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 THE ENDOWMENT FOR MIDDLE EAST TRUTH (EMET) AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

The Endowment for Middle East Truth (EMET) is a Washington, D.C. non-profit think tank dedicated to preserving and defending the national security of the United States, and its ally, Israel. It provides information and analysis to Senators and Members of Congress. EMET is a primary resource for those concerned with American and Israeli security.

EMET has an interest in the status of Jerusalem and its connection to Israel, while recognizing that this question is not before the Court. EMET also has an interest in the proper allocation of powers between the Executive and Legislative departments under the United States Constitution.[1]

INTRODUCTION

This case has revolved around the "receive Ambassadors" clause, U.S. Const. Art. II, section 3, and whether it "impermissibly infringes on the President's exercise of the recognition power reposing exclusively in him." But stating the question this way concedes too much to the President. *Amicus* agrees with Petitioner and those scholars who conclude that the Constitution merely imposes a ministerial duty on the President. Pet'r's Brief 28-29; Robert J. Reinstein, *Recognition: A Case Study on the Original Understanding of Executive Power*, 45 U. Rich. L. Rev. 801 (2011); Saikrishna B. Prakash & Michael D. Ramsey,

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[1] Pursuant to Supreme Court Rule 37.6, *Amicus* certifies that no counsel for a party authored this brief in whole or in part. No person or party other than the *Amicus* or its counsel has made a monetary contribution to this brief's preparation or submission. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

Foreign Affairs and the Jeffersonian Executive: A Defense, 89 Minn. L. Rev. 1591 (2005):

> [The "receive Ambassadors" clause] may have imposed a duty on the President: he "shall" receive ambassadors—that is, he must formally greet foreign officials and receive their credentials, a tedious duty necessitated by international customs. The clause's presence in Section 3 supports this interpretation, for while Section 2 generally lists powers, Section 3 is sometimes understood to list duties.

Id. at 1627-1628.

Consequently, *Amicus* contends that the "receive Ambassadors" clause does not create a recognition *power*, and certainly not a recognition power exclusive to the Executive department.

The question therefore arises, on what basis could the President legitimately refuse to enforce section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, Public Law No. 107-228, 116 Stat. 1350 (2002)? It would be the broad claim President George W. Bush actually made in his signing statement: section 214(d) "interferes with the President's constitutional authority to conduct the Nation's foreign affairs." *Statement on Signing Foreign Relations Authorization Act*, 2 Pub. Papers 1697, 1698 (Sept. 30, 2002).

Thus, the larger issue of whether the Constitution does, in fact, commit foreign policy to the Executive Branch must be considered.

SUMMARY OF ARGUMENT

It is not clear that the "receive Ambassadors" clause actually includes a recognition power. Nor is it clear which political branch should exercise that power. If the President does not have an exclusive recognition, the only way to uphold his refusal to implement a properly-enacted statute would be a general Executive Branch monopoly on making foreign policy.

But the Founders intended the executive power of the federal government to consist chiefly of executing the laws enacted by the legislature. It was probably the Progressive movement, some hundred years later, that developed the notion of a presidency that dominates the national government, including plenary foreign affairs powers.

There is no textual basis for presidential command of foreign policy. The Constitution gives the President specific, defined foreign policy responsibilities, which he must share with Congress. Congress, on the other hand, holds "all" legislative power. That necessarily includes legislating foreign policy, as well as domestic policy. And in fact, Congress has legislated American foreign policy from its first session until today.

The proper way to conceptualize the relationship between the political branches is that the President has no independent power to determine American foreign policy. However, Congress often permits the President to take the lead, and ratifies his policy, either implicitly or explicitly. But when Congress disagrees with the President, Congress wins.

ARGUMENT

I. THE PRESIDENT CANNOT IGNORE A PROPERLY-ENACTED STATUTE SIMPLY BECAUSE IT CONCERNS FOREIGN AFFAIRS.[2]

When Congress passes a bill and the President signs it, it becomes law. Unless the law is unconstitutional, the President has the duty to enforce it.

