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

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Petitioner has repeatedly emphasized that this lawsuit does not affect the United States' official position on the status of Jerusalem. This Court is not being asked to award Jerusalem to Israel or to jeopardize Middle East peace negotiations. Nor does the statutory provision at issue here prescribe, as the Solicitor General misleadingly asserts, that "Jerusalem should be recognized as the capital of Israel." Brief for the Respondent ("Resp. Br.") 50. Nonetheless, the Solicitor General's brief argues that a ruling in petitioner's favor will endanger American foreign-policy in the Middle East.

This greatly exaggerates the impact of a judicial ruling sustaining Congress' narrow and focused legislation. The State Department claims that if American citizens who are natives of Jerusalem identify as born in "Israel," the ***perception*** (albeit mistaken) of Arab states will be that official American policy on Jerusalem has changed. There is no evidence whatever that this misperception will result from a legally mandated change in how some American citizens are identified in their birth certificates or passports. Nor does the Solicitor General specify how such a mistaken perception, if it does materialize, will harm American interests. Instead, he tells this Court that the President may nullify an Act of Congress without making any "showing that a particular recognition policy is necessary to avoid adverse foreign-policy consequences." Resp. Br. 40-41.

Congress apparently did not believe that permitting Jerusalem-born American citizens to be identified as born in "Israel" would harm American foreign policy. The Solicitor General, however, fails to provide any justification for the State Department's dire predictions of "adverse foreign-policy consequences" other than to cite the State Department's own Answers to Interrogatories. He asserts that anyone who questions the basis for the President's refusal to implement the right "seeks to supplant the Executive's foreign-policy judgments with his own." Resp. Br. 41. No one may demand a rational explanation for the President's "foreign-policy judgment."

Section 214(d) has limited impact. It does not restrict the President's formulation and execution of any future foreign-policy measure. It simply grants a personal choice to American citizens to be identified in a certain manner in documents issued by the Department of State. Congress has the constitutional power to grant that right to holders of American passports or Americans requesting birth certificates for their children.

Section 214(d) remedies the discrimination that results from State Department regulations that permit American citizens who object to having "Israel" listed as their place of birth to substitute their city of birth. Congress' law gives comparable respect to American citizens born in Jerusalem who are proud to identify themselves as born in Israel.

ARGUMENT

I.

HISTORY REFUTES THE SWEEPING "RECOGNITION POWER" ASSERTED BY THE RESPONDENT

The Solicitor General's Brief marshals fragments of memoirs and occasional Congressional and Executive Branch reports to support its contention that the language of the "Reception Clause" of Article II, Section 3, to "receive Ambassadors and other public Ministers" includes an *exclusive* Presidential power (1) to recognize foreign governments, (2) to determine the policies that govern recognition questions, and (3) to determine the territorial boundaries of foreign states. Resp. Br. 18.

There is, however, substantial proof to the contrary.

A. The Expressed Views of Chief Justice John Marshall.

The Solicitor General quotes the instruction given to a jury by Chief Justice Marshall sitting as a trial judge in a piracy case (*United States v. Hutchings*, 26 F. Cas. 440, 442 (C.C.D. Va. 1817) (Resp. Br. 24)), but disregards entirely the decision of the following year in *United States v. Palmer*, 16 U.S. (3 Wheat.) 610 (1818), rendered by the full Supreme Court in another piracy prosecution. The Court's certified holding in *Palmer* stated (16 U.S. (3 Wheat.) at 643 (emphasis added)):

> [W]hen civil war rages in a foreign nation, one part of which separates itself from the old established government, and erects itself into a distinct government, the courts of the union must view such newly constituted government *as it is viewed by the legislative and executive departments of the government of the United States*.

In the Court's opinion in *Palmer*, Chief Justice Marshall observed that the "delicate and difficult" issues affecting recognition of a foreign government are "rather political than legal in their character" and that they "belong more properly to those who can declare what the law shall be" than to the courts. 16 U.S. (3 Wheat.) at 634.

