No. 13-628

In the Supreme Court of the United States

MENACHEM BINYAMIN ZIVOTOFSKY, BY HIS PARENTS AND GUARDIANS, ARI Z. AND NAOMI SIEGMAN ZIVOTOFSKY, PETITIONER

v.

JOHN KERRY, SECRETARY OF STATE

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Pursuant to longstanding policy, the President, through the actions of his Secretary of State, has recognized no state as having sovereignty over the city of Jerusalem, and has instead left this highly sensitive issue to be resolved through negotiations by the foreign parties to that dispute. In order to implement that policy, the Secretary of State lists "Jerusalem" instead of "Israel" as the place of birth in passports, and in consular reports of births abroad, of United States citizens born in that city. In 2002, Congress enacted the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350, Section 214(d) of which 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." 116 Stat. 1366. The question presented is:

Whether Section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, impermissibly infringes the President's power to recognize foreign sovereigns.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-63a) is reported at 725 F.3d 197. Prior opinions of the court of appeals are reported at 571 F.3d 1227 and 444 F.3d 614. The opinion of the district court is reported at 511 F. Supp. 2d 97. The prior opinion of this Court is reported at 132 S. Ct. 1421.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 2013. On October 8, 2013, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including November 20, 2013, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. 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, since President Truman first recognized the state of Israel, the United States' consistent foreign policy has been to recognize no state as having sovereignty over Jerusalem, and to leave that issue to be decided by negotiations between the relevant parties within the peace process.[1] This policy is rooted in the Executive's as-

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[1] See, *e.g.*, 6 U.S. Dep't of State, *Foreign Relations of the United States 1949: The Near East, South Asia, and Africa* 739-741 (1977) (Truman Administration); 13 U.S. Dep't of State, *Foreign Relations of the United States, 1958-1960: Arab-Israeli Dispute; United Arab Republic; North Africa* 147-149 (1992) (Eisenhower Administration); 17 U.S. Dep't of State, *Foreign Relations of the United States 1961-1963: Near East 1961-1962*, at 414-416 (1994) (Kennedy Administration); *U.S. Abstains on U.N. Resolution on Jerusalem; Urges Steps Toward Durable Peace in Near East, Statement by Ambassador Goldberg, reprinted in* 57 *Department of State Bulletin* 148-151 (July 31, 1967) (Johnson Administration); *A Lasting Peace in the Middle East: An American View, Address by Secretary Rogers, reprinted in* 62 *Department of State Bulletin* 7-11 (Jan. 5, 1970) (Nixon Administration); Letters from President Carter to President Anwar Al-Sadat and Prime Minister Begin (Sept. 22, 1978), http://www.un.int/wcm/content/site/palestine/cache/offonce/pid/12020 (Carter Administration); Ronald Reagan, U.S. President, *The Reagan Peace Initiative* (Sept. 1, 1982), http://www.cmep.org/content/reagan-peace-initiative-september-1-1982 (Reagan Administration); Diplomatic Relations, Continuity and Succession of States, *1989-1990 Digest* § 9, at 266 (George H. W. Bush Administration); George W. Bush, U.S. President, *President Bush Calls for New Palestinian Leadership* (June 24, 2002), http://georgewbush-whitehouse.archives.gov/news/releases/2002/06/20020624-3.html (George W. Bush Administration); Barack Obama, U.S. President, *Remarks by President Obama in Address to the United Nations General Assembly* (Sept. 21, 2011), http://www.whitehouse.gov/the-press-office/

sessment 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." C.A. J.A. 58-59 (Secretary of State's response to interrogatories); see Letter from George P. Shultz, Sec'y of State, to Hon. Charles H. Percy (Feb. 13, 1984), *reprinted in American Embassy in Israel, Hearing Before the Senate Comm. on Foreign Relations*, 98th Cong., 2d Sess. 13-14 (1984) (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."). For parallel reasons, the Executive does not officially recognize Palestinian claims to current sovereignty in Jerusalem, pending the outcome of these negotiations.

Israeli and Palestinian leaders are currently engaged in such negotiations on a number of key issues, including the future status of Jerusalem, in significant part because of intensive United States diplomatic efforts. These efforts are predicated on the need for the two sides to reach mutually acceptable solutions. See John Kerry, Sec'y of State, *Remarks at Solo Press Availability* (Jan. 5, 2014), http://www.state.gov/secretary/remarks/2014/01/219298.htm ("We're at the table today because of the determination to try to resolve this issue, and both [Israeli Prime Minister

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2011/09/21/remarks-president-obama-address-united-nations-general-assembly (Obama Administration).