That's the fundamental relationship the Contitution erected between the political branches. There is no exception for foreign affairs. *Particular* functions relating to foreign relations are allocated. But the essential distribution of political power—Congress creates laws, the President executes those laws—is not limited to domestic affairs.

A. WHETHER THE PRESIDENT CONSTITUTIONALLY CONTROLS UNITED STATES FOREIGN POLICY REMAINS AN OPEN QUESTION.

The notion that foreign policy is a presidential preserve is widely believed. Indeed, some regard it as a truism.

But the picture is not simple. Focusing on the recognition power, Petitioner has amply shown that from the founding period throughout the nineteenth century, the political branches themselves were at least uncertain about their respective powers. Pet'r's Br. 34-57.

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[2] *Amicus* acknowledges the valuable legal history research assistance of Carl Cecere, Principal of Cecere PC, Issues and Appeals, and Lorianne Updike Toler, constitutional legal historian and founder of Libertas Constitutional Consulting, and of www.ConSource.org.

Contemporaneous legal scholars were similarly hesitant in their conclusions. See 1 St. George Tucker, *Blackstone's Commentaries* App. 341, Note D (1803) (the "receive Ambassadors" clause is "a power of some importance, as it may sometimes involve in the exercise of it, questions of delicacy; especially in the recognition of authorities of a doubtful nature"); William Rawle, *A View of the Constitution of the United States of America* 195 (2d ed. 1829) (the "receive Ambassadors" clause implies presidential recognition power, but Congress can override); 3 Joseph Story, *Commentaries on the Constitution of the United States of America* §§ 1560, 1561 (1833) (agreeing with Rawle that the "receive Ambassadors" clause implies executive recognition power, but says that whether Congress can override is a difficult question).

Turning to the broader issue of control over foreign policy, there are Supreme Court opinions one can brandish to support the claim of exclusive Executive power. *See, e.g., United States v. Curtiss-Wright Export Corp*., 299 U.S. 304, 319 (1936), and *National City Bank v. Republic of China*, 348 U.S. 356, 358 (1955). But as the Court of Appeals noted below, all such past statements from this Court are dicta:

> To be sure, the Court has not *held* that the President exclusively holds the power. But, for us—an inferior court—"carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative . . ."

Zivotofsky v. Sec'y of State, 725 F.3d 197, 212 (D.C. Cir. 2013) (emphasis in original).

But while lower courts may have to bow before Supreme Court dicta, of course this Court itself does not.

Moreover, the court below did not take seriously enough this Court's decisions pointing the other way—recognizing the right of Congress to have its hand on the foreign policy steering wheel.

For example, in *Perez v. Brownell*, 356 U.S. 44 (1958), *overruled on other grounds* by *Afroyim v. Rusk*, 387 U.S. 253 (1967), this Court stated:

> Although there is in the Constitution no specific grant to Congress of power to enact legislation for the effective regulation of foreign affairs, there can be no doubt of the existence of this power in the law-making organ of the Nation.

Id. at 57.

This Court has also said:

> In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the law-making process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952).

The opinion of the Court of Appeals cites to a number of historic episodes, but none involve instances in which the President overrode validly-enacted legislation by Congress. *Zivotofsky v. Sec'y of State*, *supra* at 207-210. Thus, none prove that the

President actually has an exclusive power of recognition, or an exclusive control of foreign policy.

In short, the question is unsettled. This Court has never definitely answered the question: Under the Constitution, when Congress passes a law which clashes with a presidential policy in foreign affairs, who wins? This case provides an opportunity to answer that question.

B. CONGRESS MAKES THE LAWS. THE PRESIDENT EXECUTES THE LAWS.

The Constitution does not explicitly state that one or the other of the political branches shall control foreign policy. So we must begin with first principles. "All legislative Powers herein granted shall be vested in a Congress of the United States . . . ." U.S. Const. art. I, § 1. Note that the Constitution does not say that Congressional legislative power stops at the shoreline, or even the continental shelf.

