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

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

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

In accordance with longstanding policy, the President, through the actions of the Secretary of State, has recognized no state as having sovereignty over the city of Jerusalem, and has instead left this highly sensitive issue to be resolved through negotiations by the foreign parties to that dispute. In order to implement that policy, the Secretary of State lists "Jerusalem" instead of "Israel" as the birthplace in passports, and in consular reports of births abroad, of U.S. citizens born in that city. In 2002, Congress enacted the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350, Section 214(d) of which states that "[f]or purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary [of State] shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel." 116 Stat. 1366. The question presented is:

Whether Section 214(d) impermissibly infringes the President's power to recognize foreign sovereigns.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-3a.

STATEMENT

The status of Jerusalem is one of the most sensitive flash points in the Arab-Israeli conflict. Since 1948, when President Truman recognized the State of Israel, the United States' consistent foreign policy has been to recognize no state as having sovereignty over Jerusalem. This policy reflects the Executive's assessment that "[a]ny unilateral action by the United States that would signal, symbolically or concretely, that it recognizes that Jerusalem is a city that is lo-

cated within the sovereign territory of Israel would critically compromise the ability of the United States to work with Israelis, Palestinians and others in the region to further the peace process." J.A. 55-56. The Executive likewise does not recognize Palestinian sovereignty in Jerusalem.

The State Department has implemented that policy in its rules regarding place-of-birth designations in passports and consular reports of birth abroad issued to U.S. citizens born in Jerusalem. Only "Jerusalem" is recorded as the birthplace of U.S. citizens born in that city. Petitioner challenges this policy, seeking to have "Israel" designated as his birthplace. He relies on Section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, which requires the State Department to make such a designation upon request. Pub. L. No. 107-228, 116 Stat. 1350, 1366 (capitalization altered).

1. a. When Israel declared independence in 1948, President Truman immediately recognized the new state. See *Statement by the President Announcing Recognition of the State of Israel*, 1948 Pub. Papers 258 (May 14, 1948). But the United States did not recognize Israeli sovereignty over any part of Jerusalem. Nor did it recognize Jordanian sovereignty over the part of the city it controlled. That same year, the United Nations General Assembly, with United States support, passed a resolution stating that Jerusalem "should be accorded special and separate treatment from the rest of Palestine." G.A. Res. 194 (III), ¶ 8, U.N. Doc. A/RES/194(III) (Dec. 11, 1948). In 1949, when Israel announced an inaugural meeting of its Parliament in Jerusalem, the Truman Administration declined to send a representative because "the United

States cannot support any arrangement which would purport to authorize the establishment of Israeli * * * sovereignty over parts of the Jerusalem area." 6 U.S. Dep't of State, *Foreign Relations of the United States 1949: The Near East, South Asia, and Africa* 739 (1977).

In 1967, Israel established control over the entire city of Jerusalem. In subsequent United Nations proceedings, the United States stated that the "continuing policy of the United States Government" was that "the status of Jerusalem * * * should be decided not unilaterally but in consultation with all concerned." U.N. GAOR, 5th Emergency Sess., 1554th plen. mtg. at 10, U.N. Doc. A/PV.1554 (July 14, 1967). The United States emphasized that it did not recognize any Israeli measures as "altering the status of Jerusalem" or "prejudging the final and permanent status of Jerusalem."[1] *Ibid.*

In 1993, with the assistance of the United States, representatives of Israel and of the Palestinian people agreed that the status of Jerusalem is a core issue to be addressed bilaterally in permanent status negotiations. J.A. 53-54; *Declaration of Principles on Interim Self-Government Arrangements*, Art. V (Sept. 13, 1993), http://www.unsco.org/Documents/Key/Declaration%20of%20Principles%20on%20Interim%20Self-Government%20Arrangements.pdf. Subsequently, both President George W. Bush and President Obama sought to as-

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[1] Every President since Truman has taken the same position. See, *e.g.*, Ronald Reagan, *Address to the Nation on United States Policy for Peace in the Middle East*, 1982 Pub. Papers 1093-1097 (Sept. 3, 1982); 17 U.S. Dep't of State, *Foreign Relations of the United States, 1961-1963: Near East 1961-1962*, at 414-416 (1994) (Kennedy Administration).

sist the parties in establishing negotiations on all outstanding issues, including Jerusalem's status. See *Remarks by President 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; *President Bush Discusses the Middle East* (July 16, 2007), http://georgewbush-whitehouse.archives.gov/news/releases/2007/07/20070716-7.html.