Netanyahu and Palestinian Authority President Abbas] have made the tough choices to stay at that table. We are now at a point where the choices narrow down and the choices are obviously real and difficult.").

b. In this highly sensitive context, United States Presidents have maintained a consistent policy of not recognizing any party's sovereignty over Jerusalem and thus not engaging in any official action that would recognize, or might be perceived as constituting recognition of, Jerusalem as a city located within the sovereign territory of Israel. One of the ways the State Department has implemented that policy is in its rules regarding place-of-birth designations in consular reports of birth abroad and passports issued to United States 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 7 *Foreign Affairs Manual* 1383.1 (1987) (*FAM*).[2] Consistent with the United States' policy of not taking any official act recognizing sovereignty over Jerusalem, only "Jerusalem" is recorded as the place of birth in the passports of United States citizens born in that city.[3] 7 *FAM* 1383.5-6, Exh. 1383.1.

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[2] In 2008 and 2010, the State Department revised the *FAM* provisions governing the place-of-birth designation of United States citizens born in "Israel, Jerusalem, and Israeli-occupied [a]reas." See 7 *FAM* 1360, App. D, Birth in Israel, Jerusalem, and Israeli-occupied Areas (2008), http://www.state.gov/documents/org-anization/94675.pdf. These revisions made no change in policy. Unless otherwise noted, this brief cites the 1987 version, which is reproduced in the joint appendix filed in the court of appeals. See C.A. J.A. 376-379.

[3] Similarly, because the United States recognizes no state as having sovereignty over the territories of the West Bank and Gaza,

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." C.A. J.A. 56 (Secretary of State's response to interrogatories). Recording "Israel" as the place of birth of United States 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." *Id.* at 61. That reversal could "cause irreversible damage" to the United States' ability to further the peace process. *Id.* at 59.

2. In 2002, Congress passed and the President signed the Foreign Relations Authorization Act, Fiscal Year 2003 (Act), Pub. L. No. 107-228, 116 Stat. 1350. 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 Is-

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the State Department's rules mandate recording "West Bank," "Gaza Strip," or the town of birth, in the passports of United States citizens born in those locations. 7 *FAM* 1383.5-5.

rael." § 214(b), 116 Stat. 1365-1366. 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 of the Presidents of the United States: George W. Bush 1697, 1698 (Sept. 30, 2002). That signing statement made clear that "U.S. policy regarding Jerusalem has not changed." *Ibid.*

3. Petitioner is a United States citizen born in Jerusalem in 2002. Pet. App. 9a. Petitioner's mother filed an application for a consular report of birth abroad and a United States passport for petitioner, listing his place of birth as "Jerusalem, Israel." *Id.* at 10a & n.3. United States 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.*

Petitioner'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.[4] Pet. App. 10a.

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. 444 F.3d 614, 615, 619-620 (2006).

4. a. 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. C.A. J.A. 58-59, 412. The district court again dismissed on political question grounds. *Id.* at 401-423.

b. The court of appeals affirmed. 571 F.3d 1227, 1233 (2009). The court concluded that petitioner's claim was nonjusticiable "because deciding whether the Secretary of State must mark a passport and Consular Report of Birth as [petitioner] requests would necessarily draw [it] into an area of decisionmaking

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[4] Plaintiff initially requested that his place of birth be recorded as "Jerusalem, Israel," but now requests that his place of birth be recorded as "Israel." 571 F.3d 1227, 1230 (2009).

the Constitution leaves to the Executive alone." *Id.* at 1232-1233. Judge Edwards concurred, explaining that he would have found Section 214(d) unconstitutional because it intrudes on the President's exclusive constitutional authority to recognize foreign states and governments, as well as their territorial boundaries. *Id.* at 1244-1245 (Edwards, J., concurring).

c. This Court granted certiorari, vacated the court of appeals' decision, and remanded for further proceedings. 132 S. Ct. 1421, 1431 (2012). The Court held that petitioner's claim did not present a nonjusticiable political question because petitioner sought to vindicate the statutory right conferred in Section 214(d), and his claim therefore required the courts to determine whether Section 214(d) is constitutional—a "familiar judicial exercise." *Id.* at 1427. Although the Court had requested briefing on the merits question whether Section 214(d) is an unconstitutional intrusion on the Executive Branch's recognition power, it elected not to reach that question, explaining that it was "without the benefit of thorough lower court opinions to guide [its] analysis of the merits." *Id.* at 1430.

