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

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

BRIEF FOR THE RESPONDENT

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QUESTIONS 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 designated that highly sensitive issue as a matter 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 U.S. 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 questions presented are:

1. Whether the political question doctrine renders nonjusticiable petitioner's claim seeking to enforce Section 214(d) and compel the Secretary of State to record "Israel" as his place of birth in his United States passport and consular report of birth abroad; and

2. Whether Section 214 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-43a) is reported at 571 F.3d 1227. A prior opinion of the court of appeals (Pet. App. 77a-90a) is reported at 444 F.3d 614. The opinion of the district court (Pet. App. 55a-77a) is reported at 511 F. Supp. 2d 97. A prior opinion of the district court is unreported but is available at 2004 WL 5835212.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 2009. A petition for rehearing was denied on June 29, 2010 (Pet. App. 44a-55a). On August 31, 2010, the Chief Justice extended the time within which to file

a petition for a writ of certiorari to and including November 26, 2010. The petition for a writ of certiorari was filed on November 24, 2010, and was granted on May 2, 2011. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are set forth in an appendix to this brief. See App., *infra*, 1a-2a.

STATEMENT

The status of the city of Jerusalem is one of the most sensitive and longstanding disputes in the Arab-Israeli conflict. For the last 60 years, the United States' consistent policy has been to recognize no state as having sovereignty over Jerusalem, leaving that issue to be decided by negotiations between the relevant parties within the peace process. This policy is rooted in the Executive's assessment that "[a]ny unilateral action by the United States that would signal, symbolically or concretely, that it recognizes that Jerusalem is a city that is located within the sovereign territory of Israel would critically compromise the ability of the United States to work with Israelis, Palestinians and others in the region to further the peace process." J.A. 52-53. The Executive similarly does not recognize Palestinian claims to current sovereignty in Jerusalem, the West Bank, or the Gaza Strip, pending the outcome of these negotiations.

One of the ways the State Department has implemented the United States' policy concerning the status of Jerusalem is in its rules regarding place-of-birth designations in passports and consular reports of birth abroad issued to U.S. citizens born in Jerusalem. Be-

cause the United States does not currently recognize any country as having sovereignty over Jerusalem, only "Jerusalem" is recorded as the place of birth in the passports and reports of birth of U.S. citizens born in that city. Petitioner challenges this policy, seeking to have "Israel" designated as his place of birth. He relies on Section 214 of the Foreign Relations Authorization Act, Fiscal Year 2003, which is entitled "United States Policy with Respect to Jerusalem as the Capital of Israel," and which purports to require the State Department to make such a designation upon request. Pub. L. No. 107-228, 116 Stat. 1350, 1366.

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

The Constitution assigns a broad range of foreign-affairs powers, however, to the President alone. Article II provides that "[t]he executive Power shall be vested in a President of the United States of America." 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.'" *American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 414 (2003) (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 610-611 (1952) (Frankfurter, J., concurring)). In addition, and of particular relevance to

this case, the Constitution assigns to the President alone the authority to "receive Ambassadors and other public Ministers." *Id.* Art. II, § 3. That power includes the authority to decide which ambassadors the President will receive and, hence, the power to decide with which governments to establish diplomatic relations. See, *e.g.*, *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 410 (1964); *United States* v. *Pink*, 315 U.S. 203, 229 (1942) (same).

2. a. Since the creation of the state of Israel in 1948, the United States has consistently declined to recognize any state's sovereignty over Jerusalem.

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

In 1967, as a result of the Six Day War, Israel acquired control over the entire city of Jerusalem. In United Nations proceedings, the United States made clear that the "continuing policy of the United States Government" was that "the status of Jerusalem * * * should be decided not unilaterally but in consultation with all concerned." U.N. GAOR, 5th Emergency Sess., 1554th plen. mtg. at 10, U.N. Doc. A/PV.1554 (July 14, 1967) (statement of U.S. Ambassador to the U.N. Arthur Goldberg). Consequently, the United States emphasized that it did not "accept or recognize" any measures taken by Israel as "altering the status of Jerusalem" or "prejudging the final and permanent status of Jerusalem." *Ibid.*

In 1993, with the assistance of the United States, representatives of Israel and the Palestinian people agreed that the status of Jerusalem is one of the core issues to be addressed bilaterally in permanent status negotiations. J.A. 50; Declaration of Principles on Interim Self-Government Arrangements, art. V, Isr.-P.L.O. team, *done* Sept. 13, 1993, http://2001-2009.state.gov/p/nea/rls/ 22602.htm. Since that time, Presidential Administrations have uniformly sought to assist the parties in establishing negotiations on all outstanding issues, including the status of Jerusalem. For example, President George W. Bush encouraged negotiations that would "lead to a territorial settlement, with mutually agreed borders reflecting previous lines and current realities, and mutually agreed adjustments," including resolution of the status of Jerusalem. *President Bush Discusses the Middle East* (July 16, 2007), http://georgewbush-whitehouse.archives.gov/news/releases/2007/07/20070716-7.html. President Obama has similarly explained that once territory and security is-

sues are resolved on the basis of outlined principles, "two wrenching and emotional issues will remain [to be negotiated]: the future of Jerusalem, and the fate of Palestinian refugees." *Remarks by the President on the Middle East and North Africa* (May 19, 2011), http://www.whitehouse.gov/the-press-office/2011/05/19/remarks-president-middle-east-and-north-africa; Hillary Rodham Clinton, Sec'y of State, *Remarks at the 2010 AIPAC Policy Conference* (Mar. 22, 2010) (The status of Jerusalem is a "permanent status issue[]" that must be resolved through "good-faith negotiations [between] the parties."), http://www.state.gov/secretary/rm/2010/03/138722.htm; *Remarks by President Obama in Address to the United Nations General Assembly* (Sept. 21, 2011) ("[I]t is the Israelis and the Palestinians * * * who must reach agreement on * * * Jerusalem."), http://www.whitehouse.gov/the-press-office/2011/09/21/remarks-president-obama-address-united-nations-general-assembly.

Within this "highly sensitive" and "potentially volatile" context, "U.S. Presidents have consistently endeavored to maintain a strict policy of not prejudging the Jerusalem status issue and thus not engaging in official actions that would recognize, or might be perceived as constituting recognition of, Jerusalem as either the capital city of Israel, or as a city located within the sovereign territory of Israel." J.A. 53. This policy is rooted in the Executive's longstanding assessment that any "action by the United States that would signal, symbolically or concretely," recognition of Israeli sovereignty over Jerusalem, J.A. 52-53, would "undercut[] and discredit[] our facilitative role in promoting a negotiated settlement," which would be "damaging to the cause of peace and * * * therefore not * * * in the interest of the United

States," Letter from George P. Shultz, Sec'y of State, to Hon. Charles H. Percy (Feb. 13, 1984), *in American Embassy in Israel: Hearing Before the Senate Comm. on Foreign Relations*, 98th Cong., 2d Sess. 13-14 (1984) (*Embassy Hearing*). This assessment affects a range of United States actions. In particular, "[t]he United States, like nearly all other countries, maintains its embassy in Tel Aviv." J.A. 52.

b. United States policy concerning the status of Jerusalem is reflected in the State Department's policies for preparing passports and reports of birth abroad of U.S. citizens born in Jerusalem. As a general rule in passport administration, the country that the United States recognizes as having sovereignty over the place of birth of a passport applicant is recorded in the passport. See 7 *Foreign Affairs Manual* (*FAM*) 1383.1 (1987).[1] Because the United States does not currently recognize any country as having sovereignty over Jerusalem, only "Jerusalem" is recorded as the place of birth in the passports of United States citizens born in that city. 7 *FAM* 1383.5-6, exh. 1383.1. Similarly, because the United States recognizes no state as having sovereignty over the territories of the West Bank and Gaza Strip, State Department rules mandate recording "West Bank" and "Gaza Strip" in the passports of United States citizens born in those locations. 7 *FAM* 1383.5-5.[2]

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[1] Relevant provisions of the *FAM* are reprinted in the Joint Appendix. See J.A. 106-146.

[2] In 2008 and 2010, the State Department revised the *FAM* provisions governing the place-of-birth designation of U.S. citizens born in Israel, Jerusalem, and Israeli-occupied areas. See 7 *FAM* 1360, App. D, Birth in Israel, Jerusalem, and Israeli-Occupied Areas, http://www.state.gov/documents/organization/94675.pdf. These revisions made no change in policy.

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." J.A. 49. 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." J.A. 55. That reversal would "cause irreversible damage" to the United States' ability to further the peace process and end violence against Israel and Israelis. J.A. 53.

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

In 1995, Congress passed the Jerusalem Embassy Act of 1995, which states that the "[p]olicy of the United States" is that "Jerusalem should be recognized as the capital of Israel," and which purports to condition a portion of State Department funding on moving the U.S.

Embassy to Jerusalem. Pub. L. No. 104-45, § 3(a) and (b), 109 Stat. 399 (enacted into law without President's signature). While Congress was considering the bill, the Office of Legal Counsel (OLC) advised the President that the bill would unconstitutionally infringe the President's recognition power. See Bill to Relocate United States Embassy from Tel Aviv to Jerusalem, 19 Op. Off. Legal Counsel 123 (1995). As enacted, the statute contains a waiver provision that permits the President to suspend the funding restriction for six months at a time to "protect the national security interests of the United States." § 7, 109 Stat. 400. Since the provision's enactment, Presidents Clinton, Bush, and Obama have repeatedly made the necessary finding to invoke the waiver provision and maintain the U.S. Embassy in Tel Aviv. See, *e.g.*, 76 Fed. Reg. 35,713 (2011).

b. In 2002, Congress passed and the President signed the Foreign Relations Authorization Act, Fiscal Year 2003, 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.