Chief Justice Marshall's statement in *Palmer* that the "political" task of recognition belongs "to those who can declare what the law shall be" and his Court's directive in *Palmer* that "the legislative and executive departments" are where courts should look for guidance on recognition issues indicate that recognition is a responsibility shared by Congress and the President. This Court reiterated the *Palmer* formulation that the recognition power is shared by Congress and the President in *Jones v. United States*, 137 U.S. 202, 212 (1890) (emphasis added):

> Who is the sovereign, de jure or de facto, of a territory, is not a judicial, but a political, question, the determination of which *by the legislative and executive* departments of any govern-

> ment conclusively binds the judges, as well as all other officers, citizens, and subjects of that government.

This observation was not limited, as the Solicitor General asserts (Resp. Br. 28, 30-31 n. 11), to "whether certain land was within United States territory." It was quoted in full in *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918), in which the issue was which of two competing governments of Mexico should be recognized in United States courts. This Court said in *Oetjen* that "The conduct of foreign relations of our government is committed by the Constitution to the *executive and legislative* – 'the political' – departments of the government . . . ." 246 U.S. at 302 (emphasis added)

B. President George Washington's Recognition of the Revolutionary French Governments.

The very recent research of Professor Robert J. Reinstein into President Washington's recognition of revolutionary French governments during the Neutrality Crisis of 1792-1794 establishes that President Washington was acting under compulsion of what was then believed to be the law of nations, and was not exercising any discretionary recognition power. *See* Robert J. Reinstein, *Executive Power and the Law of Nations in the Washington Administration*, __ U. Rich. L. Rev. __ (forthcoming January 2012), *available at* http://ssrn.com/abstract=1803496 (hereinafter "Reinstein–Washington"). This was also the conclusion of Professor David Gray Adler in *The President's Recognition Power*, *in* The Constitution and the Conduct of American Foreign

Policy 138-139 (David Gray Adler & Larry N. George eds., 1996).

The Founding Fathers believed that the law of nations was part of the law of the land, and that it was binding on the Executive and Judicial departments. The Washington Administration and the federal courts drew the obligatory doctrines of the law of nations from the treatises of Continental jurists, relying particularly on the doctrines of Emmerich de Vattel.

One of Vattel's central doctrines was *de facto* recognition – *i.e.*, the obligation of a nation to recognize any foreign government that is "in actual possession" of the instruments of national power, regardless of how it gained power or the form of the government it established. Refusal to recognize a *de facto* government because of objection to its legitimacy was, according to Vattel, so serious as to amount to a *causus belli*. Reinstein-Washington 63-64.

In a statement that had been preapproved by President Washington,[1] Secretary of State Thomas Jefferson explained the decision to recognize one revolutionary French government by invoking Vattel's mandatory doctrine of *de facto* recognition. Jefferson to Gouverneur Morris, Minister to France (March 12, 1793), *in* 25 *The Papers of Thomas Jefferson* 367 (John Catanzariti et al. eds. 1995) ("*Jefferson Papers*"):

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[1] 24 *The Papers of Thomas Jefferson* 804 (John Catanzariti et al. ed. 1995).

> We surely cannot deny to any nation that right where on our own government is founded, that every one may govern itself according to whatever form it pleases, and change these forms at its own will: and that it may transact its business with foreign nations through whatever organ it thinks proper, whether king, convention, assembly, committee, president or any thing else it may chuse. The will of the nation is the only thing essential to be regarded.[2]

President Washington also expressed his disagreement with the revised views of Alexander Hamilton as Hamilton published them in 1793 under the pseudonym "Pacificus." He told Jefferson that he was "certainly uneasy about those [doctrines] grasped by Pacificus." Jefferson to Madison (Aug. 3, 1793), 26 *Jefferson Papers* 606.

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[2] Jefferson used virtually identical language in explaining the earlier recognition in a letter to Thomas Pinckney, Minister to Great Britain. Jefferson to Pinckney (Dec. 30, 1792), *in* 24 *Jefferson Papers* 803. Chief Justice John Jay also took the position that recognition of the French governments and the exchange of diplomats were required by the law of nations. Jay to Alexander Hamilton (Draft Neutrality Proclamation, April 11, 1793), *in* 14 *The Papers of Alexander Hamilton* 308-309 (Harold C. Syrett ed. 1969).