5. On remand, the court of appeals held that Section 214(d) impermissibly intrudes on the President's exclusive recognition power. Pet. App. 1a-50a.

The court of appeals first held that the Constitution confers the power to recognize foreign states and governments exclusively on the Executive Branch. The court observed that the Executive has the power to receive ambassadors, U.S. Const. Art. II, § 3, as well as a wide range of foreign-affairs powers, Pet. App. 6a-17a, 35a-36a. Although, in the court's view, the constitutional text and pre-ratification evidence did not conclusively answer the question whether the

President's recognition power was exclusive, *id.* at 16a-20a, the court concluded that "the longstanding post-ratification practice supports the Secretary's position that the President exclusively holds the recognition power," *id.* at 20a. The court explained that "[b]eginning with the administration of our first President, George Washington," the Executive Branch had repeatedly acted unilaterally in recognizing foreign entities and in setting the United States' recognition policies. *Id.* at 20a-24a. Congress, moreover, had repeatedly acquiesced in "the President's assertion of exclusive recognition power." *Id.* at 22a-24a. The court further explained that, while petitioner cited "isolated events" in which the President had sought congressional support for recognition decisions, those instances reflected "political prudence" rather than a concession that Congress shared in the recognition power. *Id.* at 24a-26a. Petitioner, the court emphasized, pointed to no occasions on which Congress had itself recognized foreign sovereigns or taken official action contradicting Executive recognition policy. *Id.* at 24a-26a & 26a n.12.

The court of appeals found further support for the exclusivity of the President's recognition power in this Court's repeated declarations in "carefully considered" language, although technically dictum, that "the recognition power lies exclusively with the President." Pet. App. 29a-30a; see *id.* at 30a-34a. The court of appeals reasoned that those statements were consistent with the President's "long recognized" and "presumptive dominance in matters abroad." *Id.* at 28a.

The court of appeals next held that Section 214(d) unconstitutionally impinges on the Executive's exclu-

sive recognition power. Pet. App. 36a-50a. The court first rejected petitioner's argument that Section 214(d) is a valid exercise of Congress's passport authority. The court explained that the Executive has historically exercised authority to determine the form and content of passports, especially as they relate to national security or foreign affairs, and that while Congress also possesses the power to regulate passports pursuant to its enumerated powers, it may not do so in a way that infringes on the Executive's recognition power. *Id.* at 37a-40a. Section 214(d), the court concluded, did just that. Rather than "simply—and neutrally—regulat[ing] the form and content of a passport," *id.* at 41a, the provision's text and structure indicated that it purported to establish "United States policy with respect to Jerusalem as the capital of Israel," *id.* at 44a (quoting Section 214's title) (capitalization altered and italicization omitted). Section 214(d) did so by requiring the Secretary of State, on request, to record "Israel" as the place of birth of a United States citizen born in Jerusalem, *id.* at 48a. That action, the court reasoned, would "signal" that the United States "recognizes" Israel's sovereignty over Jerusalem, *id.* at 42a (quoting C.A. J.A. 58-59), contrary to the Executive Branch's "carefully calibrated and longstanding * * * policy" to refrain from taking a position on that issue, *id.* at 41a. That view, the court held, was confirmed by Congress's own understanding of the purpose and effect of the statute and the strong reactions to Section 214(d)'s enactment in the Middle East region. *Id.* at 43a-45a.

Judge Tatel concurred in the court's opinion, and he also wrote separately to emphasize two primary points. Pet. App. 50a-63a. First, "the great weight of

historical and legal precedent" "compelled" the conclusion that "[p]olitical recognition is exclusively a function of the Executive." *Id.* at 54a (brackets in original). Indeed, Judge Tatel continued, the historical practice of unilateral Executive recognition and congressional acquiescence was unbroken, such that the courts had never before had the occasion to rule on a dispute between the political Branches concerning the recognition power. *Id.* at 53a. Second, the "critical question" was whether Section 214(d) in fact infringed on the President's exclusive recognition power, and in this case both the Executive Branch and Congress agreed that it does. *Id.* at 55a. Because the Executive Branch had "reasonabl[y]" concluded that Section 214(d) interfered with its longstanding recognition policy, and Congress was "quite candid" that it "intended Section 214(d) to alter [that] recognition policy," *id.* at 60a-61a, "this is not a case in which we must choose between the President's characterization of a statute as implicating recognition and Congress's contrary view," *id.* at 60a.

