No. 10-699

IN THE

Supreme Court of the United States

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

Petitioner,

v.

HILLARY RODHAM CLINTON, Secretary of State

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals For
The District Of Columbia Circuit

BRIEF FOR MEMBERS OF THE UNITED STATES SENATE AND THE UNITED STATES HOUSE OF REPRESENTATIVES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the Secretary of State may refuse to comply with a statute passed under Congress's sole and exclusive legislative powers over immigration, naturalization and foreign commerce, when the only asserted basis for the refusal is the "recognition power," which is not implicated in the case.

2. Whether the "political question doctrine" deprives a federal court of jurisdiction to decide the constitutionality of a federal statute.

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae Members of the United States Senate and the United States House of Representatives have a fundamental institutional interest in safeguarding Congress's power—granted by the Constitution—to direct and control the Executive in the realm of passports and laws relating to foreign-born United States citizens. *Amici* also have a fundamental interest in defending the constitutionality of the statute at issue, which passed overwhelmingly in both Houses of Congress, and in seeing the directives of the Legislative Branch enforced in the courts. The names of individual *amici* are listed in the Appendix.

INTRODUCTION AND SUMMARY OF ARGUMENT

In giving to Congress the "legislative Powers" over "[Im]migration" and "Naturalization"—as well as "exclusive and absolute" power over "Commerce with foreign Nations," U.S. Const. art. I, §§ 1, 8 & 9; *Buttfield v. Stranahan*, 192 U.S. 470, 492–93 (1904)—the Constitution unambiguously places in Congress's hands ultimate control over passports and over regulations regarding U.S. citizens born abroad. Congress has regularly legislated in these fields since 1790 without a whisper of protest from the Execu-

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1 This brief was not authored, in whole or in part, by counsel for either party, and no person or entity other than *amici* and their counsel contributed monetarily to its preparation or submission. The parties have consented to the filing of this brief and copies of their letters of consent have been lodged with the Clerk of the Court.

tive, *infra* pp. 7–14, and with the express imprimatur of this Court, *infra* pp. 5–8, 17–18.

In 1856, and again in 1926, Congress passed comprehensive passport acts—still substantially in force today—that, among other things, delegate limited administrative authority over passports to the Secretary of State, while retaining ultimate legislative control for Congress. *Infra* pp. 11–14. This Court has time and again held that the Secretary of State can only exercise discretion regarding passports within the scope of power granted by Congress under these and subsequent acts, *see Kent v. Dulles*, 357 U.S. 116, 129 (1958), and on numerous occasions Congress has expressly limited the discretion of the Executive. *Infra* pp. 10–18. Having delegated (and circumscribed) authority through legislative action, Congress can now further curb and direct the exercise of that authority through subsequent legislation.

The law at issue—Section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350 (2002)—directs the Secretary of State to list the place of birth as "Israel" on passports and documentation of birth abroad for a U.S. citizen born in Jerusalem who requests such a designation. The Executive can neither refuse to execute a valid law, *see* U.S. Const. art. II, § 3 ("take Care that the Laws be faithfully executed"), nor can it legislate in Congress's stead by acting outside the bounds of its delegated authority. *See infra* pp. 15–16. This is particularly so where the Constitution has "expressly conferred upon Congress" control over the subject matter, in which case Congress's power is "complete in itself, acknowledging no limitations other than those prescribed in the Constitution." *Stranahan*, 192 U.S. at 492.

Against this clear constitutional grant of power to the Legislative Branch, and against the unbroken chain of legislation controlling and directing the Executive in this arena, the Executive can muster only the "recognition power"—the power to decide, as a matter of official United States foreign policy and law, which political body or actor legitimately speaks as the sovereign authority of the territory it purports to control, and to what sovereign territory belongs. *See* BIO 12. But Section 214(d) does not direct the Executive in the exercise of the recognition power. *See infra* pp. 18–26.

Understood correctly, Section 214(d) is domestic legislation that merely references territory (Jerusalem) over which a long-recognized sovereign—Israel—exercises day-to-day political control. Black-letter law distinguishes between a sovereign's "effective control" of territory, and "formal recognition" of that control. Restatement (Third) of the Foreign Relations Law of the U.S. § 203(1) (1987); *see also infra* pp. 20 & n.7. And Congress frequently legislates in connection with unrecognized territories—and often must do so, to effectively exercise its control over immigration, naturalization, and foreign commerce—without infringing any Executive recognition power, *infra* pp. 21–26.

The directive to the Secretary of State to permit a person born in Jerusalem to self-identify Israel as his "place of birth" is well within Congress's plenary authority over passports and documentation of birth abroad. The Executive has complied with Congress's identical statutory directive to permit, upon request, "Taiwan" as the place of birth on passports and reports of birth abroad, even though the United States does not recognize Taiwan as a sovereign state or

country. *See infra* p. 23. And the State Department already permits this act of passport self-identification for United States citizens born in the West Bank and the Gaza Strip, neither of which are recognized sovereigns. *Ibid*.

The issue in this case is therefore not whether Congress has the power to direct the Executive to officially recognize a foreign sovereign or determine territorial boundaries—it does not purport to do so here—but only whether an Executive officer may refuse to comply with a valid law enacted under Congress's enumerated powers because the law *relates to* territory about which the United States government has not made a final decision regarding sovereignty. It would be strange indeed for the Constitution's clear and unambiguous provisions granting Congress the legislative power over immigration, naturalization and foreign commerce to mean that it has these powers unless that legislation touches on a disputed territory, in which case Congress has no power at all. The better understanding is that "some power is denied to the President by implication in what is granted to others, principally in Congress," Louis Henkin, *Foreign Affairs and the United States Constitution* 40 (2d ed. 1996), and that the Executive therefore "may not disregard limitations that Congress has, in proper exercise of its own … powers, placed on his powers." *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006). When Congress issues a directive to the Executive in furtherance of the Legislative Branch's exclusive powers, the Executive must comply.