C. President Monroe and the Latin American Republics.

In 1816, the United Provinces of Rio de la Plata declared independence from Spain. Uncertain whether he had the power to recognize the new republics, Monroe asked his Cabinet whether the Executive possessed "power to acknowledge the independence of new States whose independence has not been acknowledged by the parent country, and between which parties a war actually exists on that account?" James Monroe to the Members of the Cabinet (October 15, 1817), *in* 6 *The Writings of James Monroe* 31 (Stanislaus M. Hamilton ed. 1969).[3]

In December 1817, Representative Henry Clay announced that he intended to introduce a resolution moving the recognition of Buenos Ayres. No one suggested that this was an infringement of an exclusively executive power. Julius Goebel, *The Recognition Policy of the United States* 121 (1915). On March 24, 1818, Clay introduced a bill appropriating $18,000 for a minister to be sent from the United States to the de la Plata provinces. 32 Annals of Cong. 1468-69 (1818). Clay's motion was opposed by the Monroe administration and failed in the House. Resp. Br. 22.

[3] Secretary of State John Quincy Adams expressed his view at this juncture that the President possessed that authority, but he opposed its exercise at that time. Resp. Br. 22; Goebel, *supra*, at 121-123.

In 1819, American and Spanish negotiators signed a treaty in which Spain ceded Florida to the United States. Although the Senate approved the treaty, Spain did not. The Spanish minister insisted that, as a condition for ratification, the United States make a commitment not to recognize the new republics.[4]

In April 1820, Clay renewed his motion to appropriate funds to send a minister to the countries in Latin America that had established their independence. This time, Clay's motion was passed in the House by a narrow vote. Goebel, *supra*, at 131-132; 36 Annals of Cong. 1781-82 (1820).[5] It was not implemented, however, because of concern over the fate of the Florida treaty. Samuel Flagg Bemis, *A Diplomatic History of the United States* 200 (1936).

Clay renewed his motion on February 3, 1821, and it failed by a narrow vote. A non-binding motion was then approved in the House by a large majority. Goebel, *supra*, at 133.

On February 22, 1821, Spain ratified the Florida treaty, thereby removing the major political barrier to recognition of the new republics. Instead of unilaterally recognizing them – as he could have done if he had agreed with John Quincy Adams' view that he possessed this power exclusively – President Monroe sent a message to Congress urging Congress

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[4] Although Adams rejected this ultimatum, he continued to oppose recognition of the new republics because it could jeopardize Spain's ratification of the Florida treaty. Goebel, *supra*, at 128-131.

[5] The Solicitor General's Brief fails to mention this vote.

to act jointly with him in granting recognition because the republics had, *de facto*, secured their independence. To the Senate and House of Representatives of the United States (March 8, 1822), *in Writings of James Monroe*, *supra*, at 207-211. Congress then enacted legislation appropriating $100,000 to fund diplomatic missions to the "independent nations of the American continent." Bemis, *supra*, at 200-201.

The Solicitor General's recitation of this history is flawed in several respects: *First*, on one vote not included in the Solicitor General's account, the House approved Speaker Clay's motion. *Second*, although some Members of the House opposed the motion on constitutional grounds, others expressed opposition because (a) there was uncertainty whether the newly proclaimed republics had actually secured their independence from Spain, (b) recognition of the new republics was opposed by Great Britain and other European powers (Bemis, *supra*, at 202), (c) there was concern that premature recognition would jeopardize the acquisition of Florida, and (d) there was great political rivalry between Clay and Adams, each of whom was seeking the presidency in the next election. *Finally*, President Monroe ultimately was unwilling to exercise any "recognition power" on his own and sought joint action with Congress to grant official recognition to the new republics.