Subsection (a) "urges the President * * * to immediately begin the process of relocating the United States Embassy in Israel to Jerusalem." § 214(a), 116 Stat. 1365. Subsection (b) states that none of the funds authorized to be appropriated by the Act may be used to operate the United States consulate in Jerusalem unless that consulate "is under the supervision of the United States Ambassador to Israel." § 214(b), 116 Stat. 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 1697, 1698 (Sept. 30, 2002).[3] Even though it was accompanied by a Presidential Statement making clear that "U.S. policy regarding Jerusalem has not changed," *ibid.*, Section 214 provoked strong condemnation in the Middle East and confusion about United States policy toward Jerusalem. See, *e.g.*, J.A. 223-231.

4. Petitioner is a United States citizen born in Jerusalem in 2002. Pet. App. 5a. 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."[4] *Id.* at 6a. United States

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[3] See also Letter from Eric H. Holder, Jr., U.S. Att'y Gen., to Morgan Frankel, Senate Legal Counsel, Mar. 21, 2011, at 2 (Holder Letter) (informing Congress, pursuant to 28 U.S.C. 530D, that "Section 214(d) impermissibly intrudes on the President's constitutional authorities").

[4] A report of birth abroad is an official record of the citizenship of a U.S. citizen born abroad. 22 C.F.R. 50.2.

diplomatic 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.[5] Pet. App. 6a.

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. Pet. App. 77a-90a.

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. J.A. 52-53. The district court again dismissed on political question grounds. Pet. App. 55a-77a.

5. The court of appeals affirmed. Pet. App. 1a-43a. The court relied on the first factor discussed in *Baker* v. *Carr* for identifying the presence of a political question: whether resolution of petitioner's claim would "raise issues whose resolution has been committed to the politi-

[5] Petitioner originally sought an order requiring the Secretary to record "Jerusalem, Israel" as his place of birth, but subsequently modified that request to seek the recordation of "Israel." Pet. App. 80a n.1.

cal branches by the text of the Constitution." *Id.* at 8a (citing *Baker* v. *Carr*, 369 U.S. 186, 217 (1962)). The court accordingly began "by 'interpret[ing] the [constitutional] text in question and determin[ing] whether and to what extent the issue is textually committed' to a political branch." *Ibid.* (quoting *Nixon* v. *United States*, 506 U.S. 224, 228 (1993)); see *Baker*, 369 U.S. at 217.

The court framed the "issue" as "whether the State Department can lawfully refuse to record [petitioner's] place of birth as 'Israel' in the face of a statute that directs it to do so." Pet. App. 9a. The court concluded that the President's constitutional authority to "'receive Ambassadors and other public Ministers,' U.S. C[onst.] [A]rt. II, § 3, includes the power to recognize foreign governments," and to decide "which government is sovereign over a particular place." *Id.* at 9a-11a. The State Department's decision to record "Jerusalem" as the place of birth in passports of U.S. citizens born in that city, the court explained, "implements" the President's "exclusive and unreviewable constitutional power to keep the United States out of the debate over the status of Jerusalem." *Id.* at 11a. Because petitioner's request that the court order the State Department to record his place of birth as "Israel" "trenches upon the President's constitutionally committed recognition power," the court held that the claim presents a nonjusticiable political question. *Id.* at 12a. In so concluding, the court explained that, in light of the President's exclusive constitutional authority, the fact that Congress "took a position on the status of Jerusalem and gave [petitioner] a statutory cause of action * * * is of no moment to whether the judiciary has authority to resolve this dispute between the political branches." *Id.* at 14a.

Judge Edwards concurred in the judgment. Pet. App. 16a-43a. He agreed with the majority that, under the Constitution, "[t]he Executive has exclusive and unreviewable authority to recognize foreign sovereigns" and to determine the United States' recognition policy, but he would have held that petitioner "has no viable cause of action," rather than dismiss the case on political question grounds. *Id.* at 32a, 42a-43a. Judge Edwards identified the issue as "[w]hether [Section] 214(d) * * * , which affords [petitioner] a statutory right to have 'Israel' listed as the place of birth on his passport, is a constitutionally valid enactment." *Id.* at 18a. In his view, this question of "statutory and constitutional interpretation" was a "matter[] for the court to decide." *Id.* at 19a. Judge Edwards therefore would have found Section 214(d) unconstitutional because it "impermissibly intrudes on the President's exclusive power to recognize foreign sovereigns." *Id.* at 43a.

SUMMARY OF ARGUMENT

Petitioner's claim that he is entitled under Section 214(d) to have the Secretary of State designate "Israel" as his place of birth on his passport and consular report of birth abroad should be dismissed on either of two grounds. The claim presents a nonjusticiable political question. But even if the claim is justiciable, Section 214(d) is an unconstitutional encroachment on Executive authority. Both conclusions flow from the Constitution's grant to the President of the exclusive power to recognize foreign sovereigns and determine the extent of their territorial sovereignty, as well as the power to determine the content of passports in connection with the conduct of United States foreign policy.

I. A. Longstanding Executive Branch practice, congressional acquiescence, and judicial precedent establish that the President's express constitutional authority to "receive Ambassadors and other public Ministers" encompasses the exclusive power to recognize foreign states and their governments. U.S. Const. Art. II, § 3. Presidents have unilaterally exercised this recognition power since the Washington Administration. And although Members of Congress have occasionally proposed bills that would involve the Legislature in recognition decisions, those efforts have been rebuffed as inconsistent with the Constitution's assignment of such matters to the Executive alone.

Courts, including this Court, have consistently held that the constitutional recognition power belongs exclusively to the President. See, *e.g.*, *United States* v. *Pink*, 315 U.S. 203, 229 (1942). This Court has also held that the recognition power includes all implied authorities necessary to effectuate its exercise. *Id.* at 229-230. One such implied authority is the President's power to determine on behalf of the United States the boundaries of foreign states. See *Williams* v. *Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415, 420 (1839).

B. The President also has inherent authority to determine the content of passports insofar as it implements United States foreign policy. A passport is an official instrument of foreign policy through which the United States addresses foreign nations. See *Haig* v. *Agee*, 453 U.S. 280, 294 (1981). Historically, the Executive has been assumed to have inherent authority to issue passports and determine their content, in the exercise of the President's constitutional power over national security and foreign relations. See *id.* at 293-294.

Today, passport statutes typically further Congress's own enumerated powers or aid the Executive's passport authority, without purporting to constrain the Executive's use of passports as instruments of foreign policy. On the rare occasion when a passport statute encroaches on the Executive's constitutional authorities, the President has declined to enforce it. Although Congress may enact passport legislation that is necessary and proper to implement its own enumerated powers, it may not regulate passports in a manner that constrains the President's exclusive authority to determine the content of passports as it relates to United States foreign policy, including determinations concerning the recognition of foreign states and their territorial sovereignty.

II. The State Department's policy not to record "Israel" as the place of birth in the passports or consular records of birth abroad of U.S. citizens born in Jerusalem implements the President's decision not to recognize any state's sovereignty over Jerusalem. That policy is also an exercise of the President's inherent authority to determine the content of passports in furtherance of his conduct of foreign policy. The description of a citizen's place of birth in passports operates as an official statement of whether the United States recognizes a state's sovereignty over the relevant territorial area. For this reason, the State Department has established detailed rules governing place-of-birth designations. Reversing its policy with respect to documents issued to U.S. citizens born in Jerusalem would have grave foreign-relations consequences.

III. Because petitioner's suit seeks to overturn a decision that the Constitution assigns exclusively to the President, it presents a political question. See *Baker* v. *Carr*, 369 U.S. 186, 217 (1962).

Petitioner's reliance on an asserted statutory right does not alter that conclusion. Because a basic function of the courts is to interpret statutes and the Constitution, courts presented with a statutory claim that potentially seeks review of a question that the Constitution commits to another Branch should undertake a careful inquiry into the nature of the relief sought and the interaction of that claim with the constitutional commitment at issue. If adjudicating the purported statutory right would entail reviewing or directing a decision that is constitutionally committed to a political Branch, the court should determine that the statute encroaches on the authority vested in that Branch and dismiss the suit. In other words, Congress cannot, by creating a statutory right, confer on the courts the authority to decide a question that the Constitution commits to another Branch.

Section 214(d) cannot be reconciled with the Constitution's grant of the recognition power to the President. By purporting to give petitioner the right to a judicial order directing the State Department to indicate in petitioner's passport that he was born in Israel, the provision seeks to define United States recognition policy. But the President has exclusive constitutional authority not to recognize any sovereignty over Jerusalem and to implement that determination in passports. Petitioner's Section 214(d) claim thus challenges a decision constitutionally committed to the President. The court of appeals therefore correctly dismissed this case as nonjusticiable.

IV. The question whether Section 214(d) is unconstitutional overlaps to a considerable extent with the question whether petitioner's claim for relief presents a nonjusticiable political question. Should the Court de-

cide as a threshold matter that the case is justiciable, it should hold that Section 214(d) is unconstitutional because it encroaches on the President's exclusive constitutional authority to recognize foreign sovereigns.