ARGUMENT

The court of appeals correctly held that Section 214(d) impermissibly impinges on the Executive Branch's exclusive constitutional authority to decide whether and on what terms to recognize a foreign sovereign. Further review is not warranted. By holding that Section 214(d) is unconstitutional, after considering the textual, historical, and structural evidence, the court of appeals' decision permits the Executive Branch to continue its longstanding practice of refraining from taking any official action that could constitute, or be interpreted as, recognition of any foreign government's sovereignty over Jerusalem.

Although the court below invalidated Section 214(d), the decision differs from typical cases in which a federal statute has been held unconstitutional, in that its effect is to permit the Executive Branch to maintain the status quo, both with respect to recognition generally and the status of Jerusalem in particular. That result avoids the grave foreign-relations and national-security consequences that would have resulted from a decision in petitioner's favor, while affecting only the very small number of people who could otherwise have availed themselves of the option offered by Section 214(d). The court of appeals' decision is also consistent with this Court's repeated statements and the unanimous view of the courts of appeals to have considered the question. Because Section 214(d) represents an aberrational dispute between the political Branches over recognition policy—petitioners cite, and we are aware of, no similar statutes—the dispute is unlikely to recur with any frequency. The petition for a writ of certiorari should be denied.

1. The court of appeals correctly held that the Constitution grants the President the exclusive authority to recognize foreign sovereigns and their territorial boundaries. Centuries-long Executive Branch practice and congressional acquiescence in that practice, as well as repeated statements in this Court's decisions, confirm that the Executive possesses the exclusive recognition power.

a. The Constitution distributes the powers of the National Government over external affairs between the Executive and the Legislative Branches, but "in foreign affairs the President has a degree of independent authority to act." *American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 414 (2003). The Constitu-

tion provides that the two Branches exercise some foreign-affairs powers jointly. For example, the Constitution grants the President the power to make treaties, 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 power to regulate foreign commerce and the value of foreign currency. *Id.* Art. I, § 8, Cls. 3, 5.

The Constitution assigns a broad range of foreign-affairs powers, however, to the President alone. Article II of the Constitution provides that "[t]he executive Power shall be vested in a President of the United States of America." U.S. Const. 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." *Garamendi*, 539 U.S. at 414 (internal quotation marks omitted). In particular, the President has "plenary and exclusive power * * * as the sole organ of the federal government in the field of international relations." *United States* v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936). 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 (Receive Ambassadors Clause). That power necessarily includes the authority to decide which ambassadors the President will receive—and therefore which foreign sovereigns to recognize. See, *e.g.*, *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 410-411 (1964); *United States* v. *Pink*, 315 U.S. 203, 229 (1942). As Alexander Hamilton explained, the reception power "includes th[e power] of judging, in the case of a Revolution of Government in a foreign Coun-

try, whether the new rulers are competent organs of the National Will and ought to be recognised or not."[5] Alexander Hamilton, *Pacificus No. 1* (June 29, 1793), *reprinted in* Alexander Hamilton & James Madison, *The Pacificus-Helvidius Debates of 1973-1974 Toward the Completion of the American Founding* 8, 12 (Morton J. Frisch ed., 2007) (brackets in original omitted).

b. From the Washington Administration to the present, the Executive Branch has asserted sole authority to determine whether to recognize foreign states and governments, as well as their territorial boundaries, and Congress has acquiesced in that understanding. That unbroken historical practice "give[s] meaning to the Constitution" because it reflects the settled understanding of the contours of the separation of powers under the Constitution from the very outset. *Mistretta* v. *United States*, 488 U.S. 361, 401 (1989) (quotation marks omitted).

The Executive Branch routinely has unilaterally recognized foreign states and governments, as well as their sovereign boundaries. President Washington and his cabinet unanimously decided that the President could receive the post-revolution French ambassador, thereby conferring recognition on the new French government, without first consulting Congress. See *George Washington to the Cabinet*, *reprinted in* 25 *The Papers of Thomas Jefferson* 568-569 (John Catanzariti ed., 1992). In 1824, after consulting with his cabinet, President Monroe determined that

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[5] Hamilton initially viewed the Receive Ambassadors Clause as "without consequence in the administration of the government," The Federalist No. 69, at 352 (Hamilton) (Garry Wills ed., 1982), but he came to understand the Clause differently during the Washington Administration.