D. President Jackson and the Republic of Texas.[6]

The Republic of Texas was created in 1836 following a successful revolution against Mexico. (Texas was not annexed by the United States until 1847.) Its leaders began demanding recognition from the United States as an independent republic. Both Houses of Congress resolved that the independence of Texas should be recognized "whenever satisfactory information shall be received that it has in successful operation a civil Government capable of performing the duties and fulfilling the obligations of an independent Power." Cong. Globe, 24th Cong., 1st Sess. 453 (1836) (Senate resolution); H.R. Rep. No. 24-854, at 1 (1st Sess. 1836) (House Resolution).

President Jackson then sent a message to Congress in which he observed that it was unsettled which branch of government held the recognition power. Message from the President of the United States Upon the Subject of the Political, Military and Civil Condition of Texas, H.R. Doc. No. 24-35, at 2 (2d Sess.) (December 22, 1836):

> Nor has any deliberate inquiry ever been instituted in Congress, or in any of our legislative bodies, as to whom belonged the power of originally recognising a new state – a power, the exercise of which is equivalent, under some circumstances, to a declaration of war – a power nowhere expressly delegated, and only granted in the

[6] The Solicitor General's Brief fails to mention the recognition of the Republic of Texas.

> constitution, as it necessarily involved in some of the great powers given to Congress; in that given to the President and Senate to form treaties with foreign powers, and to appoint ambassadors and other public ministers; and in that conferred upon the President to receive ministers from foreign nations.

The President then said that it was unnecessary to resolve this constitutional issue because the prudent course was for Congress and the Executive to work together. He followed with his own opinion that the recognition of Texas was premature, but if Congress disagreed, "I shall promptly and cordially unite with you." *Id.* at 4.

The House passed a resolution on February 28, 1837, appropriating funds for a diplomatic envoy to Texas whenever the President "may receive satisfactory evidence that Texas is an independent power, and shall deem it expedient to appoint such a minister." Cong. Globe, 24th Cong., 2nd Sess. 194 (1837). On the following day, the Senate approved the appropriation of funds for a diplomat to be sent to Texas and adopted a more strongly worded resolution (*id.* at 83, 214):

> Resolved, That the State of Texas having established and maintained an independent Government, capable of performing those duties, foreign and domestic, which appertain to independent Governments, and it appearing that there is no longer any reasonable prospect of the successful

> prosecution of the war by Mexico against said State, it is expedient and proper, and in perfect conformity with the laws of nations, and the practice of this Government in like cases, that the independent political existence of said State be acknowledged by the Government of the United States.

On his last day in office, President Jackson completed the recognition of Texas by reciting the resolutions passed by the House and Senate and concluding: "Regarding these proceedings as a virtual decision of the question submitted by me to Congress, *I think it my duty to acquiesce therein*, and therefore I nominate Alcee La Branche, of Louisiana, to be charge d'affaires to the Republic of Texas." Andrew Jackson, *Message to the Senate* (March 3, 1837) (emphasis added), *in* 3 *Andrew Jackson: A Compilation of the Messages and Papers of the Presidents*, at 366 (James D. Richardson ed. 2004).

The history of the recognition of Texas is one in which the Congress effected the recognition and the President "acquiesced.

E. President Taylor and the Hungarian Revolution.[7]

A revolution seeking to replace Austria's monarchical rule with an independent republic erupted in Hungary in 1848. Under instructions from President Taylor, A. Dudley Mann was appointed as a special agent to Hungary. Secretary of State Clayton wrote to Mann on June 18, 1849: "If it shall appear that Hungary is able to maintain the independence she has declared, we desire to be the very first to congratulate her, and to hail, with a hearty welcome her entrance into the family of nations." Letter from Clayton to Mann (June 18, 1849), S. Exec. Doc. No. 31-43, at 3 (1850). Clayton's instructions to Mann, apparently approved by President Taylor, continued with the following observations manifesting the Executive Branch's view that Congress had the recognition power (*id.* at 5-6; emphasis added):

> Should the new government prove to be, in your opinion, firm and stable, *the President will cheerfully recommend to Congress, at their next session, the recognition of Hungary*; and you might intimate, if you should see fit, that the President would, in that event, be gratified to receive a diplomat agent from Hungary in the United States, by

[7] The Solicitor General's Brief fails to mention the Hungarian Revolution.