Within this "highly sensitive" and "potentially volatile" context, "U.S. Presidents have consistently endeavored to maintain a strict policy of not prejudging the Jerusalem status issue and thus not engaging in official actions that would recognize, or might be perceived as constituting recognition," of Jerusalem as "a city located within the sovereign territory of Israel." J.A. 56. This policy is rooted in the Executive's longstanding assessment that any such action would "discredit[] our facilitative role in promoting a negotiated settlement," which would be "damaging to the cause of peace and * * * therefore not * * * in the interest of the United States." Letter from George P. Shultz, Sec'y of State, to Charles H. Percy (Feb. 13, 1984), in *American Embassy in Israel: Hearing on S. 2031 Before the Senate Comm. on Foreign Relations*, 98th Cong., 2d Sess. 13-14 (1984) (*Embassy Hearing*). That assessment affects a range of United States actions. In particular, the United States maintains its embassy in Tel Aviv.[2] J.A. 55.

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[2] According to public sources, no country presently maintains its embassy in Jerusalem. See Israel Gateway, *Foreign Embassies in Israel*, http://www.israelgateway.com/foreign-embassies/ (last visited Sept. 18, 2014).

b. The United States' position on Jerusalem is reflected in the State Department's policies for preparing passports and reports of birth abroad of U.S. citizens born in Jerusalem. As a general rule in passport administration, the country that the United States recognizes as having sovereignty over the applicant's birthplace at the time of issuance is recorded in the passport. See J.A. 109 (reprinting U.S. Dep't of State, 7 *Foreign Affairs Manual* (FAM) 1383.1 (1987), which is the version relevant to this case). Accordingly, only "Jerusalem" is recorded in the passports of U.S. citizens born in that city. J.A. 113. Similarly, only "West Bank," "Gaza Strip," or the town of birth is designated for U.S. citizens born in those territories. J.A. 112-113.

The State Department's passport policy reflects its determination that recording "Israel" in passports of U.S. citizens born in Jerusalem would be perceived internationally as a "reversal of U.S. policy on Jerusalem's status" that "would be immediately and publicly known." J.A. 58. That change could significantly harm "U.S. national security interests," J.A. 52, and "cause irreversible damage" to the United States' ability to facilitate the peace process, J.A. 56.

2. a. Congress has occasionally considered legislation to constrain the Executive Branch's ability to implement its recognition policy concerning Jerusalem. In 1983, Congress considered a bill that would have required the U.S. Embassy in Israel to move to Jerusalem. See S. 2031, 98th Cong., 1st Sess. The Reagan Administration opposed the bill because it would encroach on "the President's exclusive constitutional power" over recognition. *Embassy Hearing* 13-14, 58-59. The bill was not enacted.

In 1995, Congress passed the Jerusalem Embassy Act, which conditions a portion of State Department funding on moving the U.S. Embassy to Jerusalem. Pub. L. No. 104-45, § 3(a), (b), 109 Stat. 398-399. After the Justice Department's Office of Legal Counsel advised the President that the bill would unconstitutionally infringe the President's recognition power, see *Bill to Relocate United States Embassy from Tel Aviv to Jerusalem*, 19 Op. O.L.C. 123 (1995), the statute was enacted with a waiver provision that permits the President to suspend the funding restriction. § 7(a), 109 Stat. 400. Presidents Clinton, Bush, and Obama have consistently invoked that provision to maintain the embassy in Tel Aviv. See, *e.g.*, 79 Fed. Reg. 33,837 (June 12, 2014).

b. In 2002, Congress passed the Foreign Relations Authorization Act. Section 214 of that Act, at issue in this case, is entitled "United States policy with respect to Jerusalem as the capital of Israel." 116 Stat. 1365 (capitalization altered). All of its provisions address the status of Jerusalem.