Turning to the President, "The executive Power shall be vested in a President of the United States of America." U.S. Const. art. II, § 1. "[H]e shall take Care that the Laws be faithfully executed . . . ." U.S. Const. art. II, § 3. No legislative power is confirmed in the President.

The Founders' conception of the Executive Branch was shaped by their experience of rebelling against the excesses of the British crown. They did not want a monarchical President. Implementing the laws enacted by Congress would be his chief business.

Thus, for example, Thomas Jefferson stated in his 1783 "Draft of a Fundamental Constitution for Virginia" that the executive power is strictly defined:

> By Executive powers, we mean no reference to the powers exercised under our former government by the Crown as of its prerogative . . . We give them these powers only, which are necessary to execute the laws (and administer the government).

Quoted in Charles Warren, *The Making of the Constitution* 177 (1947).

Roger Sherman concurred: he "considered the Executive magistracy as nothing more than an institution for carrying the will of the Legislature into effect."

Id. at 65.

James Wilson also held that executive power was limited "to executing the laws, and appointing officers."

Id. at 66.

Alexander Hamilton was the leading proponent of a strong executive. However, he made clear that he didn't mean an overreaching president, but rather one who would energetically and vigorously "take Care that the Laws be faithfully executed":

> A feeble executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be, in practice, a bad government. THE FEDERALIST No. 70 (Alexander Hamilton).

James Madison is often acknowledged as the father of the Constitution. And he too conceived the role of the President as dependent on Congressional legislation:

> The natural province of the executive magistrate is to execute laws, as that of the legislature is to make laws. All his acts, therefore, properly executive, must presuppose the existence of the laws to be executed.

James Madison, 6 *The Writings of James Madison* 145 (Gaillard Hunt, ed., (1900-1910)).

This is the view that prevailed at the Constitutional Convention:

> There was no challenge to the definition of executive power held by Wilson and Madison; nor was an alternative understanding advanced.

David Gray Adler, *Symposium: The Steel Seizure Case and Inherent Presidential Power*, 19 Const. Commentary 155, 165 (2002).

Now, there is another, more expansive yet still somewhat originalist theory of executive power. It posits that in the eighteenth century, "executive power" was widely understood to inherently include the conduct of foreign policy. Saikrishna B. Prakash & Michael D. Ramsey, *supra*.

Perhaps this was an ambient understanding at the time of the Constitutional Convention. But the crucial point is that the Founders *rejected* it. The theory ignores that the Founders turned away from the theory of executive "prerogative," which indeed gave the king or prince unfettered power to create his country's foreign policy. The Founders, as shown above, wanted a more modest executive role. *See also* Curtis A. Bradley and Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 Mich. L. Rev. 545 (2004).

It follows that the President is bound to obey Congress. "To 'execute' a statute, as Senator Sam J.

Ervin often reminded executive officers, emphatically does not mean to kill it. Execution means implementtation." Arthur S. Miller, *The President and Faithful Execution of the Laws*, 40 Vand. L. Rev. 389, 398 (1987).

Long ago this Court held:

> To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible.

Kendall v. United States, 37 U.S. 524, 613 (1838).

It is likely that the more powerful, expansive, "imperial" conception of the presidency—with the Executive dominating Congress, and foreign affairs—came to the fore in the Progressive era of the late nineteenth and early twentieth centuries. Many Progressives regarded the Constitution, including the principle of the separation of powers, as outdated. For example, Woodrow Wilson wrote:

> The makers of the Constitution constructed the federal government upon a theory of checks and balances which was meant to limit the operation of each part and allow to no single part or organ of it a dominating force; but no government can be successfully conducted upon so mechanical a theory. . . . The trouble with the theory is that government is not a machine, but a living thing. It falls, not under the theory of the universe, but under the theory of organic life. It is accountable to Darwin, not to Newton. . . . No living thing can have its organs offset against each other as checks, and live. . . . The President is at liberty, both in law and in conscience, to be as big a man