Section 214(d) is valid; it binds the Secretary of State; and it is the duty of this Court to decide the constitutional question at the heart of this case, and to enforce the statute accordingly.

ARGUMENT

I. THE LEGISLATIVE BRANCH DIRECTS AND CONTROLS THE ISSUANCE OF PASSPORTS AND REPORTS OF BIRTH ABROAD UNDER ITS ENUMERATED IMMIGRATION, NATURALIZATION, AND FOREIGN COMMERCE POWERS

A. Since 1790, Congress has regularly exercised its "legislative Powers" over "[Im]migration," "Naturalization," and "Commerce with foreign Nations" to direct and control the issuance of passports and the status of U.S. citizens born abroad

1. By the express terms of the Constitution, Congress—and Congress alone—is granted "legislative Powers" over "[Im]migration," "Naturalization," and "Commerce with foreign Nations." U.S. Const. art. I, §§ 1, 8 & 9. These "exclusive and absolute" powers, *Stranahan*, 192 U.S. at 493 (foreign commerce); *United States v. Wong Kim Ark*, 169 U.S. 649, 701 (1898) (naturalization); *People v. Compagnie Generale Transatlantique*, 107 U.S. 59, 63 (1883) (immigration), necessarily include the power to institute "a system of laws in these matters," *Henderson v. Mayor of N.Y.*, 92 U.S. 259, 274 (1875), "provide a system of registration and identification" with respect to immigration, *Fong Yue Ting v. United States*, 149 U.S. 698, 714 (1893), and "take all proper means to carry out the system which it provides." *Id.*

And these "legislative Powers," over which "Congress has plenary authority," *Buckley v. Valeo*, 424 U.S. 1, 132 (1976), necessarily include the authority to create, delegate to, and direct and control, execu-

tive officers and agencies, who must "execute[] … the[ir] authority according to the regulations so established." *Fong Yue Ting*, 149 U.S. at 713. Such executive officers—agents, really—"may not act contrary to the will of Congress when exercised within the bounds of the Constitution." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 233 (1986). This is especially so where the delegation is ministerial; in such a case, it is "the duty of the secretary of state to conform to the law, and in this he is an officer of the United States, bound to obey the laws." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 156–59 (1803).

Section 214(d), a law passed by Congress in furtherance of its exclusive powers, clearly and explicitly directs a ministerial act of the Secretary of State: "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."

In each area covered by the statute—registrations of birth abroad, certificates of nationality, and passports—Congress has sole and exclusive authority under the Constitution, and in each area Congress has expressly delegated day-to-day administration to the Secretary of State. The direction given to the Secretary of State in these areas by Section 214(d), within the context of that delegated authority, is precise. The will of Congress is clear. The Secretary

must "execute[] … [her] authority according[ly]." *Fong Yue Ting*, 149 U.S. at 713.

2. In furtherance of Congress's exclusive powers over immigration,[2] naturalization, and foreign commerce, Congress has instituted successive regulations governing, among other things, entry to and exit from the United States, culminating in the Immigration and Nationality Act (the "INA"), ch. 477, Pub L. No. 414, 66 Stat. 163 (1952), which "established a 'comprehensive federal statutory scheme for regulation of immigration and naturalization.'" *Chamber of Commerce of the U.S. v. Whiting*, 131 S. Ct. 1968, 1973 (May 26, 2011) (quoting *De Canas v. Bica*, 424 U.S. 351, 353 (1976)).[3] The INA charged the Secretary of State with "the *administration* and the enforcement" of immigration and naturalization

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[2] U.S. Const. art. I, § 9, which forbids federal legislation limiting "migration" before 1808 "includes, necessarily, the power to admit … on such conditions as Congress may think proper to impose" after that date. *Smith v. Turner,* 48 U.S. (7 How.) 283, 454 (1849) (McKinley, J., concurring); *accord Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 216–17 (1824) (Marshall, C.J.). In addition, regulation of the movement of "both men and their goods" is "not only incidental to, but actually of the essence of, the power to regulate commerce." *Gibbons*, 22 U.S. at 231.

[3] *See also, e.g.*, An Act Regulating Passenger Ships and Vessels, ch. 46, §§ 4–5, 3 Stat. 488, 488–89 (1819) (requiring Secretary of State to report annually to Congress the number of immigrants admitted and requiring shipmasters to deliver manifest listing and describing all aliens transported for immigration); An Act to Regulate Immigration, ch. 376, § 2, 22 Stat. 214, 214–15 (1882) (charging Secretary of the Treasury with supervision over immigration).

laws within the parameters set by Congress. INA § 104(a) (emphasis added).

Foreign-born citizens such as Petitioner are not granted citizenship, or any of its attendant rights, by the Constitution, but instead by "congressional generosity." *Rogers v. Bellei*, 401 U.S. 815, 835 (1971). With the first of many such acts—"An Act to Establish an Uniform Rule of Naturalization"—passed at the second session of the First Congress, Congress established that "the children of citizens of the United States that may be born beyond the Sea, or out of the limits of the United States, shall be considered as natural born Citizens," provided the child's father had been "resident in the United States." Ch. 3, § 1, 1 Stat. 103, 104 (1790); *see also Wong Kim Ark*, 169 U.S. at 672–73.[4]

A certificate of nationality or registration of birth (such as a Consular Report of Birth Abroad) is an official record of the United States citizenship of an individual born abroad who has acquired citizenship through U.S.-citizen parents. *See* Green Haywood Hackworth, 3 Dig. Int'l L. 435, 437 (1942); 22 U.S.C.