ARGUMENT

Petitioner's claim that he is entitled under Section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, to have the Secretary of State designate "Israel" as his place of birth on his passport and consular report of birth abroad fails for two reasons. First, because petitioner seeks judicial reversal of a determination that the Constitution commits exclusively to the President, petitioner's claim presents a nonjusticiable political question. Second, even if the case is justiciable, petitioner is not entitled to relief because Section 214(d) is an unconstitutional encroachment on powers exclusively vested in the President. These two grounds for dismissing petitioner's claim overlap to a considerable extent, because both rest on the Constitution's exclusive grant to the President of the power to recognize foreign sovereigns and determine the extent of their territorial sovereignty, as well as the power to determine the content of passports in connection with the conduct of United States foreign policy. We explain the constitutional and historical foundations for these conclusions in Parts I and II, *infra*. We then address the related political question and merits arguments in Parts III and IV.

I. THE CONSTITUTION GRANTS THE PRESIDENT THE EXCLUSIVE POWER TO RECOGNIZE FOREIGN SOVEREIGNS AND TO DETERMINE PASSPORT CONTENT INSOFAR AS IT PERTAINS TO SUCH RECOGNITION DETERMINATIONS

A. The Constitution Assigns Exclusively To The Executive Branch The Authority To Recognize Foreign States And Foreign Governments, And To Determine The Territorial Boundaries Of Foreign States

It is firmly established in our constitutional framework that the President has sole authority to recognize foreign states and their governments. The Constitution assigns to the President the power to "receive Ambassadors and other public Ministers," U.S. Const. Art. II, § 3 (Reception Clause), which necessarily includes the authority to decide which ambassadors to receive and which states and governments to recognize. Centuries-long Executive Branch practice, congressional acquiescence, and decisions by this Court have solidified the understanding that the President's exclusive reception power includes the power to recognize foreign governments, to determine the policies that govern recognition questions, and, for purposes of U.S. law, to determine the territorial boundaries of foreign states.

1. The Executive Branch has consistently exercised sole authority to recognize foreign states, and Congress has acquiesced in that practice

From the Washington Administration to the present, the Executive Branch has asserted the sole authority to recognize which government represents a foreign state. The recognition power did not receive attention during the ratification debates, rendering post-ratification practice critical evidence of the nature and scope of the

power. Although Alexander Hamilton at first viewed the Reception Clause as "without consequence in the administration of the Government," The Federalist No. 69 (Hamilton), the Clause quickly came to be understood as a substantive grant of exclusive recognition authority to the President. See Louis Henkin, *Foreign Affairs and the United States Constitution* 43 (2d ed. 1996) (Henkin) ("It is no longer questioned that the President does not merely perform the ceremony of receiving foreign ambassadors but also determines whether the United States should recognize or refuse to recognize a foreign government."); Restatement (Third) of the Foreign Relations Law of the United States § 204 (1987); Robert J. Reinstein, *Recognition: A Case Study on the Original Understanding of Executive Power*, 45 U. Rich. L. Rev. 801, 801 (2011) (despite lack of evidence of the Framers' understanding of the Reception Clause, the President's sole recognition authority is "hornbook" law).

a. During the Washington Administration, Hamilton explained that he had come to understand that the power to receive ambassadors "includes th[e power] of judging, in the case of a Revolution of Government in a foreign Country, whether the new rulers are competent organs of the National Will and ought to (be) recognised, or not." See Alexander Hamilton, *Pacificus No. 1* (June 29, 1793), *reprinted in* 15 *The Papers of Alexander Hamilton*, 33, 41 (Harold C. Syrett & Jacob E. Cooke, eds., 1969). Consistent with this view, President Washington and his cabinet unanimously decided that the President could receive the ambassador from the new government of France without first consulting Congress. *George Washington to the Cabinet*, *in* 25 *The Papers of Thomas Jefferson* 568-569 (John Catanzariti

ed., 1992); Thomas Jefferson, *Notes on Washington's Questions on Neutrality and the Alliance with France*, *in* 25 *The Papers of Thomas Jefferson*, *supra*, at 665-666; see Reinstein, *supra*, at 840.

Since then, the Executive Branch has routinely and unilaterally recognized foreign states and foreign governments. In 1824, for instance, President Monroe determined that "no message to Congress would be necessary" before the President recognized Brazil, because "the power of recognizing foreign Governments was necessarily implied in that of receiving Ambassadors and public Ministers." 6 *Memoirs of John Quincy Adams* 329, 348, 358-359 (Charles Francis Adams, ed., 1875) (*Memoirs*). In 1948, President Truman recognized the creation of the State of Israel and its provisional government minutes after Israel declared independence. See *Statement by the President Announcing Recognition of the State of Israel*, 1948 Pub. Papers 258 (May 14, 1948). And in July 2011, Secretary of State Clinton announced that "until an interim authority is in place, the United States will recognize the [Transitional National Council] as the legitimate governing authority for Libya." Hillary Clinton, *Remarks on Libya and Syria* (July 15, 2011), http://www.state.gov/secretary/rm/2011/07/168656.htm. There are myriad other examples throughout our history.[6]

b. From time to time, Members of Congress proposed legislation that would have created a role for the

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[6] See, *e.g.*, Ulysses S. Grant, *Second Annual Message to Congress, December 5, 1870*, 9 Comp. Messages & Papers of the Presidents 4050, 4050 (n.s. 1897). See generally 1 *Digest of Int'l Law* 195-318 (Green Haywood Hackworth ed., 1940) (documenting early twentieth-century Executive Branch recognition of numerous foreign states and governments).

Legislative Branch in the recognition of foreign states and governments. But the Executive Branch opposed the bills, and most were rejected in Congress as inappropriate incursions into the Executive Branch's constitutional authority. Congress has thus acquiesced in the Executive Branch's exercise of sole recognition authority. See Sen. Hale, *Memorandum upon Power to Recognize Independence of a New Foreign State*, 29 Cong. Rec. 663, 672 (1867) (Hale Memorandum) ("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."); 1 *Digest of Int'l Law* § 31, at 162 (Green Haywood Hackworth ed., 1940) (Hackworth) ("Congress has exhibited little inclination to contest the prerogative" of the President, "solely on his own responsibility," to recognize foreign states.).

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

an exercise of Executive authority; consequently, for Congress to direct the Executive how he shall exercise this power, is an act of usurpation."). Within the Monroe Administration, Secretary of State John Quincy Adams argued that the recognition decision rested exclusively with the Executive, and he declined to receive an emissary from Buenos Ayres on the ground that doing so would have the effect of recognizing the government. 4 *Memoirs* 88, 205-206; see also *id.* at 166-168. Clay subsequently modified his proposal to acknowledge the President's authority to decide whether to send diplomats to the provinces. 32 Annals of Cong. 1500. Nevertheless, the proposal was overwhelmingly defeated. *Id.* at 1646.

In 1821, Speaker Clay introduced a resolution expressing the House of Representatives' "deep interest" in the "success of the Spanish provinces of South America which are struggling to establish their liberty and independence" and relaying the House's readiness to "give its Constitutional support to the President of the United States, whenever he may deem it expedient to recognise the sovereignty and independence of any of the said provinces." 37 Annals of Cong. 1082. That nonbinding resolution, which acknowledged the President's authority to recognize foreign states and governments, passed the House. *Id.* at 1091-1092. In 1822, four years after Clay's original proposal, the President first recognized an independent South American state. See 6 *Memoirs* 23.

A similar situation arose 74 years later, at the inception of the Spanish-American War. In 1896, the Senate Foreign Relations Committee reported to the Senate a joint resolution purporting to recognize "the independence of the Republic of Cuba." 29 Cong. Rec. 326, 332

(1896). In response, the Secretary of State publicly stated that "'[t]he power to recognize the so-called Republic of Cuba as an independent State rests exclusively with the Executive,'" and that any joint resolution would have the effect only of "advice of great weight." *Congress Powerless*, N.Y. Times, Dec. 20, 1896 (quoting statement). The Senate did not act on the joint resolution.

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

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

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

As a result of events like these, it has been commonly understood since the Washington Administration that "Congress cannot itself (and cannot direct the President to) recognize foreign states or governments, * * * though it may express its 'sense', and can request or exhort the President." Henkin 88; see *Mistretta* v. *United States*, 488 U.S. 361, 401 (1989) ("[T]raditional ways of conducting government give meaning to the Constitution.") (internal quotation marks, citation, and ellipsis omitted).

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

a. This Court and individual Justices have repeatedly reaffirmed that the Constitution assigns to the President alone the authority to recognize foreign states and governments.

As early as 1817, Chief Justice Marshall, sitting as Circuit Justice, held that the jury in a criminal case, in deciding whether the defendant was guilty of piracy, could not consider whether the defendant had acted under a commission from 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 independence." *United States*

v. *Hutchings*, 26 F. Cas. 440, 442 (C.C.D. Va. 1817). In 1838, Justice Story concluded that "[i]t is very clear, that it belongs exclusively to the executive department of our government to recognise, from time to time, any new governments." *Williams* v. *Suffolk Ins. Co.*, 29 F. Cas. 1402, 1404 (C.C.D. Mass. 1838); cf. *Luther* v. *Borden*, 48 U.S. (7 How.) 1, 44 (1849) ("In the case of foreign nations, the government acknowledged by the President is always recognized" by courts.). And in *Kennett* v. *Chambers*, 55 U.S. (14 How.) 38 (1852), this Court held that "the question whether Texas had or had not at that time become an independent state, was a question for that department of our government exclusively which is charged with our foreign relations." *Id.* at 46-48, 50-51.