Subsection (a) "urges the President * * * to immediately begin the process of relocating the United States Embassy in Israel to Jerusalem." 116 Stat. 1365. Subsection (b) states that none of the funds authorized under the Act may be used to operate the U.S. consulate in Jerusalem except "under the supervision of the United States Ambassador to Israel." 116 Stat. 1365-1366. Subsection (c) states that none of those funds may be used for publication of any "official government document * * * unless the publication identifies Jerusalem as the capital of Israel." 116 Stat. 1366. And Subsection (d), on which petitioner relies, states that, "[f]or purposes of the registra-

tion 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." *Ibid.*

In his signing statement, President Bush stated that if Section 214 were construed to impose a mandate, it would "impermissibly interfere with the President's constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states." *Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003*, 2002 Pub. Papers 1697, 1698 (Sept. 30, 2002). The statement further asserted that "U.S. policy regarding Jerusalem has not changed." *Ibid.*

3. Petitioner is a U.S. citizen born in Jerusalem in 2002. J.A. 18-19. Petitioner's mother applied for a U.S. passport and a report of birth abroad for petitioner, listing his place of birth as "Jerusalem, Israel." J.A. 20. In accordance with State Department policy, U.S. officials recorded "Jerusalem" as petitioner's place of birth on the official documents. *Ibid.*

Petitioner's parents then filed this suit on his behalf, seeking to compel the State Department to identify petitioner's birthplace as "Israel." J.A. 20-21.

The district court initially dismissed the complaint on standing and political-question grounds. No. 03-1921, 2004 WL 5835212 (Sept. 7, 2004). The court of appeals reversed and remanded. 444 F.3d 614, 619-620 (2006). The district court again dismissed on political-question grounds, 511 F. Supp. 2d 97 (2007),

and the court of appeals affirmed, 571 F.3d 1227, 1233 (2009).

This Court granted certiorari, vacated the court of appeals' decision, and remanded for further proceedings. 132 S. Ct. 1421, 1431 (2012). The Court held that petitioner's claim did not present a nonjusticiable political question. *Id.* at 1427. Although the Court had requested briefing on whether Section 214(d) is an unconstitutional intrusion on the Executive Branch's recognition power, it elected not to reach that question. *Id.* at 1430.

4. On remand, the court of appeals held that Section 214(d) impermissibly intrudes on the President's exclusive recognition power. Pet. App. 1a-50a.

The court of appeals first held that the Constitution confers the power to recognize foreign states and governments exclusively on the Executive Branch. The court relied on the President's power to receive ambassadors, U.S. Const. Art. II, § 3, as well as his wide range of foreign-affairs powers, Pet. App. 6a-17a, 35a-36a. Explaining that the Executive Branch had repeatedly acted unilaterally in recognizing foreign entities and in setting the United States' recognition policies, and that Congress had repeatedly acquiesced therein, the court concluded that the "longstanding post-ratification practice supports the Secretary's position that the President exclusively holds the recognition power." *Id.* at 20a-26a & n.12.

The court of appeals then held that Section 214(d) unconstitutionally infringes on that power. Pet. App. 36a-50a. Section 214(d), the court concluded, improperly purported to establish "United States policy with respect to Jerusalem as the capital of Israel," *id.* at 44a (quoting Section 214's title) (capitalization altered

and italicization omitted), because it would "signal" that the United States "recognizes" Israel's sovereignty over Jerusalem, *id.* at 42a (quoting J.A. 56).