> as he can. His capacity will set the limit; and if Congress be overborne by him, it will be no fault of the makers of the Constitution,—it will be from no lack of constitutional powers on its part, but only because the President has the nation behind him and Congress has not. . . .One of the greatest of the President's powers I have not yet spoken of at all: his control, which is very absolute, of the foreign relations of the nation. The initiative in foreign affairs, which the President possesses without any restriction whatever, is virtually the power to control them absolutely. . . . Our President must always, henceforth, be one of the great powers of the world . . . .

Woodrow Wilson, *Constitutional Government in the United States* (1908), reprinted in American Progressivism 153-167 (Ronald Pestritto and William Atto, eds.) (2008).

But this is far from the Founders' idea of the presidency which they embodied in the Constitution.

C. THERE IS NO FOREIGN POLICY EXCEPTION TO EXCLUSIVE CONGRESSIONAL LEGISLATIVE POWER. AT MOST, THE PRESIDENT HAS SPECIFIC, DEFINED POWERS AFFECTING FOREIGN RELATIONS.

One searches in vain for any textual support for presidential legislation of foreign policy. Article II, § 2 confides specific powers touching on foreign affairs to the President. However, these do not add up to the claimed power to direct American foreign policy.

Generally, at the Constitutional Convention every time a unilateral power was proposed for the presi-

dent, it was rejected in favor of sharing that power with Congress.

Thus, under the Constitution, the President is the commander in chief of the armed forces, although only Congress can declare war. U.S. Const. art. I, § 8. He can make treaties, but only with the advice and consent of a supermajority of the Senate; he nominates ambassadors, but only with the advice and consent of the Senate. Thus, not only does the President have but few explicit foreign affairs powers; he may exercise them only with congressional oversight.

Section 3 of Article II contains the "receive Ambassadors" clause. As noted above, this is a duty, not a power. Pet'r's Br. 28-29.

That's it.

War-making, treaty-making, ambassador-appointing (and perhaps ambassador-receiving)—there is no plausible theory which can knit together these disparate functions to create overarching presidential command of foreign policy.

More important, there is nothing here to overcome Article I, § 1, granting *all* legislative power to Congress. "All" is not a term of art. It presents no interpretive complexities. Accepting presidential control of foreign policy means shutting Congress into a "domestic policy" stockade. That would limit Congress' field of operation. Congress would no longer have "all" legislative power. There is no constitutional warrant for that.

D. CONGRESS HAS IN FACT LEGISLATED IN FOREIGN AFFAIRS FROM THE BEGINNING.

A presidential claim that Congress can't interfere with his control of foreign policy is, on its face, not serious. Congressional action shaping American foreign relations began in the earliest years of the nation.

> An Act 'passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, . . . is contemporaneous and weighty evidence of its true meaning.'

Marsh v. Chambers, 463 U.S. 783, 790 (1983) (ellipsis in original) (quoting *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888)).

The very creation of the State Department itself is the result of congressional action. Act of July 27, 1789, ch. 4, 1 Stat. 28, 29. Section 1 of the act requires the Secretary of Foreign Affairs to:

> perform and execute such duties as shall from time to time be enjoined or instructed to him by the President of the United States, agreeable to the Constitution, relative to correspondences, commissions or instructions to or with public ministers or consuls, from the United States, or to negotiations with public ministers from foreign states or princes, or to memorials or other applications from foreign public ministers or other foreigners, or to such other matters respecting foreign affairs as the President of the United States shall assign to the said department.

The Secretary carries out the will of the President, but only so far as is "agreeable to the Constitution." And the Constitution assigns all legislative authority to Congress. There is nothing in the creation of the State Department to suggest that Congress was giving away any part of its constitutional monopoly on legislating.