This Court reached the same conclusion in its leading decisions addressing the President's recognition power, which arose out of the United States' 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); *United States* v. *Pink*, 315 U.S. 203 (1942). In 1933, the Executive Branch normalized relations with the Soviet Union, entering into an agreement with its government to resolve all claims between them. *Belmont*, 301 U.S. at 326-327. In subsequent litigation concerning that agreement, the Court "accept[ed] as conclusive * * * the determination of our own State Department" as to what government represents "the Russian State." *Guaranty Trust*, 304 U.S. at 138; *Pink*, 315 U.S. at 230 ("We would usurp the executive function if we held that [the recognition] decision was not final and conclusive in the courts."); *Belmont*, 301 U.S. at 330. In reliance on the President's

authority to recognize foreign governments and to take actions without which "the power of recognition might be thwarted," the Court held that the claims-resolution agreements preempted inconsistent state law.[7] See *Pink*, 315 U.S. at 229-230; *Belmont*, 301 U.S. at 330-332.

Although these decisions held that the President had "sole" authority to recognize a foreign government, *Belmont*, 301 U.S. at 330, and that such action is "conclusive" on the courts, *Guaranty Trust*, 304 U.S. at 138, they did not specifically concern the constitutionality of a congressional attempt to constrain the President's exercise of his recognition power. In light of Congress's historical acquiescence in the Executive's exclusive exercise of the recognition power, however, it is unsurprising that the Court had no occasion to address a dispute between the Branches. And the Court's repeated statements throughout the nineteenth and early twentieth centuries that the recognition power is vested exclusively in the President are significant. The exchanges between the Legislative and Executive Branches over congressional attempts to share or constrain the President's recognition authority, and Congress's ultimate acquiescence in Executive authority, were well publicized and recurring. Yet the Court never suggested that Congress might have a role in recognizing foreign states or governments, or even that it was an open question whether Congress had any role. In addition, the Court's locating of the exclusive recognition power in the Presi-

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[7] Petitioner contends (Br. 39) that the Court's affirmation of Executive authority in these cases was dicta. To the contrary, the Court upheld the United States' exercise of rights under an assignment from the Soviet government based on the Court's understanding that the assignment was a component part of the Executive Branch's recognition of the Soviet government. *Pink*, 315 U.S. at 229-230.

dent necessarily follows from the Court's affirmation of the "plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations" and its emphasis on the importance of avoiding conflicting foreign-policy pronouncements among the three Branches. *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-320 (1936) (citing John Marshall's statement that "[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations"); *Belmont*, 301 U.S. at 330; *Williams* v. *Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415, 420 (1839).

In the decades following the *Pink* line of decisions, moreover, the Court has often reaffirmed that the recognition power is exclusively vested in the Executive. See, *e.g.*, *National City Bank* v. *Republic of China*, 348 U.S. 356, 358 (1955) ("The status of the Republic of China in our courts is a matter for determination by the Executive and is outside the competence of this Court."); *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 410 (1964) ("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).

b. Petitioner contends that the recognition power is not exclusive because "dicta in this Court's opinions * * * assign the recognition power jointly to the President and to Congress." Pet. Br. 39. That is incorrect. The decisions on which petitioner relies do not involve the power to recognize foreign governments. Rather, they concern territories controlled or acquired by the United States, which are subject to Congress's Article IV power to legislate regarding "the Territory or other

Property belonging to the United States."[8] See U.S. Const. Art. IV, § 3, Cl. 2; Henkin 72. Thus, in *Jones* v. *United States*, 137 U.S. 202 (1890), the Court observed that whether certain islands were "in the possession of the United States" was a determination for the "legislative and executive departments." *Id.* at 212, 216-217. In *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377 (1948), the Court observed that whether the United States exercised sovereignty within a leasehold in British territory depended on action by the "legislative and executive departments." *Id.* at 378, 380-381. In *Boumediene* v. *Bush*, 553 U.S. 723, 753 (2008), the Court discussed the United States' plenary control over territory at Guantanamo Bay, observing that "questions of sovereignty are for the political branches to decide."[9] These decisions thus acknowledge Congress's role in determining the United States' sovereignty over its territories, but they have no bearing on the Executive's authority to determine whether to recognize a foreign state or its sovereignty over particular territory when the United States claims no property interest in the land.

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[8] Petitioner's reliance (Br. 39-40) on the Hare-Hawes-Cutting Act, ch. 11, § 10, 47 Stat. 761, 768 (1933), and the Tydings-McDuffie Act, ch. 84, § 10(a), 48 Stat. 456, 463 (1934), is misplaced for the same reason. In those statutes, Congress relinquished the United States' interest in the Philippines. See Proclamation of Dec. 10, 1898, 30 Stat. 1754, 1755.

[9] In *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831), the Court held that an Indian nation is not a "foreign state" within the meaning of Article III, as Indian nations "are considered as within the jurisdictional limits of the United States." *Id.* at 17.

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

The President's recognition power is "not limited to a determination of the government to be recognized"; rather it "includes the power to determine the policy which is to govern the question of recognition" and the power to ensure that recognition policy is consistent with the United States' foreign-policy interests. *Pink*, 315 U.S. at 229. That broad authority is necessary to ensure the President's "[e]ffectiveness in handling the delicate problems of foreign relations." *Ibid.*

The determination of foreign territorial borders for purposes of United States law is an essential component of the recognition power and therefore falls within the President's exclusive authority. See Henkin 43; 1 Hackworth § 66, at 446-447. The ability to recognize the existence of a foreign state must include the subsidiary power to determine the United States government's position as to the boundaries of that state. The determination of territorial sovereignty may have foreign-policy consequences fully as significant as the determination whether to recognize the state itself, and weighing those consequences is part of "the historic conception of the powers and responsibilities of the President in the conduct of foreign affairs." *Pink*, 315 U.S. at 230; cf. Hale Memorandum, 29 Cong. Rec. at 679. Moreover, the President's power to recognize a foreign state would be rendered ineffective if Congress could undermine that recognition by enacting a statute that refused to accept the state's territorial boundaries recognized by the President, or that purported to extend recognition of broader

territorial sovereignty.[10] See *Pink*, 315 U.S. at 230. Any such exercise of congressional authority would also undermine the Executive's ability "to speak as the sole organ of [the national] government" with regard to recognition. See *Belmont*, 301 U.S. at 330.

This Court has long acknowledged that the authority to determine the territorial limits of foreign states is essential to the effective exercise of the President's recognition power. In *Williams*, for instance, insurance coverage turned, in part, on whether the Falkland Islands came within the jurisdiction of the government of Buenos Ayres. 38 U.S. at 419. The Court held that "when the executive branch of the government, which is charged with our foreign relations, shall in its correspondence with a foreign nation assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department." *Id.* at 420. As a result, the Executive's determination that the islands were not part of Buenos Ayres was "obligatory on the people and government of the Union." *Ibid.* Since *Williams*, courts have consistently held that Executive Branch determinations of foreign territorial boundaries are binding as a matter of United States law. See, *e.g.*, *Kennett*, 55 U.S. at 50-51; *Baker*, 369 U.S. at 212; *Occidental of Umm al Qaywayn, Inc.* v. *A Certain Cargo of Petroleum*, 577 F.2d 1196, 1203 (5th Cir. 1978), cert. denied, 442 U.S. 928 (1979); *Wang* v. *Masaitis*, 416 F.3d 992, 995 (9th Cir. 2005).[11]

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[10] A foreign state's territorial boundaries also may be recognized by treaty. See, *e.g.*, *Kennett*, 55 U.S. at 46. Whether to enter into a treaty, however, remains within the Executive's sole discretion.

[11] Petitioner contends (Br. 40) that this Court has suggested that Congress may determine "the borders of a sovereign that has been recognized." The decisions on which petitioner relies are inapposite, as

B. The Executive Has Inherent Constitutional Authority To Determine The Content Of Passports To Implement Foreign Policy

This Court has acknowledged that a passport is an instrument of foreign policy and national security. See *Haig* v. *Agee*, 453 U.S. 280, 294 (1981). The Executive Branch has constitutional authority to issue passports and to determine their form and content in the exercise of the President's broad power to conduct the Nation's foreign relations. Although Congress may enact legislation pertaining to passports that is necessary and proper to implement its own enumerated foreign-affairs powers, it may not regulate passports in a manner that constrains the President's exclusive authority to determine the content of passports insofar as it pertains to the conduct of diplomacy and the Nation's foreign policy.