Judge Tatel concurred in the court's opinion. He also wrote separately to emphasize that the "critical question" was whether Section 214(d) in fact infringed on the President's exclusive recognition power, and that, in this case, Congress agreed that it does. Pet. App. 55a, 60a-61a.

SUMMARY OF ARGUMENT

I. The Constitution's text and structure establish that the President has exclusive authority to recognize foreign states and their governments, as well as the territorial limits of their sovereignty. Recognition is an official determination that the United States will treat an entity as a state or government, and it is the predicate from which the Nation's foreign relations proceed. The principle that the Nation must speak with one voice in foreign affairs, see *United States* v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319-320 (1936), therefore applies with particular force to recognition decisions.

The Constitution assigns to the President both the sole power to make recognition decisions and the authority to conduct foreign relations based on those decisions. In particular, Article II confers on the President the power to "receive Ambassadors and other public Ministers." U.S. Const. Art. II, § 3. That power was understood at the time of the Founding to include the authority to determine whether the sending state or government should be recognized as sovereign. Article II reinforces the President's recognition power by assigning to him broad authority to conduct the Nation's foreign relations, including sole

power to decide whether and with which states to establish diplomatic relations or negotiate a treaty. *Id.* § 2, Cl. 2.

By contrast, the Constitution makes no provision for the Congress to participate in recognition decisions, or to override the President's decisions. The Senate's power to advise and consent on appointments and treaties does not permit it to override the Presidential recognition decisions that the nomination or proposed treaty may reflect. Congress, moreover, lacks any enumerated power that would permit it to make recognition decisions.

The political Branches' relative institutional capabilities confirm that recognition decisions must be made by the President alone. The decision whether to recognize a foreign state or government, or its territorial boundaries, requires careful and often nuanced decisions about whether the state or government exists and controls particular territory and whether recognition (or withholding recognition) will serve the United States' foreign-relations and national-security interests. Only the Executive is capable of gathering the information needed to make those judgments in a timely and decisive manner. See *Curtiss-Wright*, 299 U.S. at 320. And because the Constitution provides no framework for the Legislative and Executive Branches to share the recognition power, exclusive commitment to the Executive is necessary to ensure that the Nation speaks with one voice in foreign affairs.

More than two hundred years of historical practice confirm that the recognition power belongs exclusively to the Executive. The Executive has unilaterally made hundreds of recognition decisions concerning states, governments, and territorial shifts. Occasional

congressional attempts to unilaterally determine recognition policy were invariably rebuffed. Petitioner is unable to identify a single instance in our history in which Congress has asserted primacy in matters of recognition—either by rejecting a President's recognition decision or by making a decision the President was unwilling to make unilaterally.

II. Section 214(d), which purports to establish "United States policy with respect to Jerusalem as the capital of Israel," see Pub. L. No. 107-228, 116 Stat. 1350, 1366, encroaches on the President's exclusive constitutional authority to recognize foreign sovereigns. Since Israel's founding, U.S. Presidents have followed a consistent policy of recognizing no state as having sovereignty over Jerusalem. Section 214(d) purports to require the President simultaneously to express precisely the opposite view in official communications with foreign sovereigns—and to do so at the behest of individual citizens seeking to express their personal views on what the Nation's position should be.

The Executive historically has been understood to possess inherent constitutional authority to determine passport content as it pertains to the conduct of diplomacy. Although Congress may enact passport legislation in furtherance of its enumerated powers, it may not encroach on the President's use of passports as instruments of diplomacy. Section 214(d) bears no apparent relation to Congress's enumerated powers over foreign commerce and naturalization—the only sources of authority petitioner and his amici identify as supporting Section 214(d)—and it bears no resemblance to the passport regulations Congress has historically enacted. Thus, although petitioner seeks to

justify Section 214(d) as "passport legislation" (Br. 19), that label fairly describes Section 214(d) only insofar as the provision uses passports as a vehicle to accomplish a recognition-related purpose.