There is considerable legislation concerning foreign commerce under the specific grant of power in Article I, § 8 of the Constitution. Of course, commercial relations with foreign nations is a species of foreign policy. For example:

The Act of July 4, 1789, ch. 2, 1 Stat. 24, imposed duties on various imported goods, and preferential tariffs based on country of origin for tea.

The Act of July 4, 1789, ch. 24, 1 Stat. 254 is significant. Congress there defined and established the functions and privileges of French consuls and vice consuls. Section 1 empowers district judges to perform the office of "consul or vice-consul of the King of the French," "to attend to the saving of the wreck of any French vessels stranded on the coasts of the United States" when the consul is absent or the judge is closer. It also enlists the customs officials to assist and to "give aid to the consuls and vice-consuls of the King of the French, in arresting and securing deserters from vessels of the French nation . . ."

Section 2 provides direction to the consuls and vice-consuls of the United States, providing, among other things, procedures for recovering and distributing assets from estates of persons who die abroad.

Section 7 directs the President to provide for seamen stranded in foreign countries, including those in captivity by a foreign sovereign.

Section 8 directs consuls and vice-consuls to ensure that sailors who are stranded in foreign ports by the sale of their ship are given adequate provision to return home.

This statute explicitly directs executive and judicial officers to perform important acts of foreign policy.

Another example. The Act of May 22, 1794, ch. 33, 1 Stat. 369 is "An act prohibiting for a limited time the exportation of arms and ammunition, and encouraging the importation of the same." It prohibits exports of arms for one year. It was designed to prevent accusations of aiding or supplying either side in the confrontation between Britain and France. David Currie, *The Constitution in Congress: The Federalist Period*, 1789-1801 (1997).

A final example. The Act of June 14, 1797, ch. 1, 1 Stat. 520 criminalized privateering against the United States or anyone with whom the U.S. is at peace.

These examples could be endlessly multiplied. The founding-era Congress knew that it had the right to legislate the nation's foreign policy, just as Congress does today.

E. THE SEPARATION OF POWERS, AN ESSENTIAL GUARANTEE OF LIBERTY, IS BREACHED WHEN THE PRESIDENT BECOMES THE LEGISLATOR OF FOREIGN POLICY.

To hold that the President controls, directs or dictates our foreign policy—going so far as to disregard Congressional enactments—is the equivalent of holding that the President *legislates* in the foreign affairs arena. That does obvious violence to our constitutional structure.

"Liberty is always at stake when one or more of the branches seek to transgress the separation of powers." *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring). The structural dispersion of political power between the political departments is itself a constraint on that power. *Id*. One branch's encroachment on the functions of the other is a concentration of power feared by the drafters and unintended by the Constitution.

When the President executes Congress' foreign policies, just as he executes Congress' domestic policies, he respects the Constitution's division of powers. But when he ignores a Congressional enactment he acts lawlessly, whether the enactment concerns domestic affairs or foreign affairs.

F. THE THEORY OF CONGRESSIONAL RATIFICATION OF PRESIDENTIAL ACTION SUPPLIES A PRINCIPLED FOUNDATION FOR PERMITTING THE PRESDIENT TO TAKE THE LEAD IN FOREIGN POLICY WHEN CONGRESS IS SILENT.

> [O]ur cases say repeatedly that the President is the sole instrument of the United States for the conduct of foreign policy, but to be the sole instrument and to determine the foreign policy are two different things. . . . He's the instrument, but there is certainly room in – in those many cases for saying that Congress can say . . . what the country's instrument is supposed to do.

Justice Scalia, Transcript of *Zivotofsky v. Clinton Oral Argument* at 38, No. 10-699, November 7, 2011.

It is an undoubted fact that the President often takes the lead in formulating American foreign policy. *Amicus* does not assert that such presidential leadership is inevitably invalid under the Constitution.

Rather, when Congress legislates a foreign policy, the President is bound by it, unless it encroaches on a specific executive power. But when Congress either does not interpose its own views, or expressly approves presidential action, Congress can be said to have ratified and adopted the President's policy.