"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, Comprising Portions of His Diary from 1795 to 1848*, at 329, 348, 358-359 (Charles Francis Adams ed., 1875); see *James Monroe to the Members of the Cabinet* (Oct. 25 & 30, 1817), *reprinted in* 6 *The Writings of James Monroe* 31 (Stanislaus Murray Hamilton ed., 1902). Throughout the nineteenth and twentieth centuries, Presidents continued to exercise the recognition power unilaterally. See, *e.g.*, 1 *Digest of Int'l Law* §§ 35-51, at 195-318 (Green Haywood Hackworth ed., 1940) (Hackworth) (listing numerous twentieth-century examples); Senator Hale, *Memorandum upon Power to Recognize Independence of a New Foreign State*, 29 Cong. Rec. 663, 672 (1897) (*Hale Memorandum*) (noting that the Executive had repeatedly recognized foreign states and governments without congressional objection). That practice continues today. Contemporary examples include the Executive Branch's January 2013 recognition of the Government of Somalia, its July 2011 recognition of the Transitional National Council as the "the 'legitimate governing authority' in Libya," and its July 2011 recognition of the state of South Sudan.[6] See U.S. Dep't of State,

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[6] Contrary to the argument of the amici Members of Congress, Br. 12 n.4, Congress did not itself "act[] to shape recognition policy" in regard to Libya's Transitional National Council (TNC). The primary measure on which amici rely—a proposed Senate resolution that was never passed by the Senate—simply "call[ed] on the President" to recognize the TNC. S. Res. 102 § 5(A), 112th Cong. (2011), http://beta.congress.gov/bill/112th/senate-resolution/

Hillary Rodham Clinton, Sec'y of State, *Remarks with President of Somalia Hassan Sheikh Mohamud After Their Meeting* (Jan. 17, 2013), http://www.state.gov/secretary/20092013clinton/rm/2013/01/202998.htm; Diplomatic Relations, Succession, Continuity of States, and Other Statehood Issues, *2011 Digest* § 9, at 276 (Libya); *id.* at 272, 274 (South Sudan).

Over the course of centuries of unilateral Executive Branch recognition decisions, Congress has acquiesced in 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.").

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

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102/text. The other measures referred to by amici in regard to both Libya and Syria were never enacted by Congress and similarly did not mandate recognition contrary to the President's policies. See S. 2152, 112th Cong. (2012), https://www.govtrack.us/congress/bills/112/s2152/text (calling for a report assessing the ability of certain groups "to serve as part of a recognized transitional government" in Syria); H.R. Res. 188, 112th Cong. (2011), https://www.govtrack.us/congress/bills/112/hres188/text (expressing "the sense of the House of Representatives that * * * the regime of Mu'ammar al-Qadhaffi is no longer the legitimate government of Libya").

opposed the bills, and the legislation was either rejected in Congress as an inappropriate incursion into the Executive Branch's constitutional authority or modified to address those concerns. For instance, beginning in 1817, Speaker of the House Henry Clay sought to have Congress recognize the independence from Spain of certain South American provinces, but his efforts were successfully opposed by other Members of Congress and the Monroe Administration, all of whom argued that the recognition power belonged solely to the Executive. See, *e.g.*, Pet. App. 21a-24a (describing this example along with similar occurrences during the nineteenth and twentieth centuries). The President has also occasionally consulted with Congress regarding recognition, but those voluntary undertakings did not suggest that Congress possessed any authority to recognize foreign governments on its own. See *id.* at 25a-26a & 26a n.12 (describing examples).

Thus, as the court of appeals observed, petitioner has been unable to point to a single example, over centuries of Executive Branch recognition of foreign states, in which Congress has taken action in contravention of the Executive's recognition prerogative—until the enactment of Section 214(d).[7] See Pet. App. 24a-27a; *id.* at 52a-53a (Tatel, J., concurring).