1. A passport, this Court has explained, is an instrument of diplomacy, see *Agee*, 453 U.S. at 292-293, through which the President, on behalf of the United States, "in effect request[s] foreign powers to allow the bearer to enter and to pass freely and safely, recognizing the right of the bearer to the protection and good offices of American diplomatic and consular officers," *United States* v. *Laub*, 385 U.S. 475, 481 (1967). Thus, although a passport functions on one level as a "travel control document" that provides "proof of identity and proof of allegiance to the United States," it is also an official communication "by which the Government vouches for the bearer and for his conduct." *Agee*, 453 U.S. at 293; 3 Hackworth § 268, at 499 ("A passport is

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they concerned whether certain land was within United States territory. See *Jones*, 137 U.S. at 216; *Percy* v. *Stranahan*, 205 U.S. 257, 263 (1907).

not merely evidence or prima facie evidence of citizenship. * * * [T]he passport is a request for the good offices of the foreign government."); see also *Urtetiqui* v. *D'Arcy*, 34 U.S. (9 Pet.) 692, 699 (1835) (passport is "addressed to foreign powers, * * * and is to be considered rather in the character of a political document").

Because a passport is a diplomatic document through which the President communicates with foreign sovereigns, the Executive's authority to issue passports historically has been understood to flow directly from its constitutional power over "the national security and foreign policy of the United States." *Agee*, 453 U.S. at 293. From the time of the Founding, the Department of State routinely issued passports to citizens, even though no statute addressed the Executive Branch's authority to do so until 1856. See, *e.g.*, Department of State, *The American Passport* 8-21 (1898) (*American Passport*) (collecting examples); *Urtetiqui*, 34 U.S. (9 Pet.) at 699. The State Department also determined the content of the passports it issued, see *American Passport* 77-86, an authority that flowed naturally from passports' character as instruments of official communication to other nations. Because "[t]he President's authority to act, as with the exercise of any governmental power, 'must stem either from an act of Congress or from the Constitution itself," *Medellín* v. *Texas*, 552 U.S. 491, 524 (2008) (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 585 (1952)), that early practice is evidence of the President's constitutional authority. This Court has recognized that this practice reflected the contemporary and "generally accepted view" that passport issuance fell within "the province and responsibility of the Executive" for foreign affairs. *Agee*, 453 U.S. at 293-294.

Congress has historically "endorsed not only the underlying premise of Executive authority in the areas of foreign policy and national security, but also its specific application to the subject of passports." *Agee*, 453 U.S. at 294. When Congress enacted the first Passport Act in 1856, it did so not to provide authority that was previously lacking, but rather to "confirm[] an authority already possessed and exercised by the Secretary of State" and to establish that the Secretary's authority was exclusive of local governments. Staff of Senate Comm. on Gov't Operations, 86th Cong., 2d Sess., *Reorganization of the Passport Functions of the Dep't of State* 13 (Comm. Print 1960); *Agee*, 453 U.S. at 294 & n.27. Accordingly, the 1856 statute, using "broad and permissive language," *Agee*, 453 U.S. at 294, provided that "the Secretary of State shall be authorized to grant and issue passports * * * under such rules as the President shall designate."[12] Act of Aug. 18, 1856, ch. 127, 11 Stat. 60; see Rev. Stat. § 4075 (1875) (replacing "shall be authorized" with "may").

2. Because a passport is a diplomatic instrument addressed to other nations, the Executive Branch has the sole authority to determine the content of passports insofar as it pertains to the President's exclusive authority to conduct foreign relations. See *Curtiss-Wright*, 299 U.S. at 319 (the President is the sole "representative of the nation" in foreign affairs); see also *Agee*, 453 U.S. at

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[12] In light of this history, and this Court's explanation of the Executive Branch's inherent authority over the issuance of passports, amici Members of Congress are mistaken in asserting that "Congress has sole and exclusive authority under the Constitution" over passports and that Congress "has expressly delegated day-to-day administration to the Secretary of State." Members of the U.S. Senate and the U.S. House of Representatives Amicus Br. 6.

292-294. Congress, of course, has the constitutional authority to regulate passports in furtherance of its enumerated powers, including its powers over immigration and foreign commerce. But Congress may not regulate passports in a manner that interferes with the President's exclusive authority over passports insofar as they pertain to his representation of the Nation in foreign-relations matters.

This conclusion is reinforced by the Branches' practice with respect to passport regulation. The current Passports Act continues to provide that the Secretary of State "may grant and issue passports * * * under such rules as the President shall designate and prescribe," 22 U.S.C. 211a, and the issuance of United States passports, and the content thereof, are primarily governed by State Department regulations and rules. See 22 C.F.R. 51.1-51.74; 7 *FAM* 1300. Congress has passed relatively few statutes governing passports, and those statutes overwhelmingly regulate matters that fall within Congress's powers without impinging on the Executive's authority to use passports as diplomatic communications or instruments of foreign policy. On the rare occasion when Congress has attempted to use passport regulation to interfere with the President's exclusive authority to speak for the Nation in foreign-relations matters, see *Curtiss-Wright*, 299 U.S. at 319, the Executive has declined to enforce the provisions.

a. Passport legislation generally comes in two varieties, both of which are ancillary to the Executive's control over passports' communicative foreign-relations function. *First*, Congress has enacted legislation that furthers Congress's enumerated powers without touching on passports' uses as instruments of foreign relations. See U.S. Const. Art. I, § 8, Cls. 3, 4, 18. For example,

Congress has enacted travel control statutes that require U.S. citizens to have passports for certain travel. 8 U.S.C. 1185(b) (Supp. I 2007); see, *e.g.*, Act of Feb. 4, 1815, ch. 31, § 10, 3 Stat. 199; Act of May 22, 1918, ch. 81, §§ 1, 2, 40 Stat. 559. These statutes implement Congress's authority to control the borders under its powers over foreign commerce and the exclusion of aliens, but they are premised on the Executive's authority to issue and deny passports. See *Agee*, 453 U.S. at 294; U.S. Const. Art. I, § 8, Cls. 3, 4. Similarly, Congress has used its foreign commerce power, among others, to restrict the ability of U.S. citizens who have been convicted of certain sexual tourism and drug trafficking offenses, or who are delinquent in child support payments, to obtain passports, in order to control their travel outside of the United States. 22 U.S.C. 212a (Supp. II 2008), 2714; 42 U.S.C. 652. Congress has also limited the issuance of passports to aliens abroad in aid of its control over immigration and naturalization. Act of Feb. 28, 1803, ch. 9, § 8, 2 Stat. 205; see 22 U.S.C. 212. Finally, Congress has historically criminalized violations of passports and safe conducts in aid of its authority to "define and punish * * * Offences against the Law of Nations." U.S. Const. Art. I, § 8, Cl. 10; see Act of Apr. 30, 1790, ch. 9, § 28, 1 Stat. 118. None of these statutes encroaches upon the Executive's authority to determine passports' content in furtherance of the United States' foreign-policy interests.

Second, Congress has enacted passport legislation that assists the Executive in implementing its authority over passports. See U.S. Const. Art. I, § 8, Cl. 14. For instance, Congress has prohibited the issuance of passports by anyone but the Secretary of State. 22 U.S.C. 211a. It has also limited imposition of geographic travel

restrictions in passports to implement provisions of the Helsinki Accords, which President Ford signed on behalf of the United States. *Ibid.*; see Foreign Relations Authorization Act, Fiscal Year 1979, Pub. L. No. 95-426, § 124, 92 Stat. 971 (1978). Similarly, provisions requiring verification of passport applications, 22 U.S.C. 213, and regulating fees, 22 U.S.C. 214 and 214a, 10 U.S.C. 2602, time limits, 22 U.S.C. 217a, and notification of the Secretary of passports issued abroad, 22 U.S.C. 218, also facilitate the State Department's administration of passports.

b. On occasion, Congress has enacted legislation that encroaches on the President's constitutional foreign-affairs authority over the issuance and content of passports. When that has happened, the Executive Branch has declined to enforce the offending provision.

In 1991, for example, Congress enacted legislation purporting to prohibit the State Department's policy of issuing two passports to United States government officials traveling in the Middle East. Foreign Relations Authorization Act, Fiscal Years 1992 and 1993, Pub. L. No. 102-138, § 129(d) and (e), 105 Stat. 647, 661-662 (1991); Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1992, Pub. L. No. 102-140, § 503, 105 Stat. 782, 820 (1991). The State Department had adopted that policy in response to the practice of many Arab League nations of denying entry to persons with passports indicating travel to Israel. *Ibid.* In signing the legislation, President Bush issued a statement explaining that it could interfere with the Executive's sole constitutional authority to conduct the Nation's diplomacy. *Statement on Signing*, Pub. Papers 1344-1345 (Oct. 21, 1991). Subsequently, in a formal opinion, OLC concluded that the

provisions purporting to limit the issuance of duplicate passports impermissibly infringed, among other things, the Executive's exclusive "authority over issuance of passports for reasons of foreign policy or national security." See *Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports*, 16 Op. Off. Legal Counsel 18, 22 (1992). OLC accordingly advised the President that he was constitutionally authorized to decline to implement the relevant provisions. *Id.* at 26-28; 31-37; see *id.* at 19 n.2.

