

**ORAL ARGUMENT NOT YET SCHEDULED**

No. 07-5347

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

---

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

v.

SECRETARY OF STATE,  
*Appellee.*

**On Remand From The Supreme Court Of The United States**

---

**BRIEF OF MEMBERS OF THE UNITED STATES SENATE AND  
THE UNITED STATES HOUSE OF REPRESENTATIVES  
AS *AMICI CURIAE* IN SUPPORT OF APPELLANT  
SUPPORTING REVERSAL**

---

Theodore B. Olson  
*Counsel of Record*  
GIBSON, DUNN & CRUTCHER LLP  
1050 Connecticut Ave., N.W.  
Washington, D.C. 20036  
Telephone: (202) 955-8500  
tolson@gibsondunn.com

Randy M. Mastro  
Akiva Shapiro  
GIBSON, DUNN & CRUTCHER LLP  
200 Park Avenue  
New York, NY 10166  
Telephone: (212) 351-4000  
rmastro@gibsondunn.com

*Counsel for Amici Curiae*

**CERTIFICATE AS TO PARTIES,  
RULINGS, AND RELATED CASES**

Pursuant to Circuit Rules 26.1 and 28(a)(1)(A), *amici* state as follows:

**(A) Parties and Amici:**

All known parties, intervenors, and *amici curiae* appearing before the district court and in this Court are listed in the Brief for Appellants.

**(B) Rulings Under Review:**

References to the rulings at issue appear in the Brief for Appellants.

**(C) Related Cases:**

The case on review was previously before this Court on standing, *Zivotofsky v. Sec'y of State*, No. 04-5395, 444 F.3d 614 (D.C. Cir. 2006) (Sentelle, Randolph, and Rogers, Circuit Judges) (reversing and remanding Civil Action Nos. 03-1921 and 03-2048, 2004 U.S. Dist. LEXIS 31172 (D.D.C. Sept. 7, 2004) (Kessler, J.)), and political question, *Zivotofsky v. Sec'y of State*. No. 07-5347, 571 F.3d 1227 (D.C. Cir. 2009) (Griffith, Edwards and Williams, Circuit Judges) (affirming Civil Action No. 03-1921, 511 F. Supp. 2d 97 (D.D.C. 2007) (Kessler, J.)).

The latter ruling was vacated and remanded by the Supreme Court, *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 566 U.S. \_\_\_\_ (2012).

## CERTIFICATE IN SUPPORT OF SEPARATE BRIEF

Circuit Rule 29(d) provides that “[a]mici curiae on the same side must join in a single brief to the extent practicable,” and that “[a]ny separate brief for an amicus curiae must contain a certificate of counsel plainly stating why the separate brief is necessary.”

To the extent other *amicus* briefs are filed in support of appellant in this case, undersigned counsel certifies that a separate brief on behalf of *amici* Members of the United States Senate and the United States House of Representatives is necessary to address the unique interests of the Legislative Branch in the issues presented in this case. In particular, *amici* have a unique, fundamental interest in safeguarding Congress’s power to direct and control the Executive in the realm of passports and laws relating to foreign-born United States citizens. *Amici* also have a unique, fundamental interest in defending the constitutionality of the statute at issue, which passed overwhelmingly in both Houses of Congress, and in seeing the directives of the Legislative Branch enforced in the courts.

Dated: July 27, 2012

/s/ Theodore B. Olson  
Theodore B. Olson

## TABLE OF CONTENTS

	Page
CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES .....	i
CERTIFICATE IN SUPPORT OF SEPARATE BRIEF .....	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES .....	v
IDENTITY AND INTERESTS OF <i>AMICI CURIAE</i> .....	1
STATUTES AND REGULATIONS.....	1
INTRODUCTION AND SUMMARY OF THE ARGUMENT .....	1
ARGUMENT .....	6
I.    The Legislative Branch Directs And Controls The Issuance Of Passports And Reports Of Birth Abroad Under Its Immigration, Naturalization, And Foreign Commerce Powers. ....	6
A.    Since 1790, Congress Has Regularly Exercised Its “[L]egislative Powers” Over Immigration, “Naturalization,” And “Commerce with foreign Nations” To Direct And Control The Issuance Of Passports And The Status Of U.S. Citizens Born Abroad. ....	6
B.    Congress Retains The Power To Curb And Direct The Executive’s Limited Administrative Authority In The Field, As The Passport Cases Make Clear.....	16
II.   Section 214(d) Of The Foreign Relations Authorization Act, Fiscal Year 2003 Does Not Infringe The Executive’s “Recognition Power.”.....	20
A.    Section 214(d) Does Not Purport To Direct The Executive To Alter Its Official Position As To The Status of Jerusalem, And Evidence From The Statutory Text, State Department Passport Policies, Other Statutes, And Government Practices Demonstrates That The Statute Does Not Implicate The Recognition Power. ....	20

B.    At A Minimum, This Court Should Interpret Section 214(d) So As Not To Infringe The Executive’s Recognition Power In Order To Avoid The Difficult Constitutional Questions That Would Be Raised If It Did.....	27
CONCLUSION.....	29
CERTIFICATE OF COMPLIANCE.....	30
APPENDIX	
Appendix A: <i>Amici Curiae</i> Members Of The United States Senate .....	A1
Appendix B: <i>Amici Curiae</i> Members Of The United States House of Representatives.....	A2
CERTIFICATE OF SERVICE	

## TABLE OF AUTHORITIES<sup>1</sup>

	Page(s)
<b>Cases</b>	
<i>Abourezk v. Reagan</i> , 785 F.2d 1043 (D.C. Cir. 1986) (Ginsburg, J.), <i>aff'd by an equally divided Court</i> , 484 U.S. 1 (1987) .....	19, 20
<i>Ashwander v. TVA</i> , 297 U.S. 288 (1936) .....	5
<i>Ballinger v. United States</i> , 216 U.S. 240 (1910) .....	17
<i>Banco Nacional de Cuba v. Sabbatino</i> , 376 U.S. 398 (1964) .....	20, 21
<i>Bowen v. Georgetown Univ. Hosp.</i> , 488 U.S. 204 (1988) .....	16
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976) .....	6
<i>Burnet v. Chicago Portrait Co.</i> , 285 U.S. 1 (1932).....	23
<i>*Buttfield v. Stranahan</i> , 192 U.S. 470 (1904) .....	2, 3, 6
<i>Chamber of Commerce of the U.S. v. Whiting</i> , 563 U.S. ____, 131 S. Ct. 1968 (May 26, 2011).....	8
<i>Crowell v. Benson</i> , 285 U.S. 22 (1932) .....	27
<i>De Canas v. Bica</i> , 424 U.S. 351 (1976) .....	8

---

<sup>1</sup> Authorities upon which *amici* chiefly rely are marked with asterisks.