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[7] Petitioner now asserts (Pet. 15-16) that a recent law review article has unearthed "two instances" not considered by the court of appeals in which "early Congresses exercised the recognition power." See Robert J. Reinstein, *Is the President's Recognition Power Exclusive?*, 86 Temp. L. Rev. 1, 15-18, 42-50 (2013). Those isolated examples, concerning French sovereignty over St. Domingue, are inapposite. In each case, Congress took actions that were consistent with the President's existing recognition policies. See, *e.g.*, John Adams, *A Proclamation* (June 26, 1799), *reprinted in* 1

c. Although this Court has never had occasion to adjudicate the constitutionality of a statute that impinges on the President's recognition power because Congress has historically acquiesced in the President's exercise of that authority, the Court and individual Justices have repeatedly stated that the Constitution assigns to the President alone the power to make recognition decisions. See Pet. App. 28a-35a.

In 1817, Chief Justice Marshall, sitting as Circuit Justice, held that a criminal jury could not consider whether the defendant acted on behalf of the government of Buenos Ayres, because "as our executive had never recognized the independence of Buenos Ayres, it was not competent to the court to pronounce its

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A Compilation of the Messages and Papers of the Presidents 278-279 (James D. Richardson ed., 1897); Robert J. Reinstein, *Slavery, Executive Power and International Law: The Haitian Revolution and American Constitutionalism*, 53 Am. J. Legal Hist. 141, 205-210 (2013) (discussing Jefferson Administration's tacit agreement with 1806 statute regarding French sovereignty over St. Domingue, which was consistent with its policies).

In addition, contrary to petitioner's contention, the court of appeals correctly concluded that Congress did not independently recognize Haiti and Liberia in 1862, but instead acted at President Lincoln's request. Pet. App. 26a; see Cong. Globe, 37th Cong., 2d Sess. 1773; see also Act of June 5, 1862, ch. 96, 12 Stat. 421. The court of appeals also correctly held that Congress, in accord with the President's views, refrained from recognizing any government in Cuba in 1898, and instead passed a resolution that expressed the views that Spain should withdraw its forces from Cuba and that the "people" of Cuba are independent. Pet. App. 24a-25a; see Act of Apr. 20, 1898, ch. 24, 30 Stat. 738-739. Finally, far from altering the President's recognition decision, the core elements of the Taiwan Relations Act, Pub. L. No. 96-8, 93 Stat. 14, implemented policies articulated in President Carter's Memorandum of December 30, 1978. See 44 Fed. Reg. 1075.

independence." *United States* v. *Hutchings*, 26 F. Cas. 440, 442 (C.C.D. Va.). Similarly, Justice Story observed 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 (C.C.D. Mass. 1838), aff'd 38 U.S. (13 Pet.) 415, 420 (1839). Justice Story also explained that the recognition power includes the authority to recognize a state's territorial sovereignty over a particular area. *Ibid.*

This 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); *United States* v. *Belmont*, 301 U.S. 324 (1937); *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, and stated that "[w]e would usurp the executive function if we held that [the recognition] decision was not final and conclusive in the courts," *Pink*, 315 U.S. at 230.

Since that time, this Court and all of the courts of appeals to address the issue have repeatedly reaffirmed that the recognition power is exclusively vested in the Executive.[8] See, *e.g.*, *National City Bank* v.

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[8] Amici Members of Congress assert (Br. 8) that in certain early cases explaining that the judiciary lacks power to set recognition policy, this Court occasionally spoke in terms of the "*legislative and executive departments*" or the "political departments." See *United States* v. *Palmer*, 16 U.S. (3 Wheat.) 610, 643 (1818)); see

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."); *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, 707-708 (D.C. Cir. 1979), vacated, 444 U.S. 996 (1979); *American Int'l Grp., Inc.* v. *Islamic Republic of Iran*, 657 F.2d 430, 438 (D.C. Cir. 1981); *Can* v. *United States*, 14 F.3d 160, 163 (2d Cir. 1994).

2. The court of appeals also correctly concluded that Section 214(d) impermissibly infringes the President's exclusive recognition power.

a. As the court of appeals recognized, Pet. App. 41a-42a, the State Department's decision to record "Jerusalem," not "Israel," as the place of birth in passports and consular documents is an exercise of the recognition power.[9] A passport is an instrument of

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also *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302 (1918). As the court of appeals explained, however, when this Court "has discussed the recognition power with more specificity, * * * it has not merely stated that the judiciary lacks authority to decide the issue but instead has explained that the President has the *exclusive* authority." Pet. App. 34a. The other decision on which amici rely concerned the status of territories controlled or acquired by the United States, a matter over which Congress has authority under Article IV of the Constitution. See *Jones* v. *United States*, 137 U.S. 202, 212 (1890); see also U.S. Const. Art. IV, § 3, Cl. 2 (power to legislate regarding "the Territory or other Property belonging to the United States").