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[4] Citing, *inter alia*, Acts of Mar. 26, 1790, ch. 3, 1 Stat. 103, 103–04 (1790); Jan. 29, 1795, ch. 20, 1 Stat. 414, 414–15 (1795); June 18, 1798, ch. 54, 1 Stat. 566, 566–69 (1798); Apr. 14, 1802, ch. 28, 2 Stat. 153, 153–55 (1802); Mar. 26, 1804, ch. 47, 2 Stat. 292, 292–93 (1804); Feb. 10, 1855, ch. 71, 10 Stat. 604, 604 (1855); *see also Rogers*, 401 U.S. at 823–31 (tracing history of congressional direction and control over "the acquisition of citizenship by being born abroad of American parents" across two centuries and concluding that the subject is "to be regulated, as it ha[s] always been, by Congress, in the exercise of the power conferred by the constitution to establish an uniform rule of naturalization").

§ 2705(2) (Consular Report of Birth Abroad has force and effect as proof of United States citizenship). Legislation concerning these documents is unquestionably in furtherance of Congress's exclusive authority to establish "an uniform Rule of Naturalization." U.S. Const. art. I, § 8.

3. Congress's immigration, naturalization, and foreign commerce powers give it unchallenged authority over the passport—a "travel control document," *Haig v. Agee*, 453 U.S. 280, 293 (1981), whose "crucial function today is control over exit," *Kent v. Dulles*, 357 U.S. 116, 129 (1958); *see also* INA § 101(a)(30) ("The term 'passport' means any travel document … which is valid for the entry of the bearer into a foreign country.").[5] Congress has legislated regularly with respect to passports since 1790, with Section 214(d) as only the latest in this long line of passport legislation.

The Declaration of Independence lists, among the Founders' grievances against King George III, that "[h]e has … obstruct[ed] the laws for naturalization of foreigners [and] refus[ed] to pass others to encourage their migration hither." The Declaration of Independence para. 9 (U.S. 1776). By 1782, "the passport, although not a required document, was sufficiently recognized that the Continental Congress

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[5] The Executive's characterization of a passport as primarily a "political document" (BIO 9) is anachronistic, to say the least. As this Court explained more than 50 years ago, "[i]n part, of course, the issuance of the passport carries some implication of intention to extend the bearer diplomatic protection …. But that function of the passport is subordinate. Its crucial function today is control over exit." *Kent*, 357 U.S. at 129.

gave the recently created Department of Foreign Affairs" (the precursor to the Department of State) "the responsibility to issue passports in the name of the United States." Craig Robertson, *The Passport in America: The History of a Document* 26 (2010) (emphasis added). The passport became the subject of legislation for the first time in 1790 when Congress passed a law that provided punishment for the "violat[ion of] safe-conduct[s] or passport[s] … issued under the authority of" the United States. An Act for the Punishment of Certain Crimes against the United States, ch. 9, § 28, 1 Stat. 112, 118 (1790).

Congress subsequently enacted several other statutes concerning passports during our nation's early history. In 1803, Congress made it unlawful for an official to knowingly issue a passport to an alien certifying that he is a citizen. An Act to Prevent the Importation of Certain Persons into Certain States, ch. 9, § 8, 2 Stat. 203, 205 (1803). In 1815, just prior to the end of the War of 1812, Congress made it illegal for a citizen to "cross the frontier" into enemy territory, to board vessels of the enemy on waters of the United States, or to visit any enemy camp within the limits of the United States, "without a passport first obtained from the Secretary of State" or another designated federal or state official. An Act to Prohibit Intercourse with the Enemy, ch. 31, § 10, 3 Stat. 195, 199–200 (1815). And in 1850 Congress "ratified a treaty with Switzerland requiring passports from citizens of the two nations." *Kent*, 357 U.S. at 123 (internal citation omitted). Through these legislative acts, Congress—from its moment of birth—established its direction and control in the field of passports, without a whisper of protest from the Executive.

During this early period, "[l]ocalism" dominated governing practices with respect to the issuance of passports, as "governors, mayors, and notaries public could legally issue passports." Robertson, *supra*, at 95, 131; *see also* Melvin Scott, *Passports: A Modern Gordian Knot*, 46 Ky. L.J. 480, 480 (1956–57). Though the federal government "lacked monopoly control over the practice of issuing passports," the "need for regulation … was minimal [as] few people traveled abroad[.]" Jeffrey Kahn, *The Extraordinary Mrs. Shipley: How the United States Controlled International Travel Before the Age of Terrorism*, 43 Conn. L. Rev. 819, 827–28 (2011).

With the expansion of popular travel in the nineteenth century, "American travellers [using] their state passports would find that European countries would not recognize them unless they were endorsed by the local US representative." Martin Lloyd, *The Passport: The History of Man's Most Travelled Document* 81 (Sutton Publ'g 2005). Congress saw the need to remedy this "ludicrous situation," *id.*, and in 1856, Congress acted, passing the first comprehensive passport act. *See* An Act to Regulate the Diplomatic and Consular Systems of the United States, ch. 127, § 23, 11 Stat. 52, 60–61 (1856). The 1856 Act reorganized the diplomatic and consular services, delegated to the Secretary of State alone the power to issue passports ("The Secretary of State shall be authorized to grant and issue passports"), and explicitly forbade any "other person" from granting, issuing or verifying such passports. *Id.* The 1856 Act thus consolidated power to issue passports in the Secretary of State *pursuant to acts of Congress*, establishing the basic framework in which the modern passport developed.