<i>*Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. &amp; Constr. Trades Council,</i> 485 U.S. 568 (1988) .....	5, 28
<i>*Fong Yue Ting v. United States,</i> 149 U.S. 698 (1893) .....	6, 7, 8
<i>Gibbons v. Ogden,</i> 22 U.S. (9 Wheat.) 1 (1824) .....	6
<i>Grenada County Supervisors v. Brogden,</i> 112 U.S. 261 (1884) .....	28
<i>*Haig v. Agee,</i> 453 U.S. 280 (1981) .....	10, 12, 15, 18
<i>Henderson v. Mayor of N.Y.,</i> 92 U.S. 259 (1875) .....	6
<i>INS v. Chadha,</i> 462 U.S. 919 (1983) .....	17
<i>INS v. St. Cyr,</i> 533 U.S. 289 (2001) .....	27
<i>Japan Whaling Ass'n v. Am. Cetacean Soc'y,</i> 478 U.S. 221 (1986) .....	7
<i>*Kent v. Dulles,</i> 357 U.S. 116 (1958) .....	2, 10, 11, 18, 19
<i>Marbury v. Madison,</i> 1 Cranch 137 (1803) .....	7, 17
<i>Marsh v. Chambers,</i> 463 U.S. 783 (1983) .....	16
<i>Morse v. Boswell,</i> 393 U.S. 802 (1968) .....	17
<i>Nev. Comm'n on Ethics v. Carrigan,</i> 564 U.S. ____, 131 S. Ct. 2343 (June 13, 2011) .....	16

<i>Nixon v. Adm’r of Gen. Servs.</i> , 433 U.S. 425 (1977) .....	26
<i>People v. Compagnie Generale Transatlantique</i> , 107 U.S. 59 (1883) .....	6
<i>Rogers v. Bellei</i> , 401 U.S. 815 (1971) .....	8, 9
* <i>Shachtman v. Dulles</i> , 225 F.2d 938 (D.C. Cir. 1955) .....	10, 21, 23, 28
<i>Smith v. United States</i> , 507 U.S. 197 (1993) .....	22, 23
<i>United States ex rel. Leong Choy Moon v. Shaughnessey</i> , 218 F.2d 316 (2d Cir. 1954) .....	22
<i>United States v. Pink</i> , 315 U.S. 203 (1942) .....	21
<i>United States v. Wong Kim Ark</i> , 169 U.S. 649 (1898) .....	6, 9
<i>Urtetiqui v. D’Arcy</i> , 34 U.S. (9 Pet.) 692 (1835) .....	10
<i>Williams v. Suffolk Ins. Co.</i> , 38 U.S. (13 Pet.) 415 (1839).....	21
* <i>Woodward v. Rogers</i> , 344 F. Supp. 974 (D.D.C. 1972), <i>aff’d without opinion</i> , 486 F.2d 1317 (D.C. Cir. 1973) .....	15, 19
<i>Yakus v. United States</i> , 321 U.S. 414 (1944) .....	17
<i>Ying v. Kennedy</i> , 292 F.2d 740 (D.C. Cir. 1961) .....	22
* <i>Zemel v. Rusk</i> , 381 U.S. 1 (1965) .....	19, 20

* <i>Zivotofsky v. Clinton</i> , 566 U.S. _____, 132 S. Ct. 1421 (2012) .....	3, 4, 5, 21
--	-------------

**Constitutional Provisions**

U.S. Const. art. I, § 1 .....	2, 7
U.S. Const. art. I, § 8 .....	2, 7, 12
U.S. Const. art. II, § 3 .....	3

**Statutes and Acts of Congress**

18 U.S.C. § 11 .....	26
22 U.S.C. § 211a .....	15, 16
22 U.S.C. § 212a(b)(1)(A) .....	16
22 U.S.C. § 2705(2) .....	9
22 U.S.C. § 2714 .....	16
22 U.S.C. § 3301 <i>et seq.</i> .....	25
22 U.S.C. § 5721 <i>et seq.</i> .....	25
Act of Apr. 14, 1802, ch. 28, 2 Stat. 153 (1802) .....	9
Act of Feb. 10, 1855, ch. 71, 10 Stat. 604 (1855) .....	9
Act of Jan. 29, 1795, ch. 20, 1 Stat. 414 (1795) .....	9
Act of June 18, 1798, ch. 54, 1 Stat. 566 (1798) .....	9
Act of Mar. 26, 1790, ch. 3, 1 Stat. 103 (1790) .....	9
Act of Mar. 26, 1804, ch. 47, 2 Stat. 292 (1804) .....	9
An Act for the Punishment of Certain Crimes against the United States, ch. 9, 1 Stat. 112 (1790) .....	11
An Act Regulating Passenger Ships and Vessels, ch. 46, 3 Stat. 488 (1819) .....	8

An Act to Establish an Uniform Rule of Naturalization, Ch. 3, 1 Stat. 103 (1790).....	9
An Act to Prevent in Time of War Departure From or Entry Into the United States Contrary to the Public Safety, ch. 81, 40 Stat. 559 (1918) .....	14
An Act to Prevent the Importation of Certain Persons into Certain States, ch. 9, 2 Stat. 203 (1803).....	11
An Act to Prohibit Intercourse with the Enemy, ch. 31, 3 Stat. 195 (1815) .....	11
An Act to Regulate Immigration, ch. 376, 22 Stat. 214 (1882) .....	8
An Act to Regulate the Diplomatic and Consular Systems of the United States, ch. 127, 11 Stat. 52 (1856).....	13, 16
An Act to Regulate the Issue and Validity of Passports, and For Other Purposes, Pub. L. No. 69-493, 44 Stat. 887 (1926) .....	14, 16
Emergency Quota Act, ch. 8, 42 Stat. 5 (1921) .....	25
Foreign Relations Authorization Act, Fiscal Year 1979, Pub. L. No. 95-426, 92 Stat. 971 (1978) .....	15
Foreign Relations Authorization Act, Fiscal Years 1994 & 1995, Pub. L. No. 103-236, 108 Stat. 382 (1994).....	24
Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350 (2002) .....	2–5, 7, 10, 18, 20–22, 24, 26–28
Immigration and Nationality Act of 1952, ch. 477, Pub L. No. 414, 66 Stat. 163 (1952).....	8, 10, 25
Refugee Relief Act of 1953, Pub. L. No. 83-203, 67 Stat. 400 (1953) .....	25
Taiwan Relations Act, Pub. L. No. 96-8, 93 Stat. 14 (1979) .....	25

United States-Hong Kong Policy Act of 1992, Pub. L. No. 102-383, 106 Stat. 1448 (1992) .....	25
---	----

**Rules**

Fed. R. App. P. 29(a) .....	1
Fed. R. App. P. 29(c)(5)(A) .....	1
Fed. R. App. P. 29(c)(5)(B) .....	1
Fed. R. App. P. 29(c)(5)(C) .....	1

**Regulations**

39 C.F.R. pt. 20 .....	27
Expansion of Global Priority Mail, 63 Fed. Reg. 3814 (Jan. 27, 1998).....	27
Mission Statement for Executive-Led Trade Mission to Jordan and Israel, 75 Fed. Reg. 58,356 (Sept. 24, 2010).....	27