[9] The issuance of reports of birth abroad is not an exercise of the President's power with respect to passports. The designation of

diplomacy "addressed to foreign powers." *Haig* v. *Agee*, 453 U.S. 280, 292 (1981) (quoting *Urtetiqui* v. *D'Arcy*, 34 U.S. (9 Pet.) 692, 699 (1835)); see *United States* v. *Laub*, 385 U.S. 475, 481 (1967). The Executive Branch accordingly has authority, rooted in its constitutional power over foreign affairs and national security and independent of any congressional authorization, to issue and determine the content of passports. Pet. App. 38a-40a; *Agee*, 453 U.S. at 294 & n.27 (explaining that the Executive issued passports from the time of the Founding, without any statutory authorization to do so). And because a passport is an official instrument of diplomacy, the Executive has sole authority to determine the content of passports insofar as it pertains to the Executive's recognition decisions.

The decision as to *how* to describe a passport holder's place of birth—*i.e.*, to list a particular country name, or to designate a city as being within a particular country—is such an exercise of the recognition power. That is because the manner of describing the place of birth represents an official statement, addressed to foreign Nations through the diplomatic instrument of the passport, of whether the United States recognizes a state's sovereignty over a specific area. The "power to recognize a sovereign state's territorial boundaries is a necessary corollary to the power to recognize a sovereign in the first place," Pet. App. 56a (Tatel, J., concurring), and recognition of territorial boundaries can entail significant foreign-relations consequences. Accordingly, the Secretary's

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place of birth on a consular report of birth abroad is, however, an implementation of the President's recognition power insofar as it identifies a foreign state having sovereignty over that place.

passport regulations are designed to ensure that place-of-birth designations on passports in all cases accurately reflect the United States' positions on recognition and borders. 7 *FAM* 1330, App. D, Current Sovereignty Rule (a) (2008). Although the "general rule" is to list the country of the applicant's birth in passports, 7 *FAM* 1383.1, the State Department's policy is to refrain from listing a country whose sovereignty over the relevant territory the United States does not recognize, see 7 *FAM* 1383.5-1, -2.

The State Department's policy to list "Jerusalem" as the place of birth in passports and on consular reports of birth abroad is thus a specific—and particularly sensitive—application of the Executive's foreign policy and recognition decisions. The State Department has determined 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 * * * in the context of listing Israel as the place of birth for individuals born in Jerusalem, when issuing U.S. passports or Consular Reports of Birth Abroad, which are official statements of the U.S. Government." C.A. J.A. 56.

Because the listing of place of birth on passports is an exercise of the recognition power, Congress may not contravene the Executive's place-of-birth determinations. To be sure, Congress has constitutional authority to regulate passports in furtherance of its enumerated powers, such as its powers to regulate foreign commerce and immigration. U.S. Const. Art. I, § 8, Cls. 3, 4, 18. But because Congress's power to regulate passports is not exclusive, and the Executive

is the "sole organ" of the Nation in foreign affairs, *Curtiss-Wright*, 299 U.S. at 319, Congress may not regulate passports in a manner that infringes the Executive Branch's exclusive recognition authority, Pet. App. 40a; see *Agee*, 453 U.S. at 292-295.

But that is precisely what Section 214(d) purports to do: the section containing this provision expressly states that its purpose is to establish "United States policy with respect to Jerusalem as the capital of Israel," § 214, 116 Stat. 1365 (capitalization altered), and it directs the Secretary to permit United States citizens born in Jerusalem to have "Israel" listed as their place of birth, § 214(d), 116 Stat. 1366. As the court of appeals observed, there can be no question that Section 214, in purpose and effect, purports to alter the President's longstanding policy of not recognizing any party's sovereignty over Jerusalem. See Pet. App. 43a-44a (citing text and purpose); *id.* at 60a-61a. Section 214(d) thus impermissibly purports to override the Executive Branch's decades-long policy of neutrality with respect to sovereignty over Jerusalem.[10]

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[10] Contrary to the arguments of amici Members of Congress (Br. 1-3, 15-16), review is not warranted on the ground that the court of appeals' decision gives the Executive unreviewable, "unchecked power" to "ignore any duly enacted Act of Congress" that the Executive views as falling within its recognition power. *Id.* at 16. As this case demonstrates, the Executive's decision not to enforce a statute conferring an enforceable right on the ground that it unconstitutionally impinges on the recognition power is subject to judicial review. 132 S. Ct. at 1427-1428; Pet. App. 14a. The court of appeals held that Section 214(d) is unconstitutional only after concluding that the statute intrudes on the Executive's recognition power. Pet. App. 49a-50a.