The 1856 Act also forbade the Secretary of State from granting, issuing or verifying "any passport … for any other person than citizens of the United States." *Id.* The exercise of the Secretary of State's discretion under the 1856 Act was thus "'generally confined to requiring full establishment of the citizenship of the applicants, and of … the character of citizenship, to the end that the statute may be obeyed and that passports may issue to none but citizens.'" Robertson, *supra*, at 151 (quoting Adee to Conger (Aug. 24, 1899), *in* U.S. Dep't of State, Foreign Relations 185–87 (1899)); *see also* Scott, *supra*, at 482.

At the start of the twentieth century, as "[p]assports slowly became licenses for international travel," Congress "was more careful to limit Executive discretion when it came to citizens, even during wartime." Kahn, *supra*, at 829. At the end of 1917, "the attorney general ruled that the executive did not have authority to control the departure of aliens, nor the departure and entry of U.S. citizens," without congressional authorization. Robertson, *supra*, at 187. The President thus asked the Secretary of State "to urge upon Congress the passage of the necessary *enabling* legislation, so as to better protect the interests of the country in the present emergency." *Control of Travel From and Into the United States: Hearings on H.R. 10264 Before the H. Comm. on Foreign Affairs*, 65th Cong. 2 (1918) (emphasis added).

Congress complied, but "felt strongly enough about the importance of freedom of movement to heavily encumber the President's power to control it." Kahn, *supra*, at 831. This tightening of the leash manifested itself in the Travel Control Act of 1918, which authorized the President to limit entry

into and departure from the United States of both aliens and citizens alike, but only when the United States was at war. *See* An Act to Prevent in Time of War Departure From or Entry Into the United States Contrary to the Public Safety, ch. 81, § 1, 40 Stat. 559, 559 (1918).

In 1926, Congress passed a revised comprehensive passport act, *see* An Act to Regulate the Issue and Validity of Passports, and For Other Purposes, Pub. L. No. 69-493, 44 Stat. 887 (1926), with the State Department again acknowledging that congressional authorization was required for it to act in the passport sphere. *See, e.g.*, *Validity of Passports: Hearings on H.R. 11947 before the H. Comm. on Foreign Affairs*, 69th Cong. 1, 5, 8, 10-11 (1926) (statement of Assistant Secretary of State Wilbur J. Carr) (asking members of the House of Representatives to "give us the first section [of the pending Passport Act of 1926] … to enable consuls to issue passports"). "The sole [substantive] amendment to the 1926 provision, enacted in 1978, limits the power of the Executive to impose geographic restrictions on the use of United States passports in the absence of war, armed hostilities, or imminent danger to travelers." *Haig*, 453 U.S. at 290 n.18 (citing Foreign Relations Authorization Act, Fiscal Year 1979, Pub. L. No. 95-426, § 124, 92 Stat. 971 (1978)); *see also* Internal Security Act of 1950, Pub. L. No. 81-831, § 6(b), 64 Stat. 987, 993 (1950) (forbidding Secretary's issuance of passports to members of any "register[ed] … Communist-action organization").

Under current law, the Secretary of State may grant and issue passports under such rules as the President of the United States may designate, 22 U.S.C. § 211a, and within the boundaries established

by Congress. The Secretary of State may not designate a passport as "restricted for travel to or for use in any country," except in limited statutorily defined circumstances (*e.g.*, a country with which the United States is at war) (*ibid.*), and may not issue a passport to a person convicted of sex tourism (*id.* § 212a(b)(1)(A)) or drug trafficking (*id.* § 2714). Further, the Secretary of State is directed to revoke any passports previously issued to individuals convicted under either of the aforementioned statutes. *Id.* §§ 212a(b)(1)(B) ("shall revoke"), 2714(a)(2) (same).

In sum, the Secretary of State's administrative authority relating to passports and U.S. citizens born abroad derives from Congress's exclusive powers over immigration, naturalization, and foreign commerce. Congress first passed laws regarding these subjects "[w]ithin 15 years of the founding" (*i.e.*, by 1791); "Congress expanded" these early laws in the 1800s and again in the early 1900s; and across this 200-year history of legislation "there do not appear to have been any serious challenges to [the] statutes" on constitutional grounds. *Nev. Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2348–49 (June 13, 2011) (discussing legislative recusal rules); *see also, e.g.*, *Marsh v. Chambers*, 463 U.S. 783, 790 (1983) (acts passed by the First Congress and "consistent with two centuries of national practice" provide "contemporaneous and weighty evidence" of constitutionality) (internal quotation marks omitted). Here, as in *Carrigan*, this constitutes overwhelming evidence of constitutional acceptability.

B. Because Congress delegated limited administrative authority over passports and reports of birth abroad to the Executive by legislative action, Congress retains the power to further curb and direct the exercise of that authority through subsequent legislation

1. In the Acts of 1856 and 1926, Congress delegated broad administrative authority to the Secretary of State in the area of passport control; control over immigration and naturalization was similarly delegated in the INA, among other statutes. "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress," *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988), and that the "broader power to [grant authority] should include the narrower power to prescribe" the exercise of that authority "in whatever terms Congress sees fit." 13 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 3526 (3d ed. 2008) (discussing regulation of jurisdiction). The Congress giveth and the Congress taketh away.