This Court sanctioned the idea of post facto Congressional approval of presidential action in the *Prize Cases*, 67 U.S. 635, 671 (1863):

> [I]t is plain that if the President had in any manner assumed powers which it was necessary should have the authority or sanction of Congress, that on the well known principle of law, "omnis ratihabitio retrotrahitur et mandato equiparatur," this ratification has operated to perfectly cure the defect. In the case of *Brown vs. United States*, (8 Cr., 131, 132, 133,) Mr. Justice Story treats of this subject, and cites numerous authorities to which we may refer to prove this position, and concludes, "I am perfectly satisfied that no subject can commence hostilities or capture property of an enemy, when the sovereign has prohibited it. But suppose he did, I would ask if the sovereign may not ratify his proceedings, and thus by a retroactive operation give validity to them?"
>
> Although Mr. Justice Story dissented from the majority of the Court on the whole case, the doctrine stated by him on this point is correct and fully substantiated by authority.

See also Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 661 fn. 3 (1952) (Clark, J., concurring).

The principle is further illustrated in *Dames & Moore v. Regan*, 453 U.S. 654 (1981). The Court upheld executive orders and regulations suspending American judicial proceedings against Iran in favor of arbitration before an Iran-United States Claims Tribunal. The Court held that the 1868 Hostage Act, 22 U.S.C. § 1732, had given the President discretion to adapt his methods to unforeseen circumstances:

> As we have noted, Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act. Such failure of Congress specifically to delegate authority does not, "especially . . . in the areas of foreign policy and national security," imply "congressional disapproval" of action taken by the Executive. [Citation.] On the contrary, the enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to "invite" "measures on independent presidential responsibility," *Youngstown*, 343 U.S., at 637 (Jackson, J., concurring). At least this is so where there is no contrary indication of legislative intent and when, as here, there is a history of congressional acquiescence in conduct of the sort engaged in by the President.

Id. at 678-679.

The court continued:

> Just as importantly, Congress has not disapproved of the action taken here. Though

> Congress has held hearings on the Iranian Agreement itself, Congress has not enacted legislation, or even passed a resolution, indicating its displeasure with the Agreement. Quite the contrary, the relevant Senate Committee has stated that the establishment of the Tribunal is "of vital importance to the United States." [Citation.] We are thus clearly not confronted with a situation in which Congress has in some way resisted the exercise of Presidential authority.

Id. at 687-688, footnotes omitted.

Thus, the proper conceptualization of the President's foreign affairs power is this: The President does not exercise a foreign affairs power independent of Congress. Instead, Congress often permits the President to formulate foreign policy, and ratifies that policy implicitly or explicitly—unless it doesn't. But when Congress enacts statutes directing foreign policy, or statutorily disapproves of a Presidential foreign policy, the Congressional will must prevail.

CONCLUSION

The proposition that all foreign policy authority dwells in the President can be right only if Congress is constitutionally disabled from legislating on any facet of foreign affairs. That is clearly wrong.

The President is the instrument, but not necessarily the architect, of United States foreign policy. The President may have the sole power to communicate with foreign sovereigns; but Congress can decide what he says.

When the President quarrels with Congress, unless the matter falls within the scope of the powers textually committed to the executive, Congressional

legislation must triumph. Were that not true, the President would be the legislator of foreign policy, violating the most fundamental separation of powers principle.

No improvement is possible on the Court's statement in *Japan Whaling Ass'n. v. American Cetacean Soc'y.*, 478 U.S. 221 (1986):

> The Secretary [of State], of course, may not act contrary to the will of Congress exercised within the bounds of the Constitution. *If Congress has directly spoken to the precise issue in question, if the intent of Congress is clear, that is the end of the matter.*

Id. at 223 (emphasis added).

Let there be an end to Respondent's refusal to obey Congress' command to write "Israel" as Petitioner's birthplace in his passport.

Respectfully submitted,

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