**Other Authorities**

*7 Foreign Affairs Manual 1300 <i>et seq.</i> App’x D (Nov. 2010) .....	23, 24, 25, 27
13 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 3526 (3d ed. 2008) .....	17
<i>Control of Travel From and Into the United States: Hearings on H.R. 10264 Before the H. Comm. on Foreign Affairs, 65th Cong. 2 (1918).....</i>	14
*Craig Robertson, <i>The Passport in America: The History of a Document</i> (2010) .....	11, 12, 13, 14
Declaration of Independence (U.S. 1776) .....	10
Green Haywood Hackworth, 3 Dig. Int’l L. 435 (1942) .....	9

Jeffrey Kahn, <i>The Extraordinary Mrs. Shipley: How the United States Controlled International Travel Before the Age of Terrorism</i> , 43 Conn. L. Rev. 819 (2011) .....	12, 13, 14
Martin Lloyd, <i>The Passport: The History of Man's Most Travelled Document</i> (Sutton Publ'g 2005) .....	12
Melvin Scott, <i>Passports: A Modern Gordian Knot</i> , 46 Ky. L.J. 480 (1956–57).....	12, 13
Random House Webster's Unabridged Dictionary (2d ed. 2001).....	22
Restatement (Third) of the Foreign Relations Law of the United States (1987).....	26
U.S. Dep't of State, Foreign Relations 185–87 (1899).....	13
<i>Validity of Passports: Hearings on H.R. 11947 before the H. Comm. on Foreign Affairs</i> , 69th Cong. (1926) .....	15
Webster's New Int'l Dictionary (2d ed. 1939) .....	22
Webster's New Int'l Dictionary (2d ed. 1945) .....	23

## **IDENTITY AND INTERESTS OF *AMICI CURIAE*<sup>2</sup>**

*Amici curiae* are Members of the United States Senate and the United States House of Representatives. *Amici* have a fundamental interest in safeguarding Congress’s power—granted by the Constitution—to direct and control the Executive in the realm of passports and laws relating to foreign-born United States citizens. *Amici* also have a fundamental interest in defending the constitutionality of the statute at issue, which passed overwhelmingly in both Houses of Congress, and in seeing the directives of the Legislative Branch enforced in the courts. The names of individual *amici*, each of whom is authorized to file this brief on his or her own behalf, are listed in the Appendix.

## **STATUTES AND REGULATIONS**

All applicable statutes and regulations are contained in the Brief for Appellant.

## **INTRODUCTION AND SUMMARY OF THE ARGUMENT**

1. In giving to Congress the “legislative Powers” over immigration and naturalization—as well as “exclusive and absolute” power over “Commerce with

---

<sup>2</sup> All parties have consented to the filing of this brief. Fed. R. App. P. 29(a) & Circuit Rule 29(b). No counsel for any party authored this brief in whole or in part. Fed. R. App. P. 29(c)(5)(A). No party or party counsel, nor any other person or entity other than *amici*, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Fed. R. App. P. 29(c)(5)(B)–(C).

foreign Nations,” U.S. Const. art. I, §§ 1, 8; *Buttfield v. Stranahan*, 192 U.S. 470, 492–93 (1904)—the Constitution unambiguously places in Congress’s hands ultimate control over passports and over regulations regarding U.S. citizens born abroad. Congress has regularly legislated in these fields since 1790 without a whisper of protest from the Executive, *infra* pp. 6–16, and with the express imprimatur of the Supreme Court and this Court, *infra* pp. 18–20.

In 1856, and again in 1926, Congress passed comprehensive passport acts—still substantially in force today—that, among other things, delegate limited administrative authority over passports to the Secretary of State, while retaining ultimate legislative control for Congress. *Infra* pp. 12–15. The Supreme Court and this Court have time and again held that the Secretary of State can only exercise discretion regarding passports within the scope of power granted by Congress under these and subsequent acts, *see Kent v. Dulles*, 357 U.S. 116, 129 (1958); *infra* pp. 18–20, and on numerous occasions Congress has expressly limited the discretion of the Executive. Having delegated (and circumscribed) authority through legislative action, Congress can now further curb and direct the exercise of that authority through subsequent legislation. *Infra* pp. 16–17.

2. The law at issue—Section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350 (2002)—directs the Secretary of State to list the place of birth as “Israel” on passports and

documentation of birth abroad for a U.S. citizen born in Jerusalem who requests such a designation. The Executive can neither refuse to execute a valid law, *see* U.S. Const. art. II, § 3 (“take Care that the Laws be faithfully executed”), nor can it legislate in Congress’s stead by acting outside the bounds of its delegated authority. This is particularly so where the Constitution has “expressly conferred upon Congress” control over the subject matter, in which case Congress’s power is “complete in itself, acknowledging no limitations other than those prescribed in the Constitution.” *Stranahan*, 192 U.S. at 492. Thus, as the Supreme Court made clear, “[i]f ... the statute does not trench on the President’s powers, then the Secretary must be ordered to issue a passport that complies with § 214(d).” *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1428 (2012).

3. Nevertheless, the Executive seeks to evade the clear directive of Section 214(d) by arguing that it is an “unconstitutional encroachment” on the Executive’s exclusive authority to recognize foreign sovereigns—that is, the power to decide, as a matter of official United States foreign policy and law, which political actor legitimately speaks as the sovereign authority of a foreign territory, and to what sovereign territory belongs. *See* Br. for the Resp’t at 52–54, *Zivotofsky*, 132 S. Ct. 1421 (No. 10-699). But Section 214(d) does not instruct the State Department to alter its official position on the status of Jerusalem. *See infra* pp. 20–27. The issue in this case is therefore not whether Congress has the power to “direct a change in

the State Department’s [recognition] policy,” Br. for the Resp’t at 54—it does not purport to do so here—but only whether a law enacted under Congress’s enumerated powers impermissibly infringes Presidential powers under the Constitution simply because the law *relates to* unrecognized territory. It would be strange indeed for Congress to have clear and unambiguous legislative powers over immigration, naturalization and foreign commerce, unless that legislation touches on a disputed territory, in which case Congress has no power at all. Such a rule would, in fact, render Congress impotent in large swaths of its core legislative powers.

4. The better reading is that Section 214(d)—like many other statutes that relate to unrecognized territories—does not implicate the recognition power. *Cf. Zivotofsky*, 132 S. Ct. at 1427 (“Zivotofsky does not ask the courts to determine whether Jerusalem is the capital of Israel.”). Rather, correctly understood, the statute merely provides an individual U.S. citizen with the option to “choose to have Israel recorded on his passport as his place of birth,” *id.*, without directing the Executive to alter its official position on Jerusalem.

That Section 214(d) is best understood to provide for a statement of individual self-identification, rather than formal recognition, is clear from four independent sources. *First*, from the text of Section 214(d) itself, which provides only that “upon the request of the citizen or the citizen’s legal guardian” the “place

of birth” shall be recorded as Israel. *See infra* pp. 22–23. *Second*, from State Department’s policies that allow for the recording of certain other unrecognized territories as the “place of birth” on passports and reports of birth abroad, including Taiwan, the West Bank, and the Gaza Strip. *See infra* pp. 23–24. *Third*, from other legislation regarding unrecognized territories, passed in furtherance of Congress’s immigration, naturalization, and foreign commerce powers and implemented without protest from the Executive. *See infra* pp. 24–26. And *fourth*, from regulations that acknowledge the effective control of Israel over Jerusalem, without purporting to dictate recognition policy. *See infra* pp. 26–27.

5. Finally, any ambiguity as to the purpose and effect of the statute must be resolved so as to avoid the weighty constitutional issues that would be raised if the case did implicate the recognition power. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *Ashwander v. TVA*, 297 U.S. 288, 347-48 (1936) (Brandeis, J., concurring). Thus, if there is a plausible way to read the statute so as not to implicate the question of recognition—and here, there certainly is—this Court is obligated to take that path. *Infra* pp. 27–28. Accordingly, this Court should hold that Section 214(d) is a passport statute that does not “trench on the President’s powers” under the Constitution, and that the Secretary of State must therefore “issue a passport that complies with § 214(d).” *Zivotofsky*, 132 S. Ct. at 1428.

## ARGUMENT

### **I. The Legislative Branch Directs And Controls The Issuance Of Passports And Reports Of Birth Abroad Under Its Immigration, Naturalization, And Foreign Commerce Powers.**

#### **A. Since 1790, Congress Has Regularly Exercised Its “[L]egislative Powers” Over Immigration, “Naturalization,” And “Commerce with foreign Nations” To Direct And Control The Issuance Of Passports And The Status Of U.S. Citizens Born Abroad.**

1. By the express terms of the Constitution, Congress—and Congress alone—is granted “legislative Powers” over “Naturalization” and “Commerce with foreign Nations,” U.S. Const. art. I, §§ 1, 8, and, by extension, over immigration.<sup>3</sup> These “exclusive and absolute” powers, *Stranahan*, 192 U.S. at 493 (foreign commerce); *United States v. Wong Kim Ark*, 169 U.S. 649, 701 (1898) (naturalization); *People v. Compagnie Generale Transatlantique*, 107 U.S. 59, 63 (1883) (immigration), necessarily include the power to institute “a system of laws in these matters,” *Henderson v. Mayor of N.Y.*, 92 U.S. 259, 274 (1875), “provide a system of registration and identification” with respect to immigration, *Fong Yue Ting v. United States*, 149 U.S. 698, 714 (1893), and “take all proper means to carry out the system which it provides.” *Id.*

And these “legislative Powers,” over which “Congress has plenary authority,” *Buckley v. Valeo*, 424 U.S. 1, 132 (1976), necessarily include the

---

<sup>3</sup> Regulation of the movement of “both men and their goods” is “not only incidental to, but actually of the essence of, the power to regulate commerce.” *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 231 (1824) (Marshall, C.J.).

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

Section 214(d) clearly and explicitly directs a ministerial act of the Secretary of State: “For purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen’s legal guardian, record the place of birth as Israel.” In each area covered by the statute—registrations of birth abroad, certificates of nationality, and passports—Congress has ultimate authority under the Constitution, and in each area Congress has expressly delegated day-to-day administration to the Secretary of State. The direction given to the Secretary of State in these areas by Section 214(d), within the context of that delegated authority, is precise. The will of Congress is clear.

The Secretary must “execute[] ... [her] authority according[ly].” *Fong Yue Ting*, 149 U.S. at 713.

2. In furtherance of Congress’s powers over immigration, naturalization, and foreign commerce, Congress has instituted successive regulations governing, among other things, entry to and exit from the United States, culminating in the Immigration and Nationality Act (the “INA”), ch. 477, Pub L. No. 414, 66 Stat. 163 (1952), which “established a ‘comprehensive federal statutory scheme for regulation of immigration and naturalization.’” *Chamber of Commerce of the U.S. v. Whiting*, 563 U.S. \_\_\_\_, 131 S. Ct. 1968, 1973 (May 26, 2011) (quoting *De Canas v. Bica*, 424 U.S. 351, 353 (1976)).<sup>4</sup> The INA charged the Secretary of State with “the administration and the enforcement” of immigration and naturalization laws within the parameters set by Congress. INA § 104(a).

Foreign-born citizens such as Petitioner are not granted citizenship, or any of its attendant rights, by the Constitution, but instead by “congressional generosity.” *Rogers v. Bellei*, 401 U.S. 815, 835 (1971). With the first of many such acts—“An Act to Establish an Uniform Rule of Naturalization”—passed at the second session

---

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

of the First Congress, Congress established that “the children of citizens of the United States that may be born beyond the Sea, or out of the limits of the United States, shall be considered as natural born Citizens,” provided the child’s father had been “resident in the United States.” Ch. 3, § 1, 1 Stat. 103, 104 (1790); *see also Wong Kim Ark*, 169 U.S. at 672–73.<sup>5</sup>

A certificate of nationality or registration of birth (such as a Consular Report of Birth Abroad) is an official record of the United States citizenship of an individual born abroad who has acquired citizenship through U.S.-citizen parents. *See Green Haywood Hackworth*, 3 Dig. Int’l L. 435, 437 (1942); 22 U.S.C. § 2705(2) (Consular Report of Birth Abroad has force and effect as proof of United States citizenship). Legislation concerning these documents is unquestionably in furtherance of Congress’s exclusive authority to establish “an uniform Rule of Naturalization.” U.S. Const. art. I, § 8.

---

<sup>5</sup> Citing, *inter alia*, Acts of Mar. 26, 1790, ch. 3, 1 Stat. 103, 103–04 (1790); Jan. 29, 1795, ch. 20, 1 Stat. 414, 414–15 (1795); June 18, 1798, ch. 54, 1 Stat. 566, 566–69 (1798); Apr. 14, 1802, ch. 28, 2 Stat. 153, 153–55 (1802); Mar. 26, 1804, ch. 47, 2 Stat. 292, 292–93 (1804); Feb. 10, 1855, ch. 71, 10 Stat. 604, 604 (1855); *see also Rogers*, 401 U.S. at 823–31 (tracing history of congressional direction and control over “the acquisition of citizenship by being born abroad of American parents” across two centuries and concluding that the subject is “to be regulated, as it ha[s] always been, by Congress, in the exercise of the power conferred by the constitution to establish an uniform rule of naturalization”).

3. Congress’s immigration, naturalization, and foreign commerce powers also give it unchallenged authority over the passport—a “travel control document,” *Haig v. Agee*, 453 U.S. 280, 293 (1981), whose “crucial function today” is regulation of entry and exit, *Kent v. Dulles*, 357 U.S. 116, 129 (1958); *see also* INA § 101(a)(30) (“The term ‘passport’ means any travel document ... which is valid for the entry of the bearer into a foreign country.”).<sup>6</sup> Congress has legislated regularly with respect to passports since 1790, with Section 214(d) as only the latest in this long line of passport legislation.

The Declaration of Independence lists, among the Founders’ grievances against King George III, that “[h]e has ... obstruct[ed] the laws for naturalization of foreigners [and] refus[ed] to pass others to encourage their migration hither.” The Declaration of Independence para. 9 (U.S. 1776). By 1782, “the passport, although not a required document, was sufficiently recognized that the Continental Congress *gave* the recently created Department of Foreign Affairs” (the precursor to the Department of State) “the responsibility to issue passports in the name of the

---

<sup>6</sup> The Executive’s characterization of a passport as primarily an “instrument of foreign policy” and “diplomacy” (Br. of the Resp’t at 31, *Zivotofsky*, 132 S. Ct. 1421 (No. 10-699)) is anachronistic, to say the least. As this Court explained more than 50 years ago, a passport is “no longer ‘to be considered rather in the character of a political document, by which the bearer is recognized, in foreign countries, as an American citizen[.]’” *Shachtman v. Dulles*, 225 F.2d 938, 940 (D.C. Cir. 1955) (quoting *Urtetiqui v. D’Arcy*, 34 U.S. (9 Pet.) 692, 698 (1835)); *see also* *Kent*, 357 U.S. at 129 (“diplomatic” function of the passport is nowadays “subordinate” to the travel control function).

United States.” Craig Robertson, *The Passport in America: The History of a Document* 26 (2010) (emphasis added). The passport became the subject of legislation for the first time in 1790 when Congress passed a law that provided punishment for the “violat[ion of] safe-conduct[s] or passport[s] . . . issued under the authority of” the United States. An Act for the Punishment of Certain Crimes against the United States, ch. 9, § 28, 1 Stat. 112, 118 (1790).

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

its direction and control in the field of passports, without a whisper of protest from the Executive.

Nevertheless, “[p]rior to 1856, when there was no statute on the subject, the common perception was that the issuance of a passport was committed to the sole discretion of the Executive and that the Executive would exercise this power in the interests of the national security and foreign policy of the United States.” *Haig v. Agee*, 453 U. S. 280, 293 (1981). During this early period, “[l]ocalism” dominated governing practices with respect to the issuance of passports, as “governors, mayors, and notaries public could legally issue passports,” as could the Secretary of State. Robertson, *supra*, at 95, 131; *see also* Melvin Scott, *Passports: A Modern Gordian Knot*, 46 Ky. L.J. 480, 480 (1956–57). Thus, though the federal government “lacked monopoly control over the practice of issuing passports,” the “need for regulation ... was minimal [as] few people traveled abroad[.]” Jeffrey Kahn, *The Extraordinary Mrs. Shipley: How the United States Controlled International Travel Before the Age of Terrorism*, 43 Conn. L. Rev. 819, 827–28 (2011). This would soon change.

With the expansion of popular travel in the nineteenth century, “American travellers [using] their state passports would find that European countries would not recognize them unless they were endorsed by the local US representative.” Martin Lloyd, *The Passport: The History of Man’s Most Travelled Document* 81

(Sutton Publ'g 2005). Congress saw the need to remedy this “ludicrous situation,” *id.*, and in 1856, Congress acted, passing the first comprehensive passport act. *See* An Act to Regulate the Diplomatic and Consular Systems of the United States, ch. 127, § 23, 11 Stat. 52, 60–61 (1856). The 1856 Act reorganized the diplomatic and consular services, and delegated to the Secretary of State alone the “authori[ty] to grant and issue passports.” *Id.* The 1856 Act thus consolidated power to issue passports in the Secretary of State *pursuant to acts of Congress*, establishing the basic framework in which the modern passport developed.

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

At the start of the twentieth century, as “[p]assports slowly became licenses for international travel,” Congress “was more careful to limit Executive discretion when it came to citizens, even during wartime.” Kahn, *supra*, at 829. At the end of 1917, “the attorney general ruled that the executive did not have authority to

control the departure of aliens, nor the departure and entry of U.S. citizens,” without congressional authorization. Robertson, *supra*, at 187. The President thus asked the Secretary of State “to urge upon Congress the passage of the necessary *enabling* legislation, so as to better protect the interests of the country in the present emergency.” *Control of Travel From and Into the United States: Hearings on H.R. 10264 Before the H. Comm. on Foreign Affairs, 65th Cong. 2 (1918)* (emphasis added).

Congress complied, but “felt strongly enough about the importance of freedom of movement to heavily encumber the President’s power to control it.” Kahn, *supra*, at 831. This tightening of the leash manifested itself in the Travel Control Act of 1918, which authorized the President to limit entry into and departure from the United States of both aliens and citizens alike, but only when the United States was at war. *See An Act to Prevent in Time of War Departure From or Entry Into the United States Contrary to the Public Safety, ch. 81, § 1, 40 Stat. 559, 559 (1918)*.

In 1926, Congress passed a revised comprehensive passport act, *see An Act to Regulate the Issue and Validity of Passports, and For Other Purposes, Pub. L. No. 69-493, 44 Stat. 887 (1926)*, with the State Department again acknowledging that congressional authorization was required for it to act in the passport sphere. *See, e.g., Validity of Passports: Hearings on H.R. 11947 before the H. Comm. on*

*Foreign Affairs*, 69th Cong. 1, 5, 8, 10-11 (1926) (statement of Assistant Secretary of State Wilbur J. Carr) (asking members of the House of Representatives to “give us the first section [of the pending Passport Act of 1926] ... to enable consuls to issue passports”). “The sole [substantive] amendment to the 1926 provision, enacted in 1978, limits the power of the Executive to impose geographic restrictions on the use of United States passports in the absence of war, armed hostilities, or imminent danger to travelers.” *Haig*, 453 U.S. at 290 n.18 (citing Foreign Relations Authorization Act, Fiscal Year 1979, Pub. L. No. 95-426, § 124, 92 Stat. 971 (1978)).

Under current law, the Secretary of State may grant and issue passports under such rules as the President of the United States may designate, 22 U.S.C. § 211a, within the boundaries established by Congress. As this Court has made clear, the passport statute “only provides [the Secretary of State with] authority to promulgate procedural rules governing the operations of the Passport Office, and [is] not a grant of undefined substantive powers.” *Woodward v. Rogers*, 344 F. Supp. 974, 983 (D.D.C. 1972), *aff’d without opinion*, 486 F.2d 1317 (D.C. Cir. 1973). Among other statutory constraints, the Secretary of State may not designate a passport as “restricted for travel to or for use in any country,” except in limited statutorily defined circumstances (*e.g.*, a country with which the United States is at

war) (22 U.S.C. § 211a), and may not issue a passport to a person convicted of sex tourism (*id.* § 212a(b)(1)(A)) or drug trafficking (*id.* § 2714).

Last year, the Supreme Court upheld legislative recusal rules against a constitutional attack because Congress first legislated on the subject in 1790, “[w]ithin 15 years of the founding,” “Congress expanded” on these early laws in the 1800s and early 1900s, and across this history there have never been any “serious challenges” to the statutes on constitutional grounds. *Nev. Comm’n on Ethics v. Carrigan*, 564 U.S. \_\_\_\_, 131 S. Ct. 2343, 2348–49 (June 13, 2011); accord *Marsh v. Chambers*, 463 U.S. 783, 790 (1983) (“two centuries of national practice” provide “contemporaneous and weighty evidence” of constitutionality) (internal quotation marks omitted). Here, too, these same historical markers constitute overwhelming evidence of constitutional acceptability.