II. THE STATE DEPARTMENT'S PASSPORT POLICY IMPLEMENTS THE PRESIDENT'S DECISION NOT TO RECOGNIZE ANY STATE AS HAVING SOVEREIGNTY OVER JERUSALEM

A. The State Department's policy of listing "Jerusalem," not "Israel," as the place of birth in passports and consular reports of birth abroad for U.S. citizens born in Jerusalem implements the United States' policy, as determined by the Executive Branch, of not recognizing any national sovereignty over that city. J.A. 49-50. It is also an exercise of the President's inherent constitutional authority to determine the content of passports insofar as it pertains to his conduct of foreign policy.[13]

The State Department's decision regarding how to signify a place of birth is an exercise of the President's recognition power. The primary function of the place-of-birth entry on a passport or a report of birth abroad is to assist in identifying the passport holder and to distin-

[13] Issuance of reports of birth abroad is not an exercise of the President's passport power. The designation of 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.

guish the individual from other persons having similar names. J.A. 67; see Pet. Br. 49. But the decision as to how to describe the place of birth—*i.e.*, to list a particular country name, or to designate a particular city or region as being within a country—operates as an official statement of whether the United States recognizes a state's sovereignty over a territorial area. See J.A. 56.

Accordingly, the State Department has issued rules designed to ensure that place-of-birth designations are consistent with the United States' recognition policies. See generally 7 *FAM* 1383. While "[a]s a general rule," the Department lists the "country of the applicant's birth" in passports, the Department's policy is to refrain from listing as a place of birth a country whose sovereignty over the relevant territory the United States does not recognize. See, *e.g.*, 7 *FAM* 1383.5-1. To this end, the State Department maintains detailed rules governing the manner in which the place of birth should be described, so as to be consistent with the President's recognition decisions. See 7 *FAM* 1383 (guidance for designating the place of birth for locations where sovereignty is in dispute or not recognized). The State Department's policy to designate "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 Department's broader policy of ensuring that place-of-birth designations are consistent with United States recognition policy.

Not listing "Israel" as the place of birth in passports of U.S. citizens born in Jerusalem is a "manifestation" of the United States' policy of not recognizing any state's sovereignty over Jerusalem, J.A. 52, because the State Department has determined that listing "Israel" as the place of birth would constitute "an official decision by

the United States to begin to treat Jerusalem as a city located within Israel." J.A. 50. That would "represent a dramatic reversal of the longstanding foreign policy of the United States for over half a century, with severe adverse consequences for U.S. national security interests." *Ibid.*

B. Petitioner argues (Br. 34, 43) that the Executive's policy not to designate "Israel" as the place of birth in passports of U.S. citizens born in Jerusalem is not an exercise of the recognition power because place-of-birth designations are not limited exclusively to "sovereigns that the United States has formally recognized." That argument reflects a misunderstanding of the State Department's policy. The policy is not one of listing only a recognized sovereign as a citizen's place of birth; rather, it is one of avoiding listing as a place of birth a country whose sovereignty over the relevant territory the United States does not recognize. As a result, there are many instances in which the State Department's passport rules permit or require listing cities or other geographic regions as the place of birth, see, *e.g.*, 7 *FAM* 1383.5-2 (Disputed Territory); 7 *FAM* 1383.6 (City of Birth Listing). The State Department's policy concerning Jerusalem is fully consistent with that policy.[14]

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[14] Contrary to petitioner's argument (Br. 50-52), the State Department's practice with respect to Taiwan is consistent with the overarching policy of describing the place of birth using a geographic area whose designation does not conflict with the United States' recognition policies. In 1994, Congress directed the Secretary of State to permit U.S. citizens born in Taiwan to record "Taiwan" as their place of birth rather than "China." See Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 132, 108 Stat. 382, 395 (1994), as amended by Act of Oct. 25, 1994, Pub. L. No. 103-415, § 1(r), 108 Stat. 4299, 4302; J.A. 153-155. The State Department initially opposed this change. See J.A. 175-176. It subsequently elected to designate Taiwan

Petitioner erroneously asserts (Br. 46) that the place-of-birth designation does not implement the President's recognition power because placing "Israel" on passports of U.S. citizens born in Jerusalem would have a "negligible or trivial impact" on U.S. foreign policy.[15] See *id.* at 46-52. The President's recognition power, however, "includes the power to determine the policy which is to govern the question of recognition." *Pink*, 315 U.S. at 229. It is not dependent on a showing that a

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when requested by the applicant, after determining that doing so would be consistent with the United States' recognition that the People's Republic of China is the "sole legal government of China" and "Taiwan is a part of China." J.A. 154. Accordingly, although the State Department permitted listing "Taiwan," it directed that "[p]assports may not, repeat NOT, be issued showing place of birth as 'Taiwan, China'; 'Taiwan, Republic of China'; or 'Taiwan, ROC'" because such designations would suggest recognition of Taiwan's independence from the People's Republic of China. *Ibid.*

Here, in contrast, the State Department has concluded that designating "Israel" as the place of birth for U.S. citizens born in Jerusalem would take a position on Israel's sovereignty over Jerusalem in a manner that directly conflicts with United States policy. The Department's decisions concerning Jerusalem and Taiwan are each quintessential foreign-policy judgments based on the respective facts of each situation. See *Chicago & S. Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948). Accord Pet. App. 41a-42a (Edwards, J., concurring).

[15] Petitioner maintains that no adverse consequences have followed when State Department officials mistakenly list "Israel" as the place of birth in passports and reports of birth of U.S. citizens born in Jerusalem, as occasionally happens. Pet. Br. 50; see Zionist Org. of Am. Amicus Br. (documenting erroneous references to "Jerusalem, Israel" by Executive Branch agencies). But "these clerical errors have not had an adverse impact on the foreign policy interests of the United States because they are just that—clerical errors, and did not constitute official statements of United States policy." Pet. App. 76a. When the State Department becomes aware of such errors, it seeks to correct them.

particular recognition policy is necessary to avoid adverse foreign-policy consequences. In any event, petitioner's argument seeks to supplant the Executive's foreign-policy judgments with his own. That he cannot do. See, *e.g.*, *Regan* v. *Wald*, 468 U.S. 222, 242-243 (1984). For over six decades, the Executive has followed a policy of not recognizing any state's sovereignty over Jerusalem, precisely because of the unique sensitivity surrounding the issue. The State Department's passport practice implements that policy, and deviation from that longstanding position would cause grave adverse foreign-relations and national-security consequences. J.A. 48-56.

III. PETITIONER'S CLAIMED RIGHT TO HAVE "ISRAEL" LISTED AS THE PLACE OF BIRTH IN HIS PASSPORT PRESENTS A NONJUSTICIABLE POLITICAL QUESTION

A. The Political Question Doctrine Holds That Courts May Not Review Discretionary Decisions That Are Textually Committed To A Political Branch

The political question doctrine is "primarily a function of the separation of powers," *Baker*, 369 U.S. at 210, and "is designed to restrain the Judiciary from inappropriate interference in the business of the other branches of Government," *United States* v. *Munoz-Flores*, 495 U.S. 385, 394 (1990). The doctrine "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n* v. *American Cetacean Soc'y*, 478 U.S. 221, 230 (1986). A ruling that a plaintiff's claim presents a political question is thus a conclusion that the "final determi-

nation" of the issue should be left to the political Branches. *Coleman* v. *Miller*, 307 U.S. 433, 454-456 (1939) (application of the doctrine turns on the "appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination"); *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973).

In *Baker*, this Court identified six characteristics "[p]rominent on the surface of any case held to involve a political question." 369 U.S. at 217. At issue here is the first *Baker* factor: whether there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Ibid.* Determining whether a case implicates the first *Baker* factor calls for the court first to ascertain the issue that the plaintiff's complaint seeks to have the court resolve, and then to consider whether that issue is one for which the Constitution vests "ultimate responsibility * * * in branches of the government which are periodically subject to electoral accountability." *Gilligan*, 413 U.S. at 10. The inquiry thus entails "interpret[ing] the [constitutional] text in question and determin[ing] whether and to what extent the issue is textually committed" for final determination by a political branch of government. *Nixon* v. *United States*, 506 U.S. 224, 228 (1993); see *id.* at 238 (determining the existence and extent of textual commitment "is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution" (quoting *Baker*, 369 U.S. at 211)).

Accordingly, when a court determines that the plaintiff's claim seeks judicial review of the exercise of a discretionary power that is textually committed for final resolution to a political Branch, or seeks relief that

would require the court to overturn a textually committed decision, the court must decline to adjudicate that question. See *Nixon*, 506 U.S. at 228-229 (declining to review a challenge to the constitutionality of the Senate's procedures for impeachment trial, because the Impeachment Trial Clause commits resolution of that issue to the Senate's sole discretion); *Gilligan*, 413 U.S. at 9-10 (case presented a political question where granting relief would entail overturning the military's existing training and weaponry standards, which reflected "the type of governmental action that was intended by the Constitution to be left to the political branches"); *Baker*, 369 U.S. at 217.

B. A Plaintiff's Reliance On A Statutory Right Cannot Overcome A Constitutional Commitment Of A Decision To A Political Branch

1. When the Constitution assigns final resolution of a question to a political Branch, Congress may not override that assignment—and thereby convert an otherwise nonjusticiable political question into a matter to be adjudicated in court—by enacting a statute that purports to confer a right to have the courts resolve the issue. See *Sierra Club* v. *Morton*, 405 U.S. 727, 732 n.3 (1972) ("Congress may not confer jurisdiction on Art. III federal courts * * * to resolve 'political questions,' because suits of this character are inconsistent with the judicial function under Art. III." (internal citation omitted)). Thus, for example, this Court has held that a statutory right to judicial review did not render justiciable a challenge to an agency order that became final only after the President had concluded that it was consistent with foreign-policy and national-security considerations. *Chicago & S. Air Lines* v. *Waterman S.S. Corp.*, 333

U.S. 103, 114 (1948). That presidential determination, the Court held, was an "executive decision[] as to foreign policy" and thus was "in the domain of political power not subject to judicial intrusion or inquiry," even though Congress had enacted a statute that on its face could be read to authorize judicial review of the President's decision. *Id.* at 111 (citing *Coleman*, 307 U.S. at 454, and *Curtiss-Wright*, 299 U.S. at 319-321); see also *Vieth* v. *Jubelirer*, 541 U.S. 267, 278 (2004) (plurality opinion) (citing *Waterman* for the proposition that "'[t]he judicial Power' created by Article III, § 1, of the Constitution is not * * * *whatever* Congress chooses to assign" to the courts (citations omitted)).