Thus "[e]xecutive action [under legislatively delegated authority] is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review as well as the power of Congress to modify or revoke the authority entirely." *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983) (internal citations omitted). Should Congress seek to amend its delegation of authority at any point, "[i]t is within the power of Congress to change existing law," *Morse v. Boswell*, 393 U.S. 802, 807 (1968), and the courts are left only to "ascertain

whether the will of Congress has been obeyed" in deciding whether the Executive's actions are proper. *Yakus v. United States*, 321 U.S. 414, 435 (1944).

This is exactly what Congress did here. There is no question that Congress properly delegated to the Secretary of State some of its authority over passports and documentation of birth abroad through a series of legislative actions, some giving the Secretary greater—and some lesser—discretion. With the passage of Section 214(d), Congress modified its earlier delegation and in so doing directed the Secretary of State to perform a ministerial task as an agent of Congress—recording the place of birth of a United States citizen born in the city of Jerusalem as Israel.

In this way, Congress directed the Secretary of State to execute her delegated authority in a particular manner. The Secretary of State, "as all others, is bound by the provisions of Congressional legislation," *Ballinger v. United States*, 216 U.S. 240, 249 (1910) (granting mandamus to compel Secretary of the Interior), and must perform "a ministerial act which the law enjoins" on her. *Marbury*, 5 U.S. (1 Cranch) at 156–59. Any attempt to modify that direction—for example, the State Department's promulgation of a rule that requires administrative officers to write "Jerusalem" instead of "Israel" as the place of birth—is an unconstitutional usurpation of Congress's legislative powers. *Morse*, 393 U.S. at 804–05 (finding that a certain Executive order went "beyond the … language of delegation" and was thus unconstitutional).

2. Early in our nation's history, this Court faced a case, like this one, in which a Presidential imperative ran afoul of a congressional statute. *Little v. Barreme*, 6 U.S. (2 Cranch) 169 (1804), was a suit

alleging that a naval officer under express orders from the Executive to seize ships sailing to or from French ports had acted in abrogation of an act of Congress allowing the seizure of ships only if they were sailing *to* those ports. Chief Justice Marshall held that "[presidential] instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass." *Little*, 6 U.S. (2 Cranch) at 179. This Court thus ruled that an action of a member of the Executive Branch (a military officer no less), acting under direct instructions by the President, and of "pure intent," had acted improperly in failing to adhere to a congressional command. *Id*. at 179. So, too, here.

Little foreshadows this Court's decisions in the passport field, which make clear that the scope of the Secretary of State's passport power is grounded in, and dependent on, legislative approval—and that the Secretary cannot ignore a valid statutory directive. In *Kent*, this Court struck down the Secretary's practice of refusing to issue passports on the ground that an individual was affiliated with Communists because, "[w]ithout explicit congressional authorization to refuse passports on the basis of beliefs or associations, the Secretary could not employ such a standard." 357 U.S. at 127, 129.

In *Haig*, this Court held that the Secretary of State *could* revoke a passport on the ground that the passport holder's activities were likely to cause serious damage to national security or foreign policy because there was evidence that "compel[led] the conclusion that *Congress ha[d] approved* of such revocations," 453 U.S. at 306 (emphasis added); *see also id.* at 289 ("The principal question before us is

whether the statute authorizes the action of the Secretary ....”). Finally, in *Zemel v. Rusk*, this Court examined “whether the Secretary is *statutorily authorized* to refuse to validate … passports … for travel to Cuba.” 381 U.S. 1, 3 (1965) (emphasis added). In answering in the affirmative, the Court explained that “the Passport Act of 1926 ... embodie[d] a grant of authority to the Executive to refuse to validate the passports of United States citizens for travel to Cuba.” *Id.* at 7; *see also id.* at 8 (“Congress intended in 1926 to maintain in the Executive the authority to make such restrictions.”). The passport cases show that the Secretary’s discretionary power in the passport arena must only be exercised with congressional approval. Where, however—as here—the statute “do[es] not delegate to the Secretary the kind of authority exercised,” *Kent*, 357 U.S. at 129, the Secretary’s policy cannot stand.

II. SECTION 214(D) OF THE FOREIGN RELATIONS AUTHORIZATION ACT, FISCAL YEAR 2003 DOES NOT IMPLICATE THE “RECOGNITION POWER”

1. Where Congress has invoked powers that are granted to it exclusively, the Executive “*may not disregard* limitations that Congress has, in proper exercise of its own … powers, placed on his powers.” *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006) (emphasis added).[6] The Executive nevertheless argues that it is justified in its refusal to comply with Section 214(d) because the law impermissibly “over-

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[6] *See also id.* at 639, 646 (Breyer, J., concurring); *id.* at 679 (Thomas, J., dissenting) (agreeing with majority’s analytical framework but concluding that Congress had in fact authorized the President’s actions).

ride[s] or intrude[s] on" the President's "exclusive power to recognize foreign sovereigns." BIO 12. The "recognition power" is the power to decide, as a matter of official United States foreign policy and law, which political body or actor legitimately "speaks as the sovereign authority of the territory it purports to control," *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964), and "to what sovereignty" territory legitimately belongs, *Williams v. Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415, 420 (1839). Article II, Section 3 of the Constitution assigns to the President the duty to "receive Ambassadors and other Public Ministers." This Court has noted (in dicta) that, by implication, the President holds "the authority to recognize the foreign sovereign that sends the ambassador or public minister the President chooses to receive." BIO 8–9 (citing *Sabbatino*, 376 U.S. at 410; *United States v. Pink*, 315 U.S. 203, 229 (1942); *Suffolk*, 38 U.S. (13 Pet.) at 420).