> or before the next meeting of Congress; and that he entertains no doubt whatever that, in case her new government should prove to be firm and stable, *her independence would be speedily recognized by that enlightened body.*

The Hungarian revolution failed, but this exchange leaves little doubt that President Taylor's administration viewed the recognition power as residing with Congress, and not exclusively with the President.

F. President Lincoln and Recognition of Haiti and Liberia.[8]

Because of the combustible issues of race and slavery, neither Haiti nor Liberia was recognized by the United States before the Civil War. In his first message to Congress President Lincoln urged the recognition of both nations. *Lincoln's First Annual Message to Congress* (Dec. 3, 1861), *in* 6 *A Compilation of Messages and Papers of the Presidents*, *supra* at 47:

> If any good reason exists why we should persevere longer in withholding our recognition of the independence and sovereignty of Hayti and Liberia, I am unable to discern it. Unwilling, however, to inaugurate a novel policy in regard to them without the approbation

[8] The Solicitor General's Brief fails to mention the recognition of Haiti and Liberia.

> of Congress, I submit for your consideration the expediency of an appropriation for maintaining a charge d'affaires near each of these new States. It does not admit of doubt that important commercial advantages might be secured by favorable treaties with them.

Congress then enacted a statute authorizing the President to appoint diplomatic representatives to Haiti and Liberia. Cong. Globe, 32nd Cong. 2nd Sess. 1814-1815 (April 24, 1862) (Senate); *id.* at 2536 (June 3, 1862) (House). This was followed by an exchange of diplomats and the negotiation of commercial treaties with the two nations.

It is important to note what President Lincoln did *not* do. Notwithstanding his personal views regarding the past non-recognition of Haiti and Liberia and the racist reasons for their status, he did not exercise any Presidential "exclusive" power of recognition. Instead, he sought Congressional authorization for recognition and the nomination of an American diplomatic representative.

G. Summary of the Historical Data.

From the founding of the Republic through the Lincoln Administration there clearly was no consensus that the Constitution assigned recognition of foreign governments exclusively to the discretion of the Executive. President Monroe requested joint action from the Congress to accord recognition to new Latin American republics. President Jackson analogized the recognition power to the power to

declare war, and he left to Congress the recognition of the independent Republic of Texas. President Taylor believed that he could only "recommend to Congress . . . the recognition of Hungary.". And President Lincoln withheld dispatch of ministers to Haiti and Liberia until Congress authorized recognition of those countries – even though he could discern no reason why nations with black populations should not be recognized.

The Solicitor General's Brief ignores the 74-year period following 1822 and relies principally on declarations made by the Executive Branch in 1896-1898 and in 1919. Resp. Br. 23-24. It belittles Congress' own conflicting assertions of authority made during the McKinley Administration by the Senate (29 Cong. Rec. 326, 332 (1896)) and by both Houses of Congress (31 Cong. Rec. 3988 (1898)).

Indeed, the Solicitor General's discussion of Cuban independence from Spain (Resp. Br. 23) fails to note that the resolution passed by the Senate in 1898 declared that "the Government of the United States hereby recognizes the Republic of Cuba as the true and lawful Government of that island." 31 Cong. Rec. 3993. That resolution – a unilateral recognition decision of the Congress – refutes any suggestion that the 1898 Congress acquiesced in President McKinley's assertion of exclusive recognition power. The resolution was adopted by the Senate by a vote of 67-21.

The Solicitor General's quoted texts demonstrate that in 1896-1898 and in 1919, two Presidents unilaterally declared that they had exclusive recognition authority. The Congress disagreed with

those Presidents but ultimately chose, in each instance, not to engage in a public contest with the Executive.