At the same time, "one of the Judiciary's characteristic roles is to interpret statutes, and [courts] cannot shirk this responsibility merely because [their] decision may have significant political overtones." *Japan Whaling*, 478 U.S. at 230. The interpretation of statutes is, moreover, a "recurring and accepted task for the federal courts." *Ibid.* Accordingly, a court must undertake a careful inquiry into the nature of the plaintiff's statutory claim and the interaction of that claim with the constitutional commitment at issue in order to determine whether the claim raises a political question. See *Baker*, 369 U.S. at 217 (determination of whether a case involves a political question requires a "discriminating inquiry into the precise facts and posture of the particular case").

Thus, the court should assess the plaintiff's claim to determine whether it seeks relief that would dictate or set aside a determination that the Constitution commits to a coordinate Branch. See *Gilligan*, 413 U.S. at 10; *El-Shifa Pharm. Indus. Co.* v. *United States*, 607 F.3d 836, 842 (D.C. Cir. 2010) (en banc), cert. denied, 131 S. Ct.

997 (2011). Because the Constitution confers on the judiciary the authority to determine whether a statute is constitutional, a suit seeking invalidation of a statute rarely would raise a political question. See *INS* v. *Chadha*, 462 U.S. 919, 943 (1983). But, for instance, a suit challenging the constitutionality of a statute in one of the rare areas in which the Constitution grants Congress or one of its Houses sole authority to determine constitutionality *would* present a political question. Thus, *Nixon*'s holding that a challenge to the constitutionality of a Senate rule governing impeachment trials was a political question presumably would have been the same had the Senate rule been incorporated in a statute, or had Congress enacted a statute that purported to dictate different procedures for the Senate to follow in such trials. 506 U.S. 228-238. Similarly, when a plaintiff seeks to *rely* on a statute to challenge in court a decision by the Executive, the fact that a statute is involved does not determine whether the suit presents a political question; rather, that issue turns on whether the relief sought would require the court to direct or overturn a decision that is the sole constitutional responsibility of the Executive.

In determining whether an issue presents a political question because the Constitution assigns the matter to a coordinate Branch of government, a court must consider not only whether there is a textual commitment, but also the scope of that commitment. See *Powell* v. *McCormack*, 395 U.S. 486, 521 (1969). The court should therefore construe the statute in order to assess whether enforcement of the asserted statutory right would require the court to direct or review a decision

taken by another Branch that is within the scope of the textual commitment.[16]

2. When a court, having ascertained the nature of the plaintiff's statutory claim and the existence and scope of a textual commitment, determines that the plaintiff's request for relief requires the court to pass on the validity of a decision constitutionally committed to the discretion of a political Branch, the appropriate disposition is to dismiss the suit. In such a case, the existence of a statutory right does not alter the fundamental characteristic that makes the suit nonjusticiable: the plaintiff's claim asks the court to review and set aside a decision that the court has determined is vested by the Constitution in a political Branch. Congress cannot, by creating a statutory right, confer on the courts the authority to decide a question that the Constitution commits to the Executive. See *Waterman*, 333 U.S. at 111, 114 (despite Congress's enactment of a statute that could be read to authorize judicial review, courts may not review President's determination pursuant to statute regarding foreign air carrier routes because resolution of foreign-policy issues is by nature political, not judicial).

That is equally true when Congress, in purporting to confer statutory authority to consider a question that is textually committed to a political Branch, also delineates

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[16] In his concurrence in the judgment in *El-Shifa*, Judge Kavanaugh suggested that applying the political question doctrine in a case alleging that the Executive Branch has violated a statute "may *sub silentio* expand executive power in an indirect, haphazard, and unprincipled manner." 607 F.3d at 857. But because the political question inquiry entails considering whether the Executive has exclusive Article II authority over the issue and whether the plaintiff's statutory claim falls within that constitutional assignment, there is little such risk.

standards to guide the court's adjudication of the issue. To be sure, an issue that is textually committed to a political Branch would typically lack discernible standards that the judiciary could use to resolve the issue in any event. See *Nixon*, 506 U.S. at 228-229. Congress's provision of statutory guidelines might appear to simplify the court's task, were it to adjudicate whether the plaintiff was entitled to relief on the merits. Nonetheless, once the court has determined that the Constitution textually commits final resolution of an issue to a political Branch, Congress's provision of standards for the court to apply in reviewing the political Branch's decision would not alter the conclusion that the relief sought is prohibited by the political question doctrine. See *Gilligan*, 413 U.S. at 9-10 (claim seeking judicial "oversight" of military training requirements was a political question, even though the judicial relief might involve "simply order[ing] compliance with the standards set by Congress and/or the Executive") (citation omitted); *El-Shifa*, *supra* (suit challenging President's decision to destroy Sudanese plant presented a political question despite plaintiffs' reliance on Administrative Procedure Act).

Petitioner is thus incorrect in arguing (Br. 30-32) that *Japan Whaling* suggests that a statutory claim cannot present a political question because the court need only interpret the statute in order to grant relief. *Japan Whaling* did not involve a statute that purported to confer authority on the courts to review a discretionary decision textually committed by the Constitution to another Branch. Rather, the plaintiffs claimed that the Secretary of Commerce had a statutory duty to certify that Japanese nationals were conducting fishing operations in a manner that would undermine the effective-

ness of international conservation programs; it was undisputed that the Executive's authority and responsibility to decide whether to certify Japan were themselves created by a statute—which was enacted pursuant to Congress's Article I power to regulate commerce with foreign nations. 478 U.S. at 224-229. Certain intervenors in *Japan Whaling* nevertheless argued that the case presented a political question because of the "danger of embarrassment" from multiple "pronouncements by various departments." *Id.* at 229 (citing *Baker*, 369 U.S. at 217). The Court rejected that argument, concluding that the potential "political overtones" of its decision did not alter the fact that whether the Secretary had properly exercised his statutory authority presented a "purely legal question of statutory interpretation." *Id.* at 230. *Japan Whaling* thus has no bearing on statutes that purport to authorize judicial review of an Executive decision in an area that is constitutionally committed to the Executive's sole discretion.

C. Petitioner's Claim Based On Section 214(d) Presents A Nonjusticiable Political Question

1. Petitioner's claim under Section 214(d) seeks to overturn the State Department's policy not to list "Israel" as the place of birth in passports of U.S. citizens born in Jerusalem. Section 214(d), by purporting to give petitioner the right to have the State Department indicate in petitioner's passport that he was born in Israel, seeks to effect a reversal of the Executive Branch's recognition policy with respect to Jerusalem.[17] Indeed, the

[17] As the Attorney General's letter to the Senate explained, although President Bush directed that Section 214 be construed as advisory, "[n]either of the courts below construed Section 214(d) as advisory only. The Department of Justice did not renew that argument in its response

evident purpose of Section 214(d) is to establish "United States policy with respect to Jerusalem as the capital of Israel." § 214, 116 Stat. 1365 (capitalization altered). Section 214(d) is thus an attempt, through the indirect means of judicial enforcement of a purported statutory right, to alter Executive Branch policy on a matter of major international sensitivity by requiring the Secretary to represent in passports—official documents addressed to foreign nations—that the United States recognizes Israel's claimed sovereignty over Jerusalem.

The right purportedly granted by Section 214(d) is irreconcilable with the Executive's textually committed authority. The Constitution assigns exclusively to the President the discretion to recognize foreign states, their governments, and their territorial boundaries. See pp. 18-30, *supra*. The President also has the sole power to determine the form and content of passports insofar as they implement such foreign policy determinations that the Constitution commits exclusively to the President. See pp. 31-37, *supra*. And here, the State Department's passport policy is an implementation of the President's decision not to recognize any state as having sovereignty over Jerusalem. See J.A. 52; Pet. App. 35a (Edwards, J., concurring).

Adjudicating petitioner's claim under Section 214(d) would thus entail judicial review of a recognition decision that the Constitution commits to the Executive Branch, and therefore presents a political question beyond the power of the courts to decide. See *Pink*, 315 U.S. at 229 ("Objections to the underlying policy as well as objections to recognition are to be addressed to the

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to the petition for rehearing en banc in the court of appeals, and the Executive Branch is no longer relying on that argument." Holder Letter 3.

political department and not to the courts."); *Baker*, 369 U.S. at 212 ("[T]he judiciary ordinarily follows the executive as to which nation has sovereignty over disputed territory."). Because "[o]nly the Executive—not Congress and not the courts—has the power to define U.S. policy regarding Israel's sovereignty over Jerusalem and decide how best to implement that policy," Pet. App. 12a-13a, Congress may not confer authority on the courts to set aside the Executive's recognition decision. The fact that Section 214(d) pertains to passports—which Congress has some authority to regulate as necessary and proper to implementing its enumerated powers—does not take the provision outside the scope of the textual commitment to the Executive Branch. Cf. *Powell*, 395 U.S. at 519. The President has exclusive power to determine the content of passports as it relates to foreign policy, including recognition determinations. See pp. 31-37, *supra*.