The Executive properly takes the lead in recognizing foreign sovereigns. At the same time, the Legislative Branch retains the power to make laws that relate to disputed territories, without addressing the question of recognition. Congress has often done just that, *see infra* pp. 21–26, and rightfully so; a rule that forbade Congress from enacting any law relating to disputed territories, even if it does not speak to recognition policy, would render Congress impotent in large swaths of its core legislative powers. Can it not make laws governing immigration from unrecognized sovereigns? Laws of commerce that relate to those nations? It certainly can, and often does, without implicating the recognition power at all.

2. Blackletter law distinguishes between the existence of a foreign government ("effective control of [a] state") and the legitimacy of that government—that is, "formal recognition." Restatement (Third) of the Foreign Relations Law of the U.S. § 203(1) (1987).[7] The State Department, in its rules implementing the authority granted it by Congress to issue passports, makes this same distinction between political control ("what country now has sovereignty") and formal recognition ("whether that sovereignty is recognized by the United States"). 7 Foreign Affairs Manual 1300 *et seq.* App'x D (Nov. 2010) ("7 F.A.M.") at 1340(a). Similarly, the standards developed and maintained by the Office of the Geographer, the State Department office responsible for determinations of sovereignty, 7 F.A.M. at 1330(a), include "political regimes not recognized by the United States" as one of the "[b]asic geopolitical entities." Federal Information Processing Standard (FIPS) Pub. 10-4, Countries, Dependencies, Areas of Special Sovereignty, and Their Principal Administrative Subdivisions (Apr. 1995) (withdrawn in accordance with 73 Fed. Reg. 51,276 (Sept. 2, 2008)).

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[7] *See also, e.g.*, 22 U.S.C. § 611(e) ("The term 'government of a foreign country' … shall include any faction or body of insurgents within a country assuming to exercise governmental authority whether such faction or body of insurgents has or has not been recognized by the United States."); Restatement (Third) of the Foreign Relations Law of the U.S. §§ 201 & 202 (distinguishing between satisfying requirements of statehood and "formal recognition" of a state); *id.* § 205 (discussing which acts of unrecognized governments are given effect under U.S. law); Webster's New International Dictionary 2406 (2d ed. 1939) (defining "sovereignty" as "the power that determines and administers the government of a state in the final analysis").

Congress can, and in many instances must, make law that covers such non-recognized territories in furtherance of its immigration, naturalization, and foreign commerce powers. For example, Congress has long established immigration quotas by country, *see, e.g.*, Emergency Quota Act, ch. 8, § 2, 42 Stat. 5 (1921); Refugee Relief Act of 1953, Pub. L. No. 83-203, § 4, 67 Stat. 400 (1953), and has at the same time made clear that such legislation about a particular non-recognized sovereign "shall not constitute … recognition of a government not recognized by the United States." INA § 202(d).

For the purposes of criminal law, Congress has defined "foreign government" to include "any government … within a country with which the United States is at peace, *irrespective of recognition by the United States*." 18 U.S.C. § 11 (emphasis added). It has done so in order to ensure that crimes relating to chemical weapons development, stockpiling, transfer and use (*id.* §§ 229 *et seq.* & 229F(5)), counterfeiting of bills, notes, and bonds (*id.* § 478), smuggling (*id.* § 546), and espionage (*id.* §§ 792–798), among many others, apply without regard for whether the foreign government to which weapons or secrets have been passed, goods smuggled, or bills counterfeited has been formally recognized.[8] There is no reason to

[8] Title 18 similarly criminalizes the assault (18 U.S.C. § 112), extortion (*id.* § 878), property destruction (*id.* § 970), murder (*id.* § 1116) and kidnapping (*id.* § 1201) of any foreign official, whether of a recognized government or not. *See id.* § 1116(2) ("'Foreign government' means the government of a foreign country, irrespective of recognition by the United States."); *id.* §§ 112, 878, 970 (incorporating this definition of foreign government).

think that Congress intends to enter the recognition arena simply because legislation relates to territorial control that the United States does not recognize.

Here, Congress has made a decision—well within its plenary authority over passports and documentation of birth abroad—that, on request, a person born in Jerusalem may list Israel as his "place of birth." The Executive mistakenly equates this directive regarding "place of birth" with an attempt to override the President on a question of recognition. But "place of birth" does not mean or imply a recognized government; "place" refers instead to any "region; locality; spot." Webster's New International Dictionary 1876 (2d ed. 1939); *accord, e.g.*, Random House Webster's Unabridged Dictionary 1478 (2d ed. 2001) ("a region or area"). It "*may* describe a foreign State in the international sense," but it also "may embrace all the territory subject to a foreign sovereign power." *Burnet v. Chicago Portrait Co.*, 285 U.S. 1, 5–6 (1932) (discussing meaning of "country") (emphasis added); *see also Rogers v. Cheng Fu Sheng*, 280 F.2d 663, 664–65 (D.C. Cir. 1960) (holding that Formosa (*i.e.*, Taiwan) was a "country" under INA § 243(a), despite "its status being in limbo," because "there is a government on Formosa which has undisputed control of the island"). In the context of passports and reports of birth abroad, the purpose of a "place of birth" designation is only "to assist in identifying the individual," 7 F.A.M. at 1310(g)(2), not to legislate recognition. *Cf. Burnet*, 285 U.S. at 6 ("the sense in which ['country'] is used in a statute must be determined by reference to the purpose of the particular legislation"). Congress thus permitted a person born in Jerusalem to self-identify as being born in Israel, without legislating in the recognition sphere.