It is, therefore, inaccurate to say that "it has been commonly understood since the Washington Administration" (Resp. Br. 24) that the President has exclusive discretionary power to recognize foreign governments. At least through the administration of President Lincoln, Presidents who were confronted with controversial recognition issues acknowledged that action or approval by the Congress was necessary before a foreign government would be formally recognized. More recent assertions of exclusive Executive authority have been challenged by Congress, and no decision of this Court or any lower federal tribunal has, until now, determined whether the President has the totally plenary discretionary recognition power that is being asserted by the Solicitor General in this case.

H. Inapplicable Language in this Court's Opinions.

Language in decisions like *National City Bank v. Republic of China*, 348 U.S. 356, 358 (1955), and *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964), describe the recognition power as belonging to "the Executive." Those, however, are cases in which the issue is not whether the recognition power belongs to the President or to the Congress, but whether the Judiciary may decide recognition questions. When there is no controversy, the President unilaterally makes the recognition decision and appoints an ambassador. The issue in this case concerns the less frequent instance in

which the Congress disagrees with the President. The history we have recited demonstrates that neither Presidents before the late Nineteenth Century nor Congresses to this date have, when recognition is controversial, assigned the recognition power exclusively to the discretion of the Executive Branch.

The Solicitor General acknowledges that the decisions of this Court that followed United States' recognition of the Soviet Union "did not specifically concern the constitutionality of a congressional attempt to constrain the President's exercise of his recognition power." Resp. Br. 26. Hence language in this Court's opinions that spoke of recognition as an "executive function" (*United States v. Pink*, 315 U.S. 203, 230 (1942)) did not address cases where there is a dispute between the President and Congress. Nonetheless, the Solicitor General contends that Congress' "acquiescence" proves that the recognition power is exclusively vested in the President.

This Court "generally is reluctant to draw inferences from Congress' failure to act." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306 (1988), quoted in *Brecht v. Abrahamson*, 507 U.S. 619, 632 (1993). That reluctance is particularly appropriate when, as has been true with the recognition power, there is ordinarily no need for Congress to become involved. In controversial recognition decisions, when Congress has had reason to assert its authority, it has not "acquiesced."

We demonstrate in the following section that in a number of cases, including President Truman's seizure of the steel mills, this Court has held that

the President may not exercise a foreign-policy power in direct contravention of Congress' command. That is this case.

II.

THE PRESIDENT'S FOREIGN-POLICY POWER MUST YIELD WHEN CONGRESS DISAGREES

The Solicitor General invokes the broad authority ordinarily vested in the President to conduct the Nation's foreign policy. Resp. Br. 33-34. Recent rulings by this Court establish, however, that the President's usually broad authority over foreign policy is overridden if Congress disagrees with the President's judgment.

A. The Applicable "Familiar Tripartite Scheme."

We noted in our principal brief (pp. 44-46) that this Court has repeatedly confirmed the tripartite test of Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) ("the *Steel Seizure Case*"), for evaluating the constitutionality of "executive action" in the realm of foreign policy. *Medellin v. Texas*, 552 U.S. 491, 525-530 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n. 23 (2006); *id.* at 638-639 (Kennedy, J., concurring); *Dames & Moore v. Regan*, 453 U.S. 654, 668-669 (1981).

Justice Jackson noted that when Congress explicitly and squarely disagrees with the President's foreign-policy judgment, his power "is at its lowest ebb." 343 U.S. at 637. "Courts can sustain

exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system" 343 U.S. at 637-638.

In the *Steel Seizure Case*, not only Justice Jackson but five other Justices explicitly considered whether the President's conduct conflicted with the will of Congress. *See* 343 U.S. at 655, 659-660 (Burton, J., concurring); 660-662 (Clark, J., concurring); 701-703 (Vinson, C.J., and Reed and Minton, JJ., dissenting). Although there were much more immediate national interests supporting the President's conduct in the *Steel Seizure Case* than in the present case, the Court held that the President's action was unauthorized because it conflicted with the limited authorizations Congress had granted to the President.