Accordingly, Section 214(d), by purporting to require the Secretary to alter the contents of passports to implement Congress's view that Jerusalem should be recognized as the capital of Israel, regulates passports in an area that is constitutionally committed to the Executive. See *Mistretta*, 488 U.S. at 382. This Court is presented here with a "rare exception[] in which a statute call[s] for a decision constitutionally committed to the President and hence not subject to judicial review." *El-Shifa*, 607 F.3d at 851-852 (Ginsburg, J., concurring in the judgment).[18]

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[18] Petitioner argues that the recognition power is shared between the Executive and Congress. Pet. Br. 41-42. That contention is mistaken. See pp. 18-30, *supra*. But even if petitioner were correct, his suit would nevertheless present a political question because there would be no judicially manageable standards by which a court could adjudicate a

2. Petitioner contends (Br. 29), relying on separation-of-powers cases, that the "*only* issue" for the Court is "whether Congress has the constitutional authority to enact Section 214(d)." Petitioner's assertion that his reliance on a statute precludes application of the political question doctrine is misplaced for the reasons discussed above. See pp. 43-48, *supra*. Moreover, because petitioner's claim seeks judicial review of a decision that is textually committed to the Executive, his claim is distinguishable from the separation-of-powers decisions on which he relies. In those cases, the question the plaintiff asked the court to decide—namely, whether a particular statutory provision enacted pursuant to Congress's enumerated powers was consistent with the structural provisions of the Constitution—was not committed solely to one political Branch. See, *e.g.*, *Chadha*, 462 U.S. at 941-942 (plaintiff brought constitutional challenge to the one-House veto, which required the Court to determine whether the relevant statute was consistent with Article I, a question that was not textually committed to Congress).

Petitioner also argues that because he asserts the infringement of a supposed "personal right," his suit cannot present a political question. Pet. Br. 33. The "personal right" he asserts, however, is based entirely on a statute, Section 214(d), and as explained above, Congress cannot by statute create an enforceable per-

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disagreement between the two political Branches with respect to that shared constitutional power. See *Baker*, 369 U.S. at 212; Hale Memorandum, 29 Cong. Rec. at 664 ("[I]f the legislative and executive branches both possessed the power of recognizing the independence of a foreign nation, and one branch should declare it independent, while the other denied its independence, then, since they are coordinate, how could the problem be solved by the judicial branch?").

sonal right to begin with if that right intrudes upon a subject that the Constitution commits to the Executive.

Quite aside from that flaw in his argument, petitioner's categorical view is inconsistent with this Court's precedents. This Court has explained, for instance, that "settlement of boundaries [is not] a judicial but a political question," even "when individual rights depended on national boundaries." *United States* v. *Arredondo*, 31 U.S. (6 Pet.) 691, 711 (1832); see also *Gilligan*, 413 U.S. at 3, 7. More fundamentally, in any suit involving a textually demonstrable commitment of an issue to a political Branch, the question whether an individual has a right to have an issue decided one way rather than the other will depend on the scope of the commitment. Here, petitioner's claimed individual right to have "Israel" listed as his place of birth in his passport is not cognizable because the President has sole discretion to implement his recognition decision concerning Jerusalem through the State Department's passport policy. See Pet. App. 12a-13a; see pp. 31-41, *supra*.

IV. SECTION 214(d) IMPERMISSIBLY INFRINGES THE PRESIDENT'S POWER TO RECOGNIZE FOREIGN SOVEREIGNS

Because the political question analysis requires the Court to analyze the existence and scope of the textual commitment of exclusive authority to the Executive, the question whether Section 214(d) is unconstitutional because it impermissibly interferes with a power conferred on another Branch overlaps to a considerable extent with the question whether petitioner's claim for relief presents a political question. Nonetheless, whether a case presents a political question because it involves an issue that the Constitution commits to the Executive for

decision is a threshold issue of justiciability. The Court should therefore address that issue before determining whether petitioner is entitled to relief on his statutory claim. See *Chadha*, 462 U.S. at 929, 941-942. But if the Court concludes, contrary to our submission in Part III, that petitioner's claim is justiciable, it should affirm the court of appeals' judgment on the ground that Section 214(d) is an unconstitutional encroachment on the President's sole authority to recognize foreign sovereigns.

"[I]t remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another." *Loving* v. *United States*, 517 U.S. 748, 757 (1996). In particular, Congress cannot overstep its bounds and exercise a power entrusted by the Constitution exclusively to the President. See *Buckley* v. *Valeo*, 424 U.S. 1, 129 (1976); see also, *e.g.*, *Bowsher* v. *Synar*, 478 U.S. 714, 726 (1986); *Chadha*, 462 U.S. at 954-955; *Myers* v. *United States*, 272 U.S. 52, 161 (1926). Section 214(d) is just such an unconstitutional intrusion on a "central prerogative[]" of the President because it seeks to obtain reversal of the Executive's longstanding recognition policy regarding Jerusalem. *Loving*, 517 U.S. at 757. The Constitution vests exclusively in the President the authority to recognize foreign states, their governments, and their territorial boundaries. See pp. 18-30, *supra*. The State Department's Jerusalem passport policy is an implementation of the President's decision not to recognize any state's sovereignty over that city at this time, as well as an exercise of the Executive's authority to determine the content of passports insofar as it implements such a non-recognition decision. See pp. 31-41, *supra*. Just as the courts cannot override these core foreign-policy determinations by adjudicating individual

cases or controversies, so too Congress cannot override them by enacting a statute. Nor is Section 214(d) "appropriate passport legislation," as petitioner argues (Br. 52-53), because it seeks to constrain the President's authority to determine the content of passports in furtherance of his recognition power. See pp. 50, *supra*.

Petitioner's remaining arguments in defense of Section 214(d) are without merit. Petitioner argues (Br. 46), relying on Justice Jackson's concurring opinion in *Youngstown*, that Section 214(d) is constitutional because the President's power is "at its lowest ebb" when he "takes measures incompatible with the expressed or implied will of Congress." 343 U.S. at 637-638. But as Justice Jackson explained, Congress may not act upon a subject that the Constitution commits exclusively to the President. *Ibid.* In such situations, the President may rely on his "exclusive power" notwithstanding Congress's contrary views. *Id.* at 638 n.4. This is such a case: the State Department's passport policy is an implementation of the President's exclusive power to recognize foreign sovereigns and their territorial boundaries, and to determine the content of passports as it pertains to such determinations. Section 214(d), in purporting to direct a change in the State Department's policy, impermissibly encroaches on those exclusive powers.

Petitioner also contends that Section 214(d) "remedies" the State Department's discrimination against supporters of Israel. Pet. Br. 48, 53-54. Petitioner's complaint asserts no discrimination claim. See J.A. 15-18. In any event, the policy operates equally against those who wish to express on their passports their view that Jerusalem is under Palestinian sovereignty or that of any other party. And there can be no serious dispute

that the Executive Branch has refrained from recognizing any nation's sovereignty over Jerusalem not to discriminate against supporters of Israel, but to permit Israel and the Palestinian people jointly to determine the status of that city through negotiations. See, *e.g.*, J.A. 49-50.

Finally, petitioner asks the Court (Br. 57) to "invalidate" President Bush's signing statement, which explained that Section 214(d), if construed as mandatory, impermissibly interferes with the President's recognition power. See 2002 Pub. Papers at 1698. In petitioner's view, because the President did not veto the bill, he was obliged to comply with Section 214(d). Pet. Br. 55-57. There is no call for this Court to pass on that issue or on the validity of the President's signing statement. The court of appeals did not address these questions, and they are outside the questions presented. In any event, it has long been settled that the President need not comply with a statutory provision that infringes his constitutional authority. See, *e.g.*, *Myers*, 272 U.S. 169-170; see also *Chadha*, 462 U.S. at 942 n.13; *Freytag* v. *Commissioner*, 501 U.S. 868, 906 (1991) (Scalia, J., concurring in part and concurring in the judgment); Memorial of Captain Meigs, 9 Op. Att'y Gen. 462, 469-470 (1860).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. Section 3 of Article II of the United States Constitution provides:

> [The President] shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

2. Section 214 of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350, provides:

> **UNITED STATES POLICY WITH RESPECT TO JERUSALEM AS THE CAPITAL OF ISRAEL.**
>
> (a) CONGRESSIONAL STATEMENT OF POLICY.—The Congress maintains its commitment to relocating the United States Embassy in Israel to Jerusalem and urges the President, pursuant to the Jerusalem Embassy Act of 1995 (Public Law 104-45; 109 Stat. 398), to immediately begin the process of relocating the United States Embassy in Israel to Jerusalem.
>
> (b) LIMITATION ON USE OF FUNDS FOR CONSULATE IN JERUSALEM.—None of the funds authorized to be

appropriated by this Act may be expended for the operation of a United States consulate or diplomatic facility in Jerusalem unless such consulate or diplomatic facility is under the supervision of the United States Ambassador to Israel.

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

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