Indeed, the State Department already permits this act of passport self-identification for U.S. citizens born in the West Bank and the Gaza Strip, 7 F.A.M. at 1360(c) & (d)—neither of which are recognized sovereigns, *see id.* at 1360(a) ("U.S. policy recognizes that … the West Bank and the Gaza Strip are territories whose final status must be determined by negotiations")—apparently in light of the de facto existence of those territories.

Similarly, Congress directed the Secretary of State to include "Taiwan" as the place of birth on passports and reports of birth abroad, when requested to do so by applicants born there, Foreign Relations Authorization Act, Fiscal Years 1994 & 1995, Pub. L. No. 103-236, § 132, 108 Stat. 382 (1994) ("For purposes of the registration of birth or certification of nationality of a United States citizen born in Taiwan, the Secretary of State shall permit the place of birth to be recorded as Taiwan."), even though the United States does not recognize Taiwan as a state or country, and instead takes the official position that "Taiwan is a part of China." 7 F.A.M. at 1340(d)(6)(f); *see also id.* at 1310(h) (place names described in the 7 F.A.M. appendix are also used for issuance of reports of birth abroad). In that instance—unlike this one—the Executive has complied. *Id*. at 1340(d)(6)(d).

3. Congress has regularly legislated in relation to disputed territories in furtherance of its enumerated legislative powers—even when the issue is sensitive from a foreign relations perspective—without

any objection from the Executive.[9] This "abundant statutory precedent" has "never been considered invalid as an invasion of [Executive] autonomy," and provides overwhelming evidence that the exercise of congressional power here does not "impermissibly intrude[] into the executive function." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 445, 449 (1977); *see also, e.g.*, *Carrigan*, 131 S. Ct. at 2349. The United States government refers to Jerusalem as a city in Israel in numerous other contexts, from foreign trade to the workings of the U.S. mail, without any suggestion from the Executive that such acknowledgment of

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[9] *See, e.g.*, Taiwan Relations Act, Pub. L. No. 96-8, 93 Stat. 14 (1979) (codified at 22 U.S.C. § 3301 *et seq.*) (granting Taiwan many of the rights of recognized sovereigns, without changing unrecognized status, including right to sue and be sued, normal application of its laws, right to own property in the United States, and export licenses under nuclear non-proliferation and nuclear energy treaties); United States-Hong Kong Policy Act of 1992, Pub. L. No. 102-383, 106 Stat. 1448 (1992) (codified at 22 U.S.C. § 5721 *et seq.*) (providing, *inter alia*, that "the laws of the United States shall continue to apply" with respect to Hong Kong "[n]otwithstanding any change in the exercise of sovereignty over Hong Kong" (*i.e.*, transfer of sovereignty from the United Kingdom to China), unless modified by law or executive order); Cuban Democracy Act of 1992, Pub. L. No. 102-484, 106 Stat. 2315 (1992) (codified at 22 U.S.C. § 6001 *et seq.*) (establishing, *inter alia*, that "[e]xports [to Cuba] of medicines or medical supplies, instruments, or equipment shall not be restricted" except under enumerated circumstances, that "[t]elecommunications services between the United States and Cuba shall be permitted," and the "United States Postal Service shall take such actions as are necessary to provide direct mail service to and from Cuba"); *see also supra* pp. 20–23.

political control infringes on the recognition power.[10] Section 214(d) is no different.

This Court faced a similar issue in *Smith v. United States*, 507 U.S. 197 (1993), when it considered the argument that because Antarctica has no "recognized government," it is not a "country" under the Foreign Tort Claims Act. *Id*. at 200–01. This Court found that "the commonsense meaning of the term ['country'] undermines petitioner's attempt to equate it with 'sovereign state,'" because the "dictionary definition of 'country' is simply '[a] region or tract of land.'" *Id.* (quoting Webster's New International Dictionary 609 (2d ed. 1945)). The lower courts have time and again understood Congress to have intended to include non-recognized territories with the word "country."[11] Thus, in *Smith*, the Court concluded that "the ordinary meaning of the

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[10] *See, e.g.*, Expansion of Global Priority Mail, 63 Fed. Reg. 3814, 3815–16 (Jan. 27, 1998) (codified at 39 C.F.R. pt. 20) (Global Priority Mail to "Israel" can be sent "to Jerusalem, Tel Aviv, and Haifa"); Mission Statement for Executive-Led Trade Mission to Jordan and Israel, 75 Fed. Reg. 58,356, 58,356 (Sept. 24, 2010) ("The United States Department of Commerce, International Trade Administration, U.S. and Foreign Commercial Service is organizing a Trade Mission to Amman, Jordan, and *Jerusalem and Tel-Aviv, Israel*.") (emphasis added).

[11] *See, e.g., United States ex rel. Leong Choy Moon v. Shaughnessey*, 218 F.2d 316, 318 (2d Cir. 1954) (holding, in the context of deportation under INA § 253(a), that Congress intended the term "country" to include countries not recognized by the United States); *Chan Chuen v. Esperdy*, 285 F.2d 353, 354 (2d Cir. 1960) (holding that Hong Kong was a "country" under INA § 253(a) because its government, despite not being recognized, had the authority to accept a deportee).

language itself"—there, "country"—"includes Antarctica, even though it has no recognized government," 507 U.S. at 201, without legislating in the recognition sphere. There is no reason for this Court to read the congressional directive regarding "place of birth"—which is, if anything, a more general term—in any other way.