Nor did the court of appeals suggest that the Executive's determination that a matter falls within the scope of the recognition

3. Further review is unwarranted. The court of appeals' decision does not conflict with any decision of this Court or any other court of appeals. The decision below is consistent with this Court's repeated statements that the recognition power belongs to the Executive alone, as well as similar statements by every court of appeals to consider the issue. See pp. 18-20, *supra*. It is also consistent with the "textual, structural, and historical evidence * * * regarding the nature of the statute and of the passport and recognition powers." 132 S. Ct. at 1430.

Although the court of appeals held that Section 214(d) is unconstitutional, the decision differs from typical decisions invalidating a federal statute. The decision below enables the Executive Branch to maintain its current, longstanding practice of refraining from taking any official action that recognizes any

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power is unreviewable. But cf. Amicus Br. 16. As the court observed, Section 214(d) indisputably impinges on the core of the Executive's recognition power because it expressly purports to alter the President's recognition policy by identifying Jerusalem as a part of the state of Israel. See § 214, 116 Stat. 1365 (entitling the statutory section containing Section 214(d), "United States Policy with Respect to Jerusalem as the Capital of Israel"); see also Pet. App. 43a-44a; *id.* at 60a-61a (Tatel, J., concurring) (noting that Congress was "quite candid" about its intentions, and the Executive Branch was "reasonable" in concluding that Section 214(d) interfered with its recognition policy regarding Jerusalem). This case therefore does not present a situation in which the Branches disagree on whether a statute implicates the recognition power. *Id.* at 61a. If a case were to arise that presented a closer question whether the legislation at issue intruded into an area encompassed by the Executive's recognition power, the courts could address in that case how to determine the scope of the recognition power and the appropriate degree of deference due to the Executive Branch in deciding that question.

government's sovereignty over Jerusalem, and it maintains more generally the historical practice under the Constitution with respect to recognition of foreign states, governments, and territorial boundaries. A contrary decision—one that upheld Section 214(d), permitting Congress to override the Executive's judgment in an extraordinarily sensitive context—would have "significantly harmed" United States foreign policy and national security interests and risked "caus[ing] irreversible damage" to the United States' ability to further the peace process in the Middle East. C.A. J.A. 56, 59. At the same time, only a limited number of people—those United States citizens born in Jerusalem who might wish the Secretary to record their place of birth as Israel rather than Jerusalem—may be affected by Section 214(d)'s invalidation.

Review is unwarranted for the additional reason that the disagreement between Congress and the Executive Branch over the substance of a recognition decision that gave rise to this case is a historical aberration that is unlikely to recur. As Judge Tatel observed, "the most striking thing about [the historical evidence] is what is absent from it: a situation like this one, where the President and Congress disagree about a recognition question." Pet. App. 52a. Petitioner has not cited, and the United States is not aware of, any other statute that, like Section 214, purports to alter or supersede any Executive Branch decision to recognize a foreign sovereign within certain territorial boundaries. Before and after Section 214(d)'s enactment, moreover, the Executive Branch has consistently acted unilaterally to recognize foreign states and governments, including with respect to

territorial borders, and Congress has not opposed those decisions. See pp. 14-17, *supra*; see also, *e.g.*, Diplomatic Relations, Succession and Continuity of States, *2004 Digest* § 9, at 451-452 (recognition of independent Iraqi government); Diplomatic Relations, Succession and Continuity of States, *2002 Digest* § 9, at 463-464 (recognition of state of East Timor on the day it declared independence); Diplomatic Relations, Succession and Continuity of States, *1991-1999 Digest* § 9, at 1145-1147 (recognizing Bosnia-Herzegovina, Croatia, and Slovenia, and "accept[ing] the pre-crisis republic borders as the[ir] legitimate international borders"). There is therefore no pressing need for this Court to resolve the questions presented by this case at this time, particularly in light of the uniquely sensitive foreign-relations context in which this unusual dispute has arisen.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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