B. This Court's Recent Decisions.

In *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006), this Court cited Justice Jackson's *Steel Seizure Case* concurrence and invalidated Presidential conduct that had "disregard[ed] limitations that Congress has, in proper exercise of its own war powers, placed on his powers." And in *Medellin v. Texas*, 552 U.S. 491, 524 (2008), the Court applied Justice Jackson's "familiar tripartite scheme" which, the Court said, "provides the accepted framework for evaluating executive action in this [foreign policy] area." The *Medellin* majority said, in terms that apply *a fortiori* to the present case (552 U.S. at 527) (emphasis added): "When the

President asserts the power to 'enforce' a non-self-executing treaty by unilaterally creating domestic law, he acts in conflict with the *implicit understanding of the ratifying Senate*. His assertion of authority, insofar as it is based on the pertinent non-self-executing treaties, is therefore within Justice Jackson's third category, not the first or even the second."

The President's "assertion of authority" in this case conflicts not with an *implicit*, but with an *explicit* declaration of Congress. It therefore follows from this Court's *Medellin* decision that the policy challenged in this case comes within Justice Jackson's third category.

C. Congress' Constitutional Authority.

The Solicitor General acknowledges that Congress has constitutional authority to "enact legislation pertaining to passports" but claims that this power is limited to laws that are "necessary and proper to implement its own enumerated foreign-affairs powers." Resp. Br. 31. In fact, Congress has enacted passport laws that prescribe the duration of validity of a passport (22 U.S.C. § 217a), the fees that may be charged (22 U.S.C. § 214), and application requirements (22 U.S.C. § 213), even though these provisions do not implement "enumerated foreign affairs powers."

Congress has powers explicitly enumerated in the Constitution over naturalization (Art. I, Section 8, Clause 4) and foreign commerce (Art. I, Section 8, Clause 3). The Constitution does not exclude from these powers expressly granted to Congress any

"foreign affairs powers" that are not "enumerated." *See also* the Brief for Members of the United States Senate, *et al* as *Amici Curiae* in Support of Petitioner at 7-18.

Moreover, President Andrew Jackson observed in 1836 that the "power of originally recognizing a new state" could be deemed "equivalent, under some circumstances, to a declaration of war." *See* p. 11, *supra*. The authority to declare war is committed by the Constitution exclusively to Congress. U.S. Const. art. I, § 8, cl. 11. When Congress declares war, it surely has the authority to designate the foreign sovereign that is the subject of the declaration and to define the territory of that sovereign.

D. Congress' Power Over Territorial Disputes.

The Solicitor General contends that the opinions of this Court that assign to the "*legislative* and executive departments" the authority to determine territorial boundaries are limited to "territories controlled or acquired by the United States" (subject to Congress' Article IV power). Resp. Br. 27-28.

This Court's decision in *Jones v. United States*, 137 U.S. 202, 212 (1890), which declared that sovereignty over a territory is determined by "the legislative and executive departments," did, indeed, concern territory claimed by the United States. But Justice Gray's declaration was not limited to property interests of the United States. Justice Gray's opinion announced a general rule regarding determinations of "[w]ho is the sovereign, *de jure* or *de facto*, of a territory," and did not limit that rule to

determinations regarding "territories controlled or acquired by the United States."

Proof that the *Jones* rule extended beyond claims involving American jurisdiction was Justice Gray's observation that his principle regarding authority of "the legislative and executive departments" was "equally well settled in England." 137 U.S. at 212. That reference, and the British precedents supporting it, do not concern "territories controlled or acquired by the United States."

Finally, the legal rule articulated in *Jones* was quoted and applied by this Court in *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918), a case that concerned property within Mexico.

Nor are this Court's statements in *Vermilya-Brown Co. v. Connell*, 335 U.S. 378, 380-381 (1948), and in *Boumedienne v. Bush*, 553 U.S. 723, 753 (2008), assigning the power to determine sovereignty over disputed territory to the "legislative and executive departments" and to "the political branches," limited to situations involving United States claims to property. Neither opinion invoked Article IV. Both decisions approved the general principle that the political departments have shared responsibilities in determining the borders of a recognized foreign sovereign. *See also Manual-Garcia v. Lee*, 37 U.S. (12 Pet.) 511, 520 (1838) (emphasis added) ("the boundary line determined on as the true one *by the political departments* of the government, must be recognised as the true one by the judicial department").

Deciding boundary lines is, as discussed in our principal brief (pp. 40-43), different from recognizing a foreign sovereign. Even if the act of recognizing a foreign sovereign were, *arguendo*, an exclusively Executive discretionary function, determination of sovereignty over territory claimed by different sovereigns, is within Congress' constitutional power.

III.

THE EFFECT OF SECTION 214(d) ON FOREIGN POLICY IS TRIVIAL

The State Department asserts that the ban on naming "Israel" as the place of birth of American citizens born in Jerusalem "implements" United States' policy on the status of Jerusalem. Resp. Br. 8, 15, 31, 37, 49. But the Solicitor General's brief contains no objective support for the conclusion that this prohibition actually furthers a foreign-policy objective. The *only* basis for the State Department's rule is its own concern expressed in its Answers to Interrogatories. See Resp. Br. 6, 38-39, 41, citing J.A. 49-56.

The State Department's Answer to Interrogatory 5 condemns actions that "*might be perceived* as constituting recognition of Jerusalem as . . . located within the sovereign territory of Israel" and warns that opponents of Israel "*could be expected* to condemn" implementation of Section 214(d) to the extent that it "*could* provoke uproar throughout the Arab and Muslim world." J.A. 53, 55, 56.

These predictions are based on what would be a misperception in the "Arab and Muslim world.". That misperception could easily be corrected by a public statement re-affirming official U.S. policy regarding Jerusalem.

In 1994, the State Department claimed permitting "Taiwan" to be recorded on U.S. passports as a place of birth would severely damage American foreign policy vis-à-vis the Republic of China. J.A. 175-176. When Congress enacted a law requiring the State Department to permit Taiwanese-born American citizens to be identified on their passports as born in "Taiwan," the law was implemented, with no apparent harm to relations with China. See Brief for the Petitioner 50-52.

Section 214(d) is an extremely narrow and limited correction of a discriminatory State Department practice. The Foreign Affairs Manual ("FAM") allows opponents of Israel, who "object to showing the country having present sovereignty" – *i.e.*, Israel – to remove "Israel" from their passport and list their city of birth. J.A. 109. No similar accommodation is granted by the FAM to American citizens who "protest" that their birth in Jerusalem should entitle them to call themselves natives of "Israel."

IV.

THIS IS A JUSTICIABLE CASE

The Solicitor General contends that dismissal on "political question" grounds is required in this case because the district court was asked to resolve an

issue "textually committed for final resolution to a political Branch." Resp. Br. 42, 47. The "textually committed" issue is whether to recognize Israel's sovereignty over Jerusalem. Resp. Br. 49.

But the district court was not asked to decide whether Jerusalem is in Israel. It was asked only to enforce the statutory right of identification of a place of birth in United States passports and certificates of birth abroad accorded by Congress to American citizens born in Jerusalem. If a "political" finding was the basis for this statutory right, the "political" branch – Congress – made the "political" judgment.

Nor is this a case in which the law Congress enacted gave a district court authority to decide an "otherwise nonjusticiable political question," as the Solicitor General argues. Resp. Br. 43. In *Sierra Club v. Morton*, 405 U.S. 727, 732 n.3 (1972), this Court said that Congress could not give Article III courts jurisdiction to issue advisory opinions, entertain "friendly" suits, or decide political questions. Had Section 214(d) purported to grant federal jurisdiction over a lawsuit to determine *whether* Jerusalem is in Israel, it would have been the type of statute contemplated by the footnote in the *Sierra Club* opinion.

In fact, Section 214(d) neither purported to confer jurisdiction to decide a "political question" nor even decided the "political question" of sovereignty over Jerusalem. The issue presented to the district court was a straightforward question of enforcement of a federal statute. If the federal statute was

constitutional – as we maintain it was – the district court had a duty to uphold it.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the District of Columbia Circuit should be reversed.

Respectfully submitted,

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