision.

III. THE VALIDITY OF THE PRESIDENT'S SIGNING STATEMENT IS NOT BEFORE THIS COURT

Plaintiff's request that this Court "invalidate" the President's signing statement is based on the mistaken belief that this signing statement is the equivalent of a line-item veto. On the contrary, then President George W. Bush did not attempt to veto Section 214(d). He simply expressed his views regarding its constitutionality. Presidents frequently express their views of the constitutionality of statutes in signing statements, as the Supreme Court and this Court have recognized. *See Bowsher v. Synar*, 478 U.S. 714, 719 n.1 (1986); *Federal Election Commission v. NRA Political Victory Fund*, 6 F.3d 821, 824-25 (D.C. Cir. 1993). There is no call for this Court to separately evaluate the propriety of this statement. *Cf. Hamdan v. Rumsfeld*, 548 U.S. 557, 666 (2006) (Scalia, J., dissenting) (noting that majority "wholly ignore[d]" the President's signing statement).

Since the enactment of § 214(d), President Bush and President Obama have both taken the official view that it unconstitutionally encroaches on the Executive's foreign policy and recognition power and have, accordingly, refrained from implementing the statute. *Cf. Myers v. United States*, 272 U.S. 52, 164 (1926); *see also INS v. Chadha*, 462 U.S. 919, 942 n.13 (1983); *Freytag v. Comm'r*, 501 U.S. 868, 906 (1991) (Scalia, J., concurring in part and concurring in the judgment) ("the means [available to a President] to resist legislative encroachment" upon

Executive power include "the power to veto encroaching laws, or even to disregard them when they are unconstitutional" (internal citation omitted)); *Memorial of Captain Meigs*, 9 Op. Att'y Gen. 462, 469-70 (1860) (advising President that he need not enforce a statute that encroaches a power assigned by the Constitution to the Executive). It is now for the courts to make a final determination regarding the constitutionality of the statute. *See Marbury v. Madison*, 1 Cranch 137, 177 (1803).

CONCLUSION

For the foregoing reasons, § 214(d) is unconstitutional and this Court should instruct the district court to dismiss plaintiff's claim seeking enforcement of that statute.

Respectfully submitted,

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OCTOBER 2012

CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that the certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,973 words excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/Dana Kaersvang
DANA KAERSVANG

CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2012, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Dana Kaersvang
DANA KAERSVANG

ADDENDUM

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Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, § 214, 116 Stat. 1350 (2002) SA-1

Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, § 214, 116 Stat. 1350 (2002)

SEC. 214. UNITED STATES POLICY WITH RESPECT TO JERUSALEM AS THE CAPITAL OF ISRAEL.

(a) CONGRESSIONAL STATEMENT OF POLICY.
The Congress maintains its commitment to relocating the United States Embassy in Israel to Jerusalem and urges the President, pursuant to the Jerusalem Embassy Act of 1995 (Public Law 104–45; 109 Stat. 398), to immediately begin the process of relocating the United States Embassy in Israel to Jerusalem.

(b) LIMITATION ON USE OF FUNDS FOR CONSULATE IN JERUSALEM.
None of the funds authorized to be appropriated by this Act may be expended for the operation of a United States consulate or diplomatic facility in Jerusalem unless such consulate or diplomatic facility is under the supervision of the United States Ambassador to Israel.

(c) LIMITATION ON USE OF FUNDS FOR PUBLICATIONS.
None of the funds authorized to be appropriated by this Act may be available for the publication of any official government document which lists countries and their capital cities unless the publication identifies Jerusalem as the capital of Israel.

(d) RECORD OF PLACE OF BIRTH AS ISRAEL FOR PASSPORT PURPOSES.
For purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel.