No. 13-628

IN THE
Supreme Court of the United States

MENACHEM BINYAMIN ZIVOTOFSKY,
by his parents and guardians, ARI Z. and
NAOMI SIEGMAN ZIVOTOFSKY,
Petitioner,
v.
JOHN KERRY, SECRETARY OF STATE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICI CURIAE* OF ANTI-DEFAMATION LEAGUE, AMERICAN ISRAEL PUBLIC AFFAIRS COMMITTEE, ASSOCIATION OF PROUD AMERICAN CITIZENS BORN IN JERUSALEM, ISRAEL, B'NAI B'RITH INTERNATIONAL, CENTRAL CONFERENCE OF AMERICAN RABBIS, HADASSAH, THE WOMEN'S ZIONIST ORGANIZATION OF AMERICA, INC., JEWISH COUNCIL FOR PUBLIC AFFAIRS, NATIONAL COUNCIL OF JEWISH WOMEN, NATIONAL COUNCIL OF YOUNG ISRAEL, UNION FOR REFORM JUDAISM, UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA, WOMEN OF REFORM JUDAISM, AND WOMEN'S LEAGUE FOR CONSERVATIVE JUDAISM IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

The Anti-Defamation League ("ADL") and other prominent Jewish organizations respectfully submit this brief as *Amici Curiae* in support of Menachem Binyamin Zivotofsky.[1]

Founded in 1913 to "fight the defamation of the Jewish people and to secure justice and fair treatment to all," ADL is the world's leading organization fighting anti-Semitism, racism, and all forms of bigotry through programs and services that counteract hatred and prejudice. ADL advocated for passage of the law at issue in this case, as it believes that U.S. citizens born in Jerusalem should have the right to have "Israel" recorded as the country of birth on their passports and consular reports of birth abroad.

The American Israel Public Affairs Committee ("AIPAC") was founded in 1954. AIPAC is registered as a domestic lobby and supported financially by private donations. The organization receives no financial assistance from Israel or any foreign group. AIPAC is not a political action committee and it does not rate, endorse, or contribute to candidates. AIPAC is the only American organization whose principal mission is to lobby the United States government on issues affecting the U.S.-Israel relationship. To this end, AIPAC's over 100,000 citizen-activist members and staff work to educate members of Congress, candidates for public office, policymakers, media professionals and student leaders on college campuses

[1] ADL obtained consent to file this brief from the parties' counsel of record. ADL's counsel authored this brief in whole. No person other than the ADL or its counsel made a monetary contribution intended to fund its preparation or submission.

about the importance of a strong U.S.-Israel friendship.

The Association of Proud American Citizens Born in Jerusalem, Israel is an ad hoc, web-based organization, administered by both the International Israel Allies Caucus Foundation and the National Council of Young Israel, which consists of Jerusalem-born American citizens who wish to self-identify as U.S. citizens born in Israel. To this end, the Association emphatically supports Menachem Binyamin Zivotofsky's appeal to the Supreme Court.

B'nai B'rith International ("BBI"), the global voice of the Jewish community, is the oldest and most widely known Jewish humanitarian, human rights, and advocacy organization. Founded in 1843, BBI works for Jewish unity, security, and continuity while fighting anti-Semitism and intolerance around the world. Central to BBI's mission is the security and well-being of the State of Israel. BBI joins this brief in support of the Petitioner and urges the United States government to comply with current law.

Hadassah, the Women's Zionist Organization of America, Inc., founded in 1912, has over 330,000 members, associates and supporters nationwide. In Israel, Hadassah initiates and supports pace-setting health care, education and youth institutions, as well as land development to meet the country's changing needs. Hadassah has an historic connection to Jerusalem and plays an integral role in its economy as the city's largest non-governmental employer. In addition to Hadassah's mission of maintaining health care institutions in Israel, Hadassah has a proud history of protecting the rights of the Jewish community in the United States. Although Hadassah believes that the narrow question in this case can and should

be decided on non-political grounds, Hadassah maintains its strong and long-standing support for the government of Israel and the State as the homeland of the Jewish people.

The Jewish Council for Public Affairs ("JCPA") is the coordinating body of 14 national Jewish organizations and 125 local Jewish federations and community relations councils. Founded in 1944, the JCPA is dedicated to safeguarding the rights of Jews throughout the world; upholding the safety and security of the State of Israel; and protecting, preserving, and promoting a just, democratic, and pluralistic society. These values motivate JCPA's advocacy. The JCPA recognizes Jerusalem's unique place in the Jewish religion and history.

The National Council of Jewish Women ("NCJW") is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families, and by safeguarding individual rights and freedoms. Consistent with these ideals, NCJW joins this brief.

The National Council of Young Israel ("NCYI") is the umbrella organization for over 300 Young Israel branch synagogues with over 25,000 families within its membership throughout North America and Israel. It is one of the premier organizations representing the Orthodox Jewish community, its challenges and needs, and is involved in issues that face the greater Jewish community in North America and Israel. NCYI assists its branches in programming and planning through its Departments of Synagogue Services, Rabbinic Services, Women's Programming, Jewish Education, Youth Services, Publications and

Political Action. It is represented in Israel through its office in Jerusalem. NYCI joins this brief in support of the Petitioner.

The Union for Reform Judaism, whose 900 congregations across North America include 1.3 million Reform Jews; the Central Conference of American Rabbis, whose membership includes more than 2000 Reform rabbis; and the Women of Reform Judaism that represents more than 65,000 women in nearly 500 women's groups in North America and around the world, come to this issue out of their commitment to uphold the right of a U.S. citizen to identify the country in which he or she was born. This right must extend to American citizens born in Jerusalem.

The Union of Orthodox Jewish Congregations of America ("Orthodox Union") is the nation's largest Orthodox Jewish umbrella organization, representing nearly 1,000 synagogues across the country. Through its Institute for Public Affairs, the Orthodox Union has participated, typically via *amicus* briefs, in many cases before the Supreme Court which have raised issues of importance to the Orthodox Jewish community. There are few issues of higher symbolic value to the Orthodox Jewish community than the centrality of Jerusalem, toward which the community's many members turn thrice daily to face in prayer. The Orthodox Union joins this brief.

The Women's League for Conservative Judaism ("WLCJ") is the voice of the women of the Conservative Movement, representing its membership at a wide array of national, international, religious and social action organizations. The mission of WLCJ is to strengthen and unite synagogue women's groups and their members, support them in mutual efforts to understand and perpetuate Conservative/Masorti

Judaism in the home, synagogue and community, and reinforce their bonds with Israel and Jews worldwide. WLCJ joins this brief in support of the Petitioner.

SUMMARY OF ARGUMENT

The Petitioner, an American citizen who was born in the western sector of Jerusalem, seeks nothing more than to identify his place of birth as "Israel" on his passport and Consular Report of Birth Abroad. The United States Congress, under whose statutory authorization the Secretary of State issues passports, enacted a statute which merely permits an American citizen born in Jerusalem to identify himself as having been born in "Israel"—not "Jerusalem, Israel," but simply "Israel."

The Secretary has refused to obey an Act of Congress instructing him to permit the Petitioner to identify his place of birth on his own passport as "Israel." He maintains that this statute, § 214(d) of the Foreign Relations Authorization Act for Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350, 1366 (2002) ("§ 214(d)"), unconstitutionally usurps what he asserts is the Executive Branch's exclusive power to recognize, or decline recognition of, foreign sovereigns. This is a power, he contends, that is implicitly granted exclusively to the Executive in Article II, § 3's grant to the President of the power to "receive Ambassadors and other public ministers."

Amici respectfully submit that § 214(d) simply authorizes a limited ministerial act. It permits an American citizen born in Jerusalem to identify his place of birth on his passport and Consular Record of Birth Abroad as "Israel." It does not usurp an exclusive power granted to the Executive Branch. The Secretary's position cannot, therefore, withstand scrutiny. Accordingly, *amici* urge the Court to reverse

the lower court decision and to permit American citizens falling within the ambit of § 214(d) to identify their place of birth in the manner provided by Congress.

ARGUMENT

I. THE PLAIN LANGUAGE OF § 214(d) ONLY AUTHORIZES A LIMITED, MINISTERIAL ACT

The only section of § 214 at issue here, subsection (d), provides simply that:

> (d) *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 [of State] shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel (emphasis added).

Section 214(d) does not constitute or purport to constitute a proclamation on the status of Jerusalem, or the United States' recognition of Jerusalem as the capital of Israel, or an announcement of any change in our Government's position concerning the status of Jerusalem. It is, on its very face, a limited provision. It allows United States citizens who were born in Jerusalem to request that, for the purpose of their own passport, they may record their place of birth as "Israel." Were there any doubt that this recording is solely for this limited purpose, the provision begins, "*For purposes of*." The permitted entry is allowed for a narrow purpose. The provision simply authorizes American citizens to identify their place of birth on their own passport and merely "record [their] place of birth as Israel."

Significantly, if the Secretary complies with § 214(d), nothing in Zivotofsky's passport will even *mention* Jerusalem, let alone recognize it as a city of—or the capital of—Israel. Indeed, the passport will be entirely silent concerning the particular city in which Zivotofsky was born. It therefore can in no way constitute a representation that the United States has taken any position about Israel's sovereignty over Jerusalem.

In short, this is an Act of the United States Congress that permits a limited number of American citizens who were born in Jerusalem to identify themselves on their own individual passports as having been born in "Israel." The statute operates solely "for the purpose of" permitting those citizens to record their own identity and place of birth on their own identity papers. It does not constitute a pronouncement of foreign policy. Congress made that plain in its drafting of the statute. The Secretary cannot seriously contend that this ministerial provision constitutes the "usurpation" of the Executive Branch's power to recognize the sovereignty of foreign governments, to express its position about the resolution of the Israeli-Arab conflict, or to conduct foreign policy.

II. THE SECRETARY BEARS THE BURDEN OF OVERCOMING THE PRESUMPTION THAT ENACTING § 214(d) WAS WITHIN CONGRESS' CONSTITUTIONAL POWER AND OF DEMONSTRATING THAT IT "PLAINLY" HAS THE EFFECT OF "USURPING" A FUNCTION EXCLUSIVELY VESTED IN THE EXECUTIVE

Congress' authority to legislate concerning the issuance of passports is found in Article I of the Constitution. That body has been enacting statutes

governing passports since the founding of the republic. Accordingly, the sole issue presented is whether enactment of § 214(d) improperly usurped a power granted exclusively to the President by the Constitution. It did not.

The Secretary's claim that Congress' enactment of § 214(d) should be disregarded must be evaluated against the backdrop of: (1) the presumption that it is valid; (2) the Supreme Court's requirement that § 214(d) be construed, if at all possible, to avoid its invalidation; and (3) the Secretary's burden to demonstrate clearly that if § 214(d) is not invalidated, the Executive Branch's ability to conduct foreign policy will be "usurped."

A. Section 214(d) Is Presumptively Valid and Should Be Construed to Avoid Invalidation.

It has been said that the Court's duty to rule on the constitutionality of an act of Congress "is the gravest and most delicate duty that [it] is called upon to perform." *Blodget v. Holden*, 275 U.S. 142, 147-48 (1927) (Holmes, J., concurring) (Court's "plain duty" is to adopt the interpretation "which will save the Act," rather than one which invalidates it). The Supreme Court has repeatedly affirmed that courts are to proceed "on the reasonable presumption that Congress did not intend the [interpretation] which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005); *see also Almendarez-Torres v. United States*, 523 U.S. 224, 237-38 (1998) (quoting *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916), for the proposition that "[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is

unconstitutional, but also grave doubts upon that score").

As the Supreme Court has recently put it:

> Proper respect for a coordinate branch of the government requires that we strike down an Act of Congress only if the lack of constitutional authority to pass [the] act in question is clearly demonstrated.

Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2579 (2012) (quoting *United States v. Harris*, 106 U.S. 629, 635 (1883)); *see also United States v. Morrison*, 529 U.S. 598, 607 (2000) (Court will "invalidate a congressional enactment only upon a *plain showing* that Congress has exceeded its constitutional bounds") (emphasis added).

B. The Secretary Cannot Clearly Demonstrate That the Executive Branch's Ability to Conduct Foreign Policy Will Be "Usurped."

The Secretary bears the burden of demonstrating that § 214(d) actually "prevents the Executive Branch from accomplishing its constitutionally assigned functions." *Nixon v. Adm'r of Gen. Servs*., 433 U.S. 425, 443 (1977) (citing *United States v. Nixon*, 418 U.S. 683, 711-12 (1974)). It is the position of the United States that the final status of Jerusalem should be resolved through negotiation between Israel and its neighbors. *See* Remarks by President Barack Obama in Address to the United Nations General Assembly (Sept. 21, 2011), http://www.whitehouse.gov/the-press-office/2011/09/21/remarks-president-obama-address-united-nations-general-assembly (last visited July 17, 2014) ("Ultimately, it is the Israelis and the Palestinians—not us—who must reach

agreement on the issues that divide them: on borders and on security, on refugees and Jerusalem"). The Secretary argues that § 214(d) impermissibly interferes with the Executive Branch's ability to conduct foreign policy in the Middle East and, in particular, with its ability to preserve its position that it does not recognize Jerusalem as the capital of Israel or, for that matter, as part of any polity.

This ministerial act could not constitute the "usurpation" of any exclusive powers of the Executive Branch to conduct foreign policy. The Department of State's own Foreign Affairs Manual ("FAM") defines a United States passport as "a travel document issued under the authority of the U.S. Secretary of State attesting to the *identity and nationality* of the bearer." 7 FAM 1311(b) (2013) (emphasis added). A passport "[i]dentifies the bearer as a U.S. citizen or non-citizen national." 7 FAM 1311(d)(2). An American citizen's passport serves as her or his "proof of U.S. citizenship and identity at home and abroad," 7 FAM 1311(f)(2), and entitles the bearer to be "recogni[z]ed, in foreign countries, as an American citizen." *Haig v. Agee*, 453 U.S. 280, 292 (1981) (quoting *Urtetiqui v. D'Arcy*, 34 U.S. (9 Pet.) 692, 698 (1835)). An American citizen's passport, then, is not an expression of the foreign policy of the United States. Rather, it reflects the identity of an American citizen as set forth by that citizen, and nothing more.

Moreover, the "place of birth" designation by the American citizen cannot be said to constitute the Executive Branch's recognition, or non-recognition, of the sovereignty of a foreign government. Rather, as the Secretary's own FAM states:

> [T]he 'place of birth' designation is an integral part of establishing an individual's identity.

> It distinguishes that individual from other persons with similar names and/or dates of birth, and helps identify claimants attempting to use another person's identity. The information also facilitates retrieval of passport records to assist the Department in determining citizenship or notifying next of kin or other person designated by the individual to be notified in case of an emergency.

7 FAM 1310(g), App. D.[2]

Thus, a passport is not a statement of foreign policy, and it certainly is not a means of official recognition of a foreign government. Quite the contrary, a U.S. passport is a statement to foreign governments of a purely domestic matter, namely, that the bearer is a United States citizen. In a word, the United States passport serves "as proof of U.S. citizenship at home and abroad." 7 FAM 1311(f)(2). This limited role of the passport has been recognized by this Court. As was noted in *Haig v. Agee*, 453 U.S. at 292 (quoting *Urtetiqui v. D'Arcy*, 34 U.S. at 698), a passport is a document "by which the bearer is recogni[z]ed, in

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[2] Thus, for instance, requiring an American citizen born in Jerusalem to simply limit herself to identifying her place of birth as "Jerusalem," rather than "Israel," if she requests that self-identification, would consign her to a "no-man's land," in which she would be unable to have a passport which clearly identified her in the manner permitted other American citizens. This is because, in addition to Israel, there are nineteen (19) other countries that have locations named "Jerusalem." *See* Report of National Geospatial-Intelligence Agency, http://geonames.nga.mil/namesviewer/ (last visited July 17, 2014). In addition, there are twenty (20) places in the United States called "Jerusalem," located in twelve (12) different states. *See* Jerusalem-USA blog, http://jerusalem –usa.blogspot.com (last visited July 17, 2014).

foreign countries, as an American citizen"; *accord United States v. Laub*, 385 U.S. 475, 481 (1967).

It is not enough for the Secretary to simply assert that § 214(d) impermissibly interferes with the Executive Branch's power to recognize or refuse to recognize foreign sovereigns. Rather, it is his burden to demonstrate that Congress' provision actually and clearly "usurps" the Executive's power. "Usurp" is defined as "tak[ing] the place of by or as if by force; supplant." *Usurp*, Merriam-Webster.com, http://www.merriam-webster.com/dictionary/usurp (last visited July 17, 2014). As the Supreme Court has put it, "it must be obvious that there was a usurpation of functions exclusively vested in . . . the Executive." *Tenney v. Brandhove*, 341 U.S. 367, 378 (1951). That congressional enactments simply touch upon the powers of the Executive will not suffice to render them unconstitutional. *See Buckley v. Valeo*, 424 U.S. 1, 121 (1976) ("[T]he Constitution by no means contemplates total separation of each of these three essential branches of Government . . . [A] hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively.").

The Secretary's usurpation argument is also ironic given that it is Congress that authorizes the Secretary to issue passports in the first place—and it is the Constitution which provides Congress with the power to authorize the Secretary to do so. Congress empowered the Secretary to issue passports under the Passport Act of 1926, ch. 772, 44 Stat. 887 (1926). *See Zemel v. Rusk*, 381 U.S. 1, 7 (1965). Indeed, Congress retains the ability to enact new passport laws. *See, e.g.,* Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 127(a),

108 Stat. 382, 394 (1994) (amending the language "regulat[ing] the issue and validity of passports").

It is clear that the Executive does not have exclusive power to regulate the issuance of passports. Indeed, it is undisputed that Congress does have the power to enact passport legislation. Congressional authority to control entry and exit into the United States, and to authorize the Department of State to issue passports, derives from the Constitution, in particular, from the Commerce Clause. *See* U.S. Const. Art. I, § 8, cl. 3. *See also* U.S. Const. Art. I, § 9, cl. 1 (indicating that it is Congress that has the power to regulate "the Migration or Importation of such Persons as any of the States now existing shall think proper to admit"); *Aptheker v. Sec'y of State*, 378 U.S. 500, 518 (1964) (Black, J., concurring) ("Without reference to other constitutional provisions, Congress has, in my judgment, broad powers to regulate the issuance of passports under its specific power to regulate commerce with foreign nations."). In short, the Secretary makes the claim that § 214(d) usurps the exclusive domain of the Executive Branch notwithstanding the fact that his own power to issue passports in the first instance comes from Congress, and Congress' right to grant him that power derives from the Constitution.

The Circuit Court below expressly acknowledged Congress' power to legislate in this arena. *Zivotofsky v. Sec'y of State*, 725 F.3d 197, 216 (D.C. Cir. 2013). Respondent himself, by means of the Department of State Foreign Affairs Manual, expressly recognizes that his authority to issue, deny and revoke passports derives directly from congressional enactments, including 22 U.S.C. §§ 211a, 212, 213, 214, 214a, 217a, 218 and 2705. *See* 7 FAM 1318(a). This recognition is further demonstrated by the Manual's reference to

Executive Order 11295, which was issued on August 5, 1966 and sets forth rules governing the issuance of passports. The Manual describes that Executive Order as delegating "to the Secretary of State the authority to make regulations regarding passports *conferred on the President of the United States by 22 U.S.C. § 211a*." 7 FAM 1318(a)(9) (emphasis added); *see Zivotofsky v. Sec'y of State*, 571 F.3d 1227, 1241 (D.C. Cir. 2009) (Edwards, J., concurring).

Indeed, both Respondent and the Court of Appeals acknowledge that, in fact, enactment of §214(d) did not effect any change whatsoever in United States policy regarding the status of Jerusalem. It is conceded that the President did not feel the need to veto the legislation, and, in signing the law, the President issued a statement expressly advising that the enactment did not reflect or effect any change in United States policy. This message was expressly reaffirmed by the U.S. Consulate in Jerusalem. *Zivotofsky*, 725 F.3d at 218. Thus, what Respondent and the Circuit Court are left arguing is that because some foreign interests in 2002 allegedly *misperceived* the nature and scope of the congressional enactment and confused a statute that simply permits American *citizens* to self-identify their own place of birth with a statement of policy by the American *government*, Congress' two-century-old authority to pass passport legislation must be negated as somehow constituting a "plain usurpation" of exclusive executive power.[3]

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[3] There is no evidence suggesting that since their initial misperception at the time of the enactment of § 214(d) in 2002, any foreign ministers continue to labor under this misunderstanding as to the true nature and scope of the statute. Indeed, and as the Court of Appeals recognized, not a single Palestinian

Amici are unaware of any authority holding that our nation's constitutional jurisprudence may, or should, turn on "criticism" from interested factions abroad, especially when that criticism is, as the Court of Appeals notes, mistaken. Surrender of the rights of U.S. citizens to express their views—the purpose of § 214(d)—and negation of Congress' authority to act in a sphere that has long been recognized as falling within its powers, cannot be the acceptable solution. No doubt many foreigners are "critical," for example, when they see Americans on federal property protesting White House policies which those foreigners find favorable to their viewpoint. The solution cannot be to curtail the protest rights of citizens in the name of securing the foreign policy powers of the Executive. Numerous avenues are available to the Respondent to counter any mistakes by foreigners as to what a particular statute does or does not mean, including even recording in the passport itself that the ministerial act of honoring a request by a Jerusalem-born American citizen to identify Israel as his birthplace does not change the position of the United States with respect to Jerusalem.

Thus, § 214(d) should be presumed Constitutional and the Secretary cannot meet his burden to "clearly demonstrate[ ]" that § 214(d) usurps the Executive Branch's power to recognize foreign sovereigns.

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or Arab interest group submitted an *amicus curiae* brief in this matter. *Zivotofsky*, 725 F.3d at 219.

III. THE SECRETARY'S ASSERTION OF INTERFERENCE WITH EXECUTIVE POWER IS BELIED BY HIS OWN ESTABLISHED WRITTEN POLICIES AND PROCEDURES

Article II, § 3 grants the President the authority to "receive Ambassadors and other public Ministers." Respondent contends that this power implicitly includes the exclusive power to recognize or to decline recognition of foreign governments.[4] Any conflict with this asserted power posed by a citizen born in Jerusalem claiming Israel as his or her birthplace relies on erroneous speculation on third parties' part. To the extent that mistaken speculations risk interference with the Executive Branch's exercise of its powers, the State Department already permits individuals in other disputed territories to express views through the birthplace entry at odds with the official position of the United States government and has demonstrated the ability to avoid any confusion. The State Department also acknowledges Congress' authority, if it chooses, to eliminate the birthplace entry from passports entirely. As such, § 214(d) does not interfere with executive power.

A. Interpreting a Passport's Reference to Israel As the Birthplace of an Individual Born in Jerusalem As a Recognition of Sovereignty Requires Erroneous Speculation That Can Be Easily Avoided.

The Secretary asserts that if he permits American citizens born in Jerusalem to identify their place of birth in their individual passports as Israel, the

[4] This assumption of implicit, exclusive power is contested by Petitioner and other *amici*.

Executive Branch's ability to conduct foreign policy in the Middle East will be usurped. This assertion, by which the Secretary seeks to invalidate an act of Congress, is based on speculation that if Jerusalem-born American citizens are allowed to claim Israel as their birth country on their United States passport, protests in the Middle East will interfere with American foreign policy. This is not only speculation, but, indeed, speculation that there will be some in the Middle East who will *mistakenly* conclude that simply permitting individual American citizens born in Jerusalem to record their place of birth as Israel reflects a change in American policy about the status of Jerusalem, when it does not.

Even assuming that some would reach this mistaken conclusion, and further assuming that this mistaken conclusion would be meaningful to some, the United States can easily remedy the mistaken assumption. It can do so by announcing, or noting, or even recording in the passports in question, that the ministerial act of honoring a request by a Jerusalem-born American citizen to identify Israel as his birthplace does *not* change the position of the United States with respect to Jerusalem, or in any way constitute the United States' recognition of Jerusalem as the capital, or as even part, of Israel.

B. The United States Has Successfully Clarified That Passport References to Other Disputed Territories Do Not Constitute Recognition of Sovereignty.

The Secretary's treatment of Taiwan-born American citizens illustrates the point. The Secretary complies with an analogous congressional enactment concerning Taiwan-born American citizens. Congress enacted § 132 of the Foreign Relations Authorization Act,

Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 132, 108 Stat. 382, 395 (1994) as amended by Pub. L. 103-415, § 1(r), 108 Stat. 4299, 4302 (1994), requiring the State Department to permit American citizens born on the island known as Taiwan to identify their place of birth as "Taiwan." Congress instructed the Secretary to permit American citizens to make this request despite the fact that the United States recognizes the People's Republic of China as the sovereign over this territory. China strenuously objected to this legislation and its government refused to endorse visas in passports listing Taiwan as the place of birth. *See US Rule Allowing "Taiwan" As the Birthplace on US Passports "Totally Unacceptable,"* BBC Summary of World Broadcasts, July 27, 1995 (quoting July 27, 1995 Statement of the Consulate-General of the People's Republic of China in New York: "[T]his naturally is totally unacceptable to the Chinese government. For this reason, the Chinese government has lodged a strong protest with the U.S. Government"). The State Department nonetheless followed the congressional mandate, without any apparent impact on the Executive Branch's recognition power.

The State Department Manual's instructions regarding the recording of the place of birth for Taiwan-born American citizens state:

> (6) Taiwan:
>
> > (a) Public Law 103-415 (1994) provided that the Secretary of State may write "Taiwan" as place of birth in a passport, when requested to do so by applicants born there.

7 FAM 1340(d)(6)(a), App. D. This provision in the FAM is immediately followed by a "note" highlighted in a box, which is replicated below.

> NOTE. The United States does not officially recognize Taiwan as a "state" or "country" although passport issuing officers may enter "Taiwan" as a place of birth. (See also 7 FAM 1340 Appendix D(6)(f)).

Id. note, App. D. The circumstances surrounding the enactment of Public Law 103-415 (involving Taiwan) were considerably more likely to suggest a claim of "usurpation" than the instant ones surrounding § 214(d) (involving Israel). The United States *does not* recognize Taiwan as a sovereign, but instead recognizes another polity as the sovereign of that territory. By contrast, the United States *does* recognize Israel and, indeed, permits American citizens born in other parts of Israel to record their place of birth as Israel. *See* 7 FAM 1360(e), App. D. Unlike Taiwan, the United States does not recognize another polity as sovereign of Jerusalem.

The Secretary has not put forth any reason, let alone a compelling one, why he cannot do in the case of § 214(d) what he does in the case of Public Law 103-415. In order to avoid any confusion or misunderstanding, the Secretary may note in the State Department's FAM that the United States does not recognize Jerusalem as the capital of Israel, or that it regards the status of Jerusalem as subject to final status negotiations, or that adhering to § 214(d) in no way changes American foreign policy. He may issue a formal announcement, thereby ensuring that no one should mistakenly conclude otherwise. He may even include a "footnote" in the particular passport so stating. In sum, the Secretary's compliance with

Public Law 103-415, and the Department's own FAM clarifying that entering a place of birth in compliance with a citizen's wishes does not change United States policy, eviscerates his claim that § 214(d) usurps the Executive's power to recognize sovereigns.

C. A Citizen May Protest the United States' Official Recognition of Sovereignty by Indicating a City of Birth Instead of a Country of Birth on His or Her Passport.

Respondent already recognizes that the place of birth entry is not a statement of official United States policy or recognition. Within the passport document itself the citizen is already free to state his or her objection to that policy by rejecting the sovereignty of the country as recognized by the President and insisting that only the city of birth be shown in the passport.

Absent such an objection from the citizen, the place of birth entry in the passport for citizens born abroad would always (and only) state the country which the President has recognized as having sovereignty over that city. *See* 7 FAM 1310(f), App. D. For example, the passport of a citizen born in Kiev will only identify him as having been born in Ukraine. Thus, by stating, at the citizen's insistence, only the city of birth—as the Manual expressly permits—there is the exact same risk that a foreign sovereign in that instance could conclude that the President has "changed" foreign policy with respect to sovereignty as is present if a citizen born in Jerusalem were to be permitted to identify himself as being born in Israel. (Indeed, there is likely less of a "risk," since there would be no obvious reason to conclude that a person listing Israel as his

place of birth was necessarily born in Jerusalem, whereas a passport listing "Kiev" as the place of birth would of necessity be inconsistent with the President's recognition of Ukraine's sovereignty.) Precisely because Respondent has already determined that in the former case there is no interference with the President's power to recognize foreign governments and that citizens will be allowed to express such objection—just as citizens born in Taiwan may do—there is no basis for concluding that the Congress cannot afford a similar right to citizens born in Jerusalem, as it has in fact done by § 214(d).

Indeed, given that at 7 FAM 1380(a), App. D Respondent already more broadly affords citizens who object to an actual presidential decision on recognition the right to instead insert different identifying information in the place of birth entry, *a fortiori* there can be nothing unconstitutional about § 214(d), which affords citizens the right to insert Israel as their place of birth where the President had admittedly not yet even formulated an official view on the status of Jerusalem. *See Zivotofsky v. Sec'y of State*, 571 F.3d at 1228.[5]

[5] The Court of Appeals' decision also acknowledges the substantial evidence presented by Petitioner and other *amici* demonstrating that the State Department itself has occasionally issued passports with "Israel" as the place of birth to citizens born in Jerusalem, created records referring to "Jerusalem, Israel" and maintained various websites referencing "Jerusalem, Israel," all without any apparent harm to the nation's foreign policy interests. *See Zivotofsky*, 725 F.3d at 218-19.

D. The State Department Acknowledges That Congress May Eliminate the Place of Birth Entry Altogether and Recognizes That It Has Chosen to Retain It for the Convenience of Travelers.

In fact, the Foreign Affairs Manual indicates that deletion of the place of birth entry entirely from the passport is a matter that "has been discussed extensively among U.S. Government agencies and with the Congress," 7 FAM 1310(g)(4), App. D, and that Congress commissioned studies on the issue.

Thus, Respondent recognizes that Congress has legitimate authority over the question of what information need be entered in the place of birth entry, or even whether any information at all need be designnated. The Manual notes that after extensive analysis, it was determined to retain the place of birth entry as an element of the passport. This was done, however, not so that the Executive can make or advance policy statements regarding the recognition of foreign sovereigns, but rather to avoid inconvenience to U.S. citizens traveling abroad, since a number of countries would still require travelers to provide place of birth information. 7 FAM 1310(g)(4)(c).

In sum, the place of birth entry on the passport does not exist as a means of expression of United States policy on the recognition of foreign governments—the very limited matter which Respondent asserts the Constitution delegates exclusively to the President. Instead, the place of birth designation exists solely as an additional means for the citizen to provide identifying information about himself that can help differentiate him from similarly named persons or from individuals with the same date of birth.

Respondent recognizes that the citizen could either include such information as part of his passport or he could provide that information separately upon arrival at his place of foreign destination. In either event, it is the citizen who is making the statement. The determination has been made to include the information in the passport, but that decision was made only for the convenience of U.S. citizens traveling abroad and to help differentiate the particular citizen from other U.S. citizens.

IV. SECTION 214(d) REMEDIES A REGIME WHICH EFFECTIVELY DISCRIMINATES AGAINST AMERICAN CITIZENS BORN IN JERUSALEM, AND, THEREFORE, INVALIDATING § 214(d) WOULD EFFECTIVELY REINSTATE THAT DISCRIMINATORY REGIME

Section 214(d) serves to remedy a regime that discriminated against Jerusalem-born American citizens who wished to identify their place of birth as Israel. Invalidating § 214(d) would reinstate that discriminatory regime. If § 214(d) is overturned, Jerusalem-born American citizens who wished to identify their place of birth as Israel would be deprived of the right to identify their place of birth on their passport as they desire. This is a right presently accorded to American citizens born in territories not even recognized by the United States. For this additional reason, *amici* respectfully submit that this Act of Congress should be upheld.

The Secretary's FAM provides that "[a]s a general rule, the country that currently has sovereignty over the actual place of birth [of an American citizen] is listed as the place of birth, regardless of where the birth occurred." 7 FAM 1330(b), App. D. The

Secretary departs from the rule—without any adverse impact, evidently, on the Executive's exclusive power—for citizens *other than those born in Jerusalem*. As noted, American citizens born in Taiwan, which the United States does not recognize, and over which the United States recognizes that the People's Republic of China has sovereignty, are nevertheless permitted under the FAM to record their place of birth as "Taiwan."

Even with respect to the very land which the Secretary argues requires the invalidation of § 214(d), the Secretary maintains very different rules for those who object to identifying Israel as their birthplace on their passports. United States citizens born in what is presently recognized by the United States as Israel who *object* to having their place of birth recorded as Israel may *refuse* to list their place of birth as Israel. However, some may identify their place of birth as "Palestine," a country not recognized by the United States. By contrast, those who are born in Jerusalem—even West Jerusalem, like Zivotofsky—who wish to record their place of birth as Israel may not do so, unless § 214(d) is upheld.

The Secretary's FAM provides in pertinent part:

> An applicant born in the *area formerly known as Palestine* (which includes the Gaza Strip, the Golan Heights, Jerusalem, or the West Bank) *may object to showing the birthplace*. In such cases, [the government employee should] explain the Department of State (CA)'s general policy of showing the birthplace as the country having present sovereignty. The Senior Passport Specialist, Supervisory Passport Specialist, or Adjudication Manager at a domestic passport

> agency or center or supervisory consular officer or regional consular officer at a U.S. embassy or *consulate may make an exception to show PALESTINE as the birthplace if the applicant was born before 1948. If the applicant was born in 1948 or later, the city or town of birth may be listed if the applicant objects to showing the country having present sovereignty*.

7 FAM 1360(g), App. D (emphasis added). In short, an American citizen born in Tel Aviv, or Haifa, or anyplace else in what the United States recognizes as Israel, but who objects for political reasons to listing his place of birth as Israel, is entitled to either list his place of birth as "Palestine," or, in any event, *not* have his place of birth listed as Israel—even though it is Israel which has sovereignty over that city of birth. In such cases, the Secretary permits that citizen to self-identify in a way that contradicts both the Executive's recognition of Israel and the FAM's general rule. However, *Zivotofsky*, born in Jerusalem, would *not* be able to identify his place of birth as Israel if § 214(d) is invalidated.

The Secretary's position concerning American citizens born in Taiwan, and American citizens born in what the Secretary recognizes as Israel but who do not wish to identify as having been born in Israel, cannot be reconciled with his position that § 214(d) is an impermissible usurpation of executive power. To the contrary, these provisions demonstrate that § 214(d) does *not* constitute a usurpation of the Executive. Moreover, permitting the Secretary's position with respect to American citizens born in Taiwan and American citizens born in Israel who do not wish to be identified with Israel to stand, while invalidating

§ 214(d), would discriminate against Jerusalem-born American citizens who wish to identify their place of birth as Israel. As such, invalidating a statute which effectively remedies this discriminatory regime would be wrong for this additional reason.

CONCLUSION

The statute at issue here is well within the powers of the Congress—long acknowledged by both this Court and Respondent—to regulate the issuance of passports and other government documents. Section 214(d) does not impermissibly usurp the Executive's power to recognize foreign governments. Passports and other government documents generally, and the place of birth entry in particular, concern the identity of the bearer and his or her status as a U.S. citizen rather than serving as a platform for the expression of foreign policy pronouncements coming within the exclusive jurisdiction of the President. Respondent's Manual and the actual practices of the State Department recognize that citizens do have the right to state their views regarding their place of birth identification in a manner inconsistent with the official recognition policies of the Executive, demonstrating that the rights afforded to citizens born in Jerusalem by § 214(d)—like the rights granted to citizens born in Taiwan—do not constitute an infringement upon the duties assigned by the Constitution to the President. Accordingly, it is respectfully submitted that this Court should find that § 214(d) is not an unconstitutional enactment.

For the foregoing reasons, and in addition to those set forth by the Petitioner, *amici* respectfully submits that judgment should enter in favor of the Petitioner.

Respectfully submitted,

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