**B. Congress Retains The Power To Curb And Direct The Executive’s Limited Administrative Authority In The Field, As The Passport Cases Make Clear.**

1. In the Acts of 1856 and 1926, Congress delegated broad administrative authority to the Secretary of State in the area of passport control; control over immigration and naturalization was similarly delegated in the INA, among other statutes. “It is axiomatic that an administrative agency’s power to promulgate legislative regulations is limited to the authority delegated by Congress,” *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988), and that the “broader power to

[grant authority] should include the narrower power to prescribe” the exercise of that authority “in whatever terms Congress sees fit.” 13 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 3526 (3d ed. 2008) (discussing regulation of jurisdiction). The Congress giveth and the Congress taketh away.

Thus “[e]xecutive action [under legislatively delegated authority] is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review as well as the power of Congress to modify or revoke the authority entirely.” *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983) (internal citations omitted). Should Congress seek to amend its delegation of authority at any point, “[i]t is within the power of Congress to change existing law,” *Morse v. Boswell*, 393 U.S. 802, 807 (1968), and the courts are left only to “ascertain whether the will of Congress has been obeyed” in deciding whether the Executive’s actions are proper. *Yakus v. United States*, 321 U.S. 414, 435 (1944).

The Secretary of State, “as all others, is bound by the provisions of Congressional legislation,” *Ballinger v. United States*, 216 U.S. 240, 249 (1910) (granting mandamus to compel Secretary of the Interior), and must perform “a ministerial act which the law enjoins” on her. *Marbury*, 5 U.S. (1 Cranch) at 156–59. Here, Congress properly delegated to the Secretary of State some of its authority over passports and documentation of birth abroad through a series of

legislative actions. With the passage of Section 214(d), Congress modified its earlier delegation and in so doing directed the Secretary of State to perform a ministerial task as an agent of Congress—recording the place of birth of a United States citizen born in the city of Jerusalem as Israel, for those who request this designation.

2. The Supreme Court’s (and this Court’s) decisions in the passport field make clear that the scope of the Secretary of State’s passport power is grounded in, and dependent on, legislative approval. The Secretary has on numerous occasions sought to impose restrictive rules relating to passports, as it seeks to do here, and those restrictions have time and again been invalidated when not authorized by Congress.

In *Kent*, the Court struck down the Secretary’s practice of refusing to issue passports on the ground that an individual was affiliated with Communists because, “[w]ithout explicit congressional authorization to refuse passports on the basis of beliefs or associations, the Secretary could not employ such a standard.” 357 U.S. at 127, 129. In *Haig*, the Court held that the Secretary of State *could* revoke a passport on the ground that the passport holder’s activities were likely to cause serious damage to national security or foreign policy because there was evidence that “compel[led] the conclusion that *Congress ha[d] approved* of such revocations,” 453 U.S. at 306 (emphasis added); *see also id.* at 289 (“The principal

question before us is whether the statute authorizes the action of the Secretary”). Finally, in *Zemel v. Rusk*, the Court examined “whether the Secretary is *statutorily authorized* to refuse to validate ... passports” for travel to Cuba. 381 U.S. 1, 3 (1965) (emphasis added). In answering in the affirmative, the Court explained that “the Passport Act of 1926 ... embodie[d] a grant of authority to the Executive to refuse to validate the passports of United States citizens for travel to Cuba.” *Id.* at 7; *see also id.* at 8 (“Congress intended in 1926 to maintain in the Executive the authority to make such restrictions.”).

In *Woodward v. Rogers*, 344 F. Supp. 974, 981-986 (D.D.C. 1972), *aff’d without opinion*, 486 F.2d 1317 (D.C. Cir. 1973), the court rejected the Secretary of State’s “inclusion of [an] Oath of Allegiance on the passport application form” because there was “neither explicit nor implicit statutory authority” given by Congress for the Oath of Allegiance requirement. In the course of reaching that conclusion, the court distinguished *Zemel*, where “Congress *had* delegated the authority to refuse to validate passports of United States citizens for travel to Cuba,” and held that case was instead “controlled ... by *Kent v. Dulles*,” where the Court was “unable to find” congressional approval for the restriction imposed by the Secretary. *Id.* at 985-86 (emphasis added). Similarly, in *Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir. 1986) (Ginsburg, J.), *aff’d by an equally divided Court*, 484 U.S. 1 (1987), this Court warned against “Executive evasion of the will of

Congress” in the related field of denial of immigration visas, and held that Executive discretion under the INA “extends only as far as the statutory authority conferred by Congress.” *Id.* at 1057, 1061-62.

The passport cases thus show that the Secretary may act in the passport arena only to the extent authorized by Congress, and that passport restrictions imposed by the State Department without congressional approval cannot stand. Of course, the Supreme Court has held that congressional authorization need not be explicit. *See Zemel*, 381 U.S. at 7. But there is no congressional silence here from which to infer approval. Just the opposite. Congress could not have been clearer in specifically disapproving of the Secretary’s refusal to permit individuals born in Jerusalem to self-identify as born in Israel; in the face of that disapproval, the will of Congress must be enforced.

## **II. Section 214(d) Of The Foreign Relations Authorization Act, Fiscal Year 2003 Does Not Infringe The Executive’s “Recognition Power.”**

### **A. Section 214(d) Does Not Purport To Direct The Executive To Alter Its Official Position As To The Status of Jerusalem, And Evidence From The Statutory Text, State Department Passport Policies, Other Statutes, And Government Practices Demonstrates That The Statute Does Not Implicate The Recognition Power.**

1. Despite the ultimate authority of the Legislative Branch in the field of passports and the status of United States citizens born abroad, *supra* pp. 6-20, the Executive refuses to enforce Section 214(d) because, it argues, the statute represents an “unconstitutional encroachment” on the Executive’s power to

recognize foreign sovereigns. Br. for the Resp't at 52–54, *Zivotofksy*, 132 S. Ct. 1421 (No. 10-699). The “recognition power” is the power to decide, as a matter of official United States foreign policy and law, which political body or actor legitimately “speaks as the sovereign authority of the territory it purports to control,” *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964), and “to what sovereignty” territory legitimately belongs, *Williams v. Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415, 420 (1839). The Executive properly takes the lead in recognizing foreign sovereigns.<sup>7</sup>

But, understood correctly, Section 214(d) does not implicate the recognition power at all, as *Zivotofksy* “does not claim that the statutory provision in question represents an attempt by Congress to dictate United States policy regarding the status of Jerusalem.” *Zivotofksy*, 132 S. Ct. at 1436 (Alito, J. concurring in the judgment); *see also Shachtman v. Dulles*, 225 F.2d 938, 945 (D.C. Cir. 1955) (Edgerton, J., concurring) (rejecting government’s argument that “a passport involves foreign relations and that the issuance of a passport is therefore in the exclusive control of the State Department”). As such, the case “does not require the Judiciary to decide whether the power to recognize foreign governments and the extent of their territory is conferred exclusively on the President or is shared

---

<sup>7</sup> *See Sabbatino*, 376 U.S. at 410; *United States v. Pink*, 315 U.S. 203, 229 (1942); *Suffolk*, 38 U.S. (13 Pet.) at 420 (discussing, in dicta, President’s recognition authority).

with Congress.” *Zivotofksy*, 132 S. Ct. at 1436 (Alito, J. concurring in the judgment).

2. That Section 214(d) is best understood to be a passport statute—well within Congress’s plenary authority over passports and documentation of birth abroad, *see supra* pp. 7-24—and not a recognition power statute, is clear from four independent sources.

a. *First*, the statute by its plain terms does not purport to instruct the Executive to alter its official policy regarding the status of Jerusalem. Rather, it merely directs the Secretary of State, “upon the request of the citizen or the citizen’s legal guardian,” to permit a person born in Jerusalem to self-identify Israel as his “place of birth.” The Executive mistakenly equates this directive regarding “place of birth” with an attempt to usurp the President’s recognition power.

“Place of birth” does not mean or imply a recognized government; in fact, “place” refers to any “region; locality; spot.” Webster’s New Int’l Dictionary 1876 (2d ed. 1939); *accord, e.g.*, Random House Webster’s Unabridged Dictionary 1478 (2d ed. 2001) (“a region or area”). Indeed, this Court and other courts time and again understood Congress to have encompassed non-recognized territories with

the word “country.”<sup>8</sup> The Supreme Court faced this issue in *Smith v. United States*, 507 U.S. 197 (1993), when it considered the argument that because Antarctica has no “recognized government,” it is not a “country” under the Foreign Tort Claims Act. *Id.* at 200–01. The Court found that the “dictionary definition of ‘country’ is simply ‘[a] region or tract of land,’” and that it was therefore incorrect to “equate it with ‘sovereign state[.]’” *Id.* (quoting Webster’s New Int’l Dictionary 609 (2d ed. 1945)). There is no reason for this Court to read the congressional directive regarding “place of birth”—which is, if anything, a more general term—in any other way.

b. *Second*, the State Department’s policies with respect to other unrecognized countries make clear that “place of birth” is a self-identification label, not formal recognition. In the context of passports and reports of birth abroad, the purpose of a “place of birth” designation—as the State Department itself acknowledges—is only “to assist in identifying the individual,” 7 Foreign Affairs Manual 1300 *et seq.* App’x D (Nov. 2010) (“7 F.A.M.”) at 1310(g)(2), not

---

<sup>8</sup> See, e.g., *Ying v. Kennedy*, 292 F.2d 740, 743 (D.C. Cir. 1961) (holding that Hong Kong was a “country” under INA § 243(a), despite being a partially autonomous British Colony, because the word does not necessarily “describe a state in the international sense, that is, a state having the status of an international person”); *United States ex rel. Leong Choy Moon v. Shaughnessey*, 218 F.2d 316, 318 (2d Cir. 1954) (holding, in the context of deportation under INA § 243(a), that Congress intended the term “country” to include countries not recognized by the United States).

to legislate recognition. *Cf. Burnet v. Chicago Portrait Co.*, 285 U.S. 1, 6 (1932) (“the sense in which [‘country’] is used in a statute must be determined by reference to the purpose of the particular legislation”). In accordance with this limited function, Congress permitted a person born in Jerusalem to self-identify as being born in Israel, without legislating in the recognition sphere. *Cf. Shachtman*, 225 F.2d at 944 (“We must not confuse the problem of appellant’s application for a passport with the conduct of foreign affairs in the political sense . . . . [O]nly the right of a particular individual to travel is involved and not a question of foreign affairs on a political level.”).

Strikingly, in language almost identical to Section 214(d), Congress directed the Secretary of State to record the “place of birth” as “Taiwan,” upon the request of a passport applicant born there. Foreign Relations Authorization Act, Fiscal Years 1994 & 1995, Pub. L. No. 103-236, § 132, 108 Stat. 382 (1994). The United States “does not officially recognize Taiwan as a ‘state’ or ‘country,’” and instead “acknowledges the Chinese position that there is but one China and that Taiwan is a part of China.” 7 F.A.M. at Note following 1340(d)(6)(a) & 1340(d)(6)(f). Nevertheless, in that instance—unlike this one—the Executive has complied. *Id.* at 1340(d)(6)(d). Similarly, the State Department already permits West Bank and Gaza Strip as “place of birth” designations for U.S. citizens born in those territories. 7 F.A.M. at 1360(c) & (d). This despite the fact that neither one is a

recognized sovereign. *See id.* at 1360(a). Appellant merely seeks the same self-identification right as that afforded citizens born in Taiwan, the Gaza Strip, and the West Bank.

c. *Third*, Congress has regularly legislated in relation to disputed territories in furtherance of its immigration, naturalization, and foreign commerce powers—even when the issue is sensitive from a foreign relations perspective—without any objection from the Executive. For example, Congress has long established immigration quotas by country, *see, e.g.*, Emergency Quota Act, ch. 8, § 2, 42 Stat. 5 (1921); Refugee Relief Act of 1953, Pub. L. No. 83-203, § 4, 67 Stat. 400 (1953), and has at the same time made clear that such legislation “shall not constitute ... recognition of a government not recognized by the United States.” INA § 202(d).

Congress has also passed legislation specifically relating to Taiwan and Hong Kong.<sup>9</sup> And for the purposes of criminal law, Congress has defined “foreign government” to include “any government ... within a country with which the

---

<sup>9</sup> *See, e.g.*, Taiwan Relations Act, Pub. L. No. 96-8, 93 Stat. 14 (1979) (codified at 22 U.S.C. § 3301 *et seq.*) (granting Taiwan many of the rights of recognized sovereigns, without changing unrecognized status, including right to sue and be sued, normal application of its laws, and right to own property in the United States); United States-Hong Kong Policy Act of 1992, Pub. L. No. 102-383, 106 Stat. 1448 (1992) (codified at 22 U.S.C. § 5721 *et seq.*) (providing, *inter alia*, that “the laws of the United States shall continue to apply” with respect to Hong Kong, “[n]otwithstanding” the transfer of sovereignty from the United Kingdom to China, unless modified by law or executive order).

United States is at peace, *irrespective of recognition by the United States.*” 18 U.S.C. § 11 (emphasis added). Given these statutes, there is every reason to presume that Congress does not intend to enter the recognition arena by the mere passage of laws—such as Section 214(d)—that relate to unrecognized territories.

Moreover, this “abundant statutory precedent” has “never been considered invalid as an invasion of [Executive] autonomy,” and provides overwhelming evidence that the exercise of congressional power here does not “impermissibly intrude[] into the executive function.” *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 445, 449 (1977). Conversely, a rule forbidding Congress from enacting any law relating to disputed territories, even if it did not purport to alter recognition policy, would render Congress impotent in large swaths of its core legislative powers.

d. *Fourth*, Section 214(d) must be interpreted in light of blackletter foreign relations law that distinguishes between political or military control of territory (“effective control of [a] state”) and the legitimacy of that control—that is, “formal recognition.” Restatement (Third) of the Foreign Relations Law of the U.S. § 203(1) (1987); *see also, e.g., id.* §§ 201 & 202 (distinguishing between requirements of statehood and “formal recognition”). The State Department, in its rules implementing the authority granted it by Congress to issue passports, makes this same distinction between political control (“what country now has

sovereignty”) and formal recognition (“whether that sovereignty is recognized by the United States”). 7 F.A.M. at 1340(a).