This Court should finally place its full weight behind the long-standing actions of Congress in the field, and hold that Congress has the authority to legislate in connection with disputed territories. Congress often does—and, in furtherance of its sole and exclusive legislative powers, often must—make law that relates to non-recognized governments and disputed territories, without entering the field of recognition. When it does, the Executive must yield to the directives of the Legislative Branch. Section 214(d), which merely permits an individual to choose a "place of birth" that correlates with effective political control—without directing the Executive to alter its official recognition policy—does not implicate the recognition power at all.

III. THE FEDERAL COURTS HAVE THE DUTY AND RESPONSIBILITY TO DECIDE THE SEPARATION OF POWERS QUESTION

This case presents a straightforward question of constitutional interpretation: Does Congress have the legislative power to direct the Secretary of State to perform ministerial duties relating to the issuance of passports and documentation of a United States citizen's birth abroad, or, because the legislation at issue relates tangentially to a disputed territory, is it "unconstitutional" (BIO 12)?

In such a case, it is not difficult to dispense with the political question doctrine argument: This Court

unquestionably "has the duty to review the constitutionality of congressional enactments," *United States v. Munoz-Flores*, 495 U.S. 385, 391 (1990), especially where resolution of the case "would require no more than an interpretation of the Constitution." *Powell v. McCormack*, 395 U.S. 486, 548 (1969). "The alleged conflict [with the interpretation of a coordinate branch] that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility." *Id.* at 532. "If it [did], *every* judicial resolution of a constitutional challenge to a congressional enactment would be impermissible." *Munoz-Flores*, 495 U.S. at 390 (emphasis in original).

The Executive relies on *Baker v. Carr*, 369 U.S. 186 (1962), this Court's landmark political question decision, in arguing that the issue here is "textually committed" to the President and thus presents a political question. BIO 10–12. But this Court in *Baker* could not have been clearer that the decision "whether the action of [a coordinate branch] exceeds whatever authority has been committed … is a responsibility of this Court as ultimate interpreter of the Constitution." 369 U.S. at 211. More recent cases confirm that the "textually committed" test is "inapplicable" in a challenge to the constitutionality of a statute, which is emphatically "a decision for the courts" and *not* for "Congress or the Executive." *INS v. Chadha*, 462 U.S. 919, 941–42 (1983). The other *Baker* factors similarly present no obstacle here: "[C]learly there are 'judicially manageable standards'" for the "interpretation of the Constitution," *Powell*, 395 U.S. at 548, and these well-developed standards "forestall reliance by this Court on nonjudicial 'policy determinations' or any showing of disrespect for a coordinate branch" in resolving the

constitutional question. *Chadha*, 462 U.S. at 942; *cf. Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986) ("we cannot shirk this responsibility").

The separation of powers issue in this case is as fundamental as it gets: The Legislative Branch has passed a valid law in the realm of passports and documentation of birth abroad under its enumerated and exclusive "legislative Powers"; the Executive refuses to comply, citing Article II. It is now the duty and responsibility of the Judicial Branch to decide between the two. This Court is uniquely qualified to perform that task, and should do so now.

CONCLUSION

The judgment of the United State Court of Appeals for the District of Columbia Circuit should be reversed.

Respectfully submitted.

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August 5, 2011

APPENDIX

APPENDIX A:

Amici Curiae Members of The United States Senate

This Appendix provides *amici*'s affiliations for identification purposes.

Daniel K. Akaka (D-HI)
United States Senator

Kelly Ayotte (R-NH)
United States Senator

Mark Begich (D-AK)
United States Senator

Richard Blumenthal (D-CT)
United States Senator

John Boozman (R-AR)
United States Senator

Barbara Boxer (D-CA)
United States Senator

Sherrod Brown (D-OH)
United States Senator

Robert P. Casey, Jr. (D-PA)
United States Senator

Daniel Coats (R-IN)
United States Senator

Susan M. Collins (R-ME)
United States Senator

Kirsten E. Gillibrand (D-NY)
United States Senator

Dean Heller (R-NV)
United States Senator

James M. Inhofe (R-OK)
United States Senator

Daniel K. Inouye (D-HI)
United States Senator

Mark Kirk (R-IL)
United States Senator

Jon Kyl (R-AZ)
United States Senator

Frank R. Lautenberg (D-NJ)
United States Senator

Carl Levin (D-MI)
United States Senator

Joseph I. Lieberman (I-CT)
United States Senator

Joe Manchin III (D-WV)
United States Senator

Claire McCaskill (D-MO)
United States Senator

Bill Nelson (D-FL)
United States Senator

E. Benjamin Nelson (D-NE)
United States Senator

Harry Reid (D-NV)
United States Senator

James E. Risch (R-ID)
United States Senator

Marco Rubio (R-FL)
United States Senator

Charles E. Schumer (D-NY)
United States Senator

Ron Wyden (D-OR)
United States Senator

APPENDIX B:

Amici Curiae Members of The United States House of Representatives

This Appendix provides *amici*'s affiliations for identification purposes.

Gary Ackerman (D-NY-5)
United States Representative

Shelley Berkley (D-NV-1)
United States Representative

Howard L. Berman (D-CA-28)
United States Representative

Dan Burton (R-IN-5)
United States Representative

Steve Chabot (R-OH-1)
United States Representative

Eliot L. Engel (D-NY-17)
United States Representative

Ileana Ros-Lehtinen (R-FL-18)
United States Representative

Jerrold Nadler (D-NY-8)
United States Representative

Dennis Ross (R-FL-12)
United States Representative

Steven Rothman (D-NJ-9)
United States Representative

Aaron Schock (R-IL-18)
United States Representative