Against this backdrop, U.S. governmental agencies regularly refer to Jerusalem as a city in Israel in the course of routine rulemaking, from the workings of the U.S. mail to foreign trade.<sup>10</sup> When they do so, they do not purport to dictate recognition policy. Section 214(d) is no different.

**B. At A Minimum, This Court Should Interpret Section 214(d) So As Not To Infringe The Executive’s Recognition Power In Order To Avoid The Difficult Constitutional Questions That Would be Raised If It Did.**

This Court can and should resolve the case on the narrow ground that Section 214(d) does not implicate recognition at all, so as to avoid the difficult constitutional questions that would otherwise be raised. That is both the most prudent path in this clash between the Legislative and Executive Branches, and the course that courts are obligated to take in such a situation.

“When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by

---

<sup>10</sup> See, e.g., Expansion of Global Priority Mail, 63 Fed. Reg. 3814, 3815–16 (Jan. 27, 1998) (codified at 39 C.F.R. pt. 20) (Global Priority Mail to “Israel” can be sent “to Jerusalem, Tel Aviv, and Haifa”); Mission Statement for Executive-Led Trade Mission to Jordan and Israel, 75 Fed. Reg. 58,356, 58,356 (Sept. 24, 2010) (discussing trade mission to “Amman, Jordan, and Jerusalem and Tel-Aviv, Israel.”).

which the question may be avoided.” *Crowell v. Benson*, 285 U.S. 22, 62 (1932). If it is, “we are obligated to construe the statute to avoid such problems.” *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001); *accord, e.g., Ashwander*, 297 U.S. at 347–48 (Brandeis, J., concurring). “This approach ... recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution,” *DeBartolo*, 485 U.S. at 575, and that “[i]t ought never to be assumed that the law-making department of the government intended to usurp or assume power prohibited to it.” *Grenada County Supervisors v. Brogden*, 112 U.S. 261, 268-269 (1884) (Harlan, J.) (quotation marks omitted).

In light of these principles, this Court should avoid the recognition power issue completely by interpreting Section 214(d) in the manner set forth above. *See, e.g., DeBartolo*, 485 U.S. at 578 (construing statute so as to “obviate[] deciding” whether statute violates the First Amendment); *Shachtman*, 225 F.2d at 945 (Edgerton, J., concurring) (favoring construction of Passport Act provision “that will enable it to survive”). This reading is correct as a matter of statutory interpretation, and, at the very least, it is a reasonable and “fairly possible” construction.

## CONCLUSION

The judgment of the United States District Court for the District of Columbia should be reversed.

Dated: July 27, 2012

Respectfully submitted,

/s/ Theodore B. Olson

Theodore B. Olson  
*Counsel of Record*  
GIBSON, DUNN & CRUTCHER LLP  
1050 Connecticut Ave., N.W.  
Washington, D.C. 20036  
Telephone: (202) 955-8500  
tolson@gibsondunn.com

Randy M. Mastro  
Akiva Shapiro  
GIBSON, DUNN & CRUTCHER LLP  
200 Park Avenue  
New York, NY 10166  
Telephone: (212) 351-4000  
rmastro@gibsondunn.com

*Counsel for Amici Curiae*

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 28(e)(2)(C) because this brief contains 6,997 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word using 14-point Times New Roman font.

/s/ Theodore B. Olson  
Theodore B. Olson

**APPENDIX A:**

***Amici Curiae* Members of  
The United States Senate**

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

Richard Blumenthal (D-CT)  
United States Senator

Sherrod Brown (D-OH)  
United States Senator

Jon Kyl (R-AZ)  
United States Senator

Carl Levin (D-MI)  
United States Senator

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

Ron Wyden (D-OR)  
United States Senator

## **APPENDIX B:**

### ***Amici Curiae* Members of The United States House of Representatives**

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

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

Steve Austria (R-OH-7)  
United States Representative

Joe Baca (D-CA-43)  
United States Representative

Roscoe Bartlett (R-MD-6)  
United States Representative

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

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

Bruce Braley (D-IA-1)  
United States Representative

Vern Buchanan (R-FL-13)  
United States Representative

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

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

Hansen Clarke (D-MI-13)  
United States Representative

Jim Costa (R-CA-20)  
United States Representative

Joseph Crowley (D-NY-7)  
United States Representative

Ted Deutch (D-FL-17)  
United States Representative

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

Eni Faleomavaega (D-American Samoa)  
United States Representative

Louie Gohmert (R-TX-1)  
United States Representative

Gene Green (D-TX-29)  
United States Representative

Michael Grimm (R-NY-13)  
United States Representative

Janice Hahn (D-CA-36)  
United States Representative

Alcee Hastings (D-FL-23)  
United States Representative

Randy Hultgren (R-IL-14)  
United States Representative

Steve Israel (D-NY-2)  
United States Representative

Leonard Lance (R-NJ-7)  
United States Representative

James Lankford (R-OK-5)  
United States Representative

Sandy Levin (D-MI-12)  
United States Representative

Dan Lipinski (D-IL-3)  
United States Representative

Zoe Lofgren (D-CA-16)  
United States Representative

Nita Lowey (D-NY-18)  
United States Representative

Carolyn Maloney (D-NY-14)  
United States Representative

Carolyn McCarthy (D-NY-4)  
United States Representative

David McKinley (R-WV-1)  
United States Representative

Jerrold Nadler (D-NY-28)  
United States Representative

Alan Nunnelee (R-MS-1)  
United States Representative

Bill Owens (D-NY-23)  
United States Representative

Frank Pallone (D-NJ-6)  
United States Representative

Bill Pascrell (D-NJ-8)  
United States Representative

Gary Peters (D-MI-9)  
United States Representative

Ted Poe (R-TX-2)  
United States Representative

Mike Quigley (D-IL-5)  
United States Representative

Charles Rangel (D-NY-15)  
United States Representative

David Rivera (R-FL-25)  
United States Representative

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

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

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

Jan Schakowsky (D-IL-9)  
United States Representative

Adam Schiff (D-CA-29)  
United States Representative

Jean Schmidt (R-OH-2)  
United States Representative

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

Brad Sherman (D-CA-27)  
United States Representative

Albio Sires (D-NJ-13)  
United States Representative

Steve Stivers (R-OH-15)  
United States Representative

Edolphus Towns (D-NY-10)  
United States Representative

Robert Turner (R-NY-9)  
United States Representative

Debbie Wasserman Shultz (D-FL-20)  
United States Representative

Henry Waxman (D-CA-30)  
United States Representative

Allen West (R-FL-22)  
United States Representative

## CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of July, 2012, I caused the foregoing Brief of Members of the United States Senate and the United States House of Representatives as *amici curiae* in support of Appellant to be filed with the Court through the Court's CM/ECF system, and by the delivery of eight copies of the brief to the Clerk's Office. Counsel of record are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Theodore B. Olson

Theodore B. Olson  
GIBSON, DUNN & CRUTCHER LLP  
1050 Connecticut Ave., N.W.  
Washington, D.C. 20036  
Telephone: (202) 955-8500  
tolson@gibsondunn.com