The Executive's practice of designating "Jerusalem" as the birthplace on passports implements the President's recognition position. By reversing that practice, Section 214(d) would force the Executive to convey to foreign sovereigns that—contrary to the President's longstanding recognition position—the United States has concluded that Israel exercises sovereignty over Jerusalem. A decision by this Court requiring the Executive to implement Section 214(d) would thus result in significant uncertainty about the United States' position and undermine the President's ability to effectively exercise and implement his recognition power. It would also force the Executive to take an inconsistent position in conducting foreign relations on behalf of the United States, thereby undermining the President's credibility and his conduct of sensitive diplomatic efforts.

ARGUMENT

I. THE CONSTITUTION GRANTS THE PRESIDENT EXCLUSIVE POWER TO RECOGNIZE FOREIGN STATES AND THEIR TERRITORIAL BOUNDARIES

A. The Constitution Assigns Exclusively To The Executive The Authority To Recognize Foreign States And Governments, Including Their Territorial Boundaries

The decision to recognize a foreign state or its government is an official conclusion by the United States that the entity in question meets the requirements of a state or government, and should be treated as such in this Nation's foreign relations. Recognizing a gov-

ernment entails recognizing the existence of the state ruled by that government, which in turn entails determining the territorial boundaries (*i.e.*, the extent of the state's sovereignty) that will be recognized. Because the establishment of diplomatic relations and negotiation of treaties with states are predicated on recognition of the state and government in question, recognition decisions establish the foundation for the conduct of the Nation's foreign affairs.

The text and structure of the Constitution's foreign-affairs provisions establish that the President has sole recognition authority. By contrast, the Constitution's text prescribes no role for the Congress in recognition decisions, and that body lacks the institutional capability to make the timely, informed and nuanced judgments required to exercise the recognition power in a manner that advances the Nation's foreign-relations interests. And because the Constitution provides no mechanism by which the Legislative and Executive Branches could share the recognition power, exclusive commitment of the recognition power to the Executive is necessary to ensure that the Nation speaks with one voice in foreign affairs.

1. Article II of the Constitution assigns the recognition power to the President

a. The Reception Clause confers recognition power on the President

The primary source of the President's recognition power is Article II's grant of authority to the President alone to "receive Ambassadors and other public Ministers." U.S. Const. Art. II, § 3. That authority necessarily includes the power to decide which ambas-

sadors the President will receive, and therefore the power to decide whether to establish diplomatic relations with a foreign entity. Because establishing diplomatic relations with a foreign entity entails determining that the entity should be treated as a state, the recognition power is vested solely in the President. See 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1560, at 415-416 (1833) (*Story*).

The recognition power received no attention during debates on ratification of the Constitution. But during the Washington Administration, members of the Founding generation expressed, and acted on, the understanding that the Reception Clause conferred on the President the power to recognize foreign sovereigns. In 1793, President Washington and his Cabinet debated whether to receive Edmond Genet, minister of the new government of France. Thomas Jefferson, then Secretary of State, informed Washington that receiving a foreign minister was equivalent to recognizing the sovereignty of the government he represented: "[t]he reception of the Minister at all * * * is an ackno[w]le[d]gement of the legitimacy of their government." Opinion on the Treaties with France (Apr. 28, 1793), in 25 *The Papers of Thomas Jefferson* 612 (1992) (*Jefferson Papers*). Alexander Hamilton, then Secretary of the Treasury, concurred, stating that "acknowledgment of a government" would be accomplished "by the reception of its ambassador." Letter from Hamilton to Washington (Apr. 1793), in 4 *The Works of Alexander Hamilton* 394 (1904); see Alexander Hamilton, *Pacificus No. 1*, in *The Letters of Pacificus and Helvidius* 13, 14 (Gideon ed., 1845) (the President "acknowledged the republic of France, by

the reception of its minister"). Thus, although Hamilton had earlier described the authority to receive ambassadors as ceremonial in nature, *The Federalist No. 69*, at 468 (Jacob E. Cooke ed., 1961), by 1793, he had come to understand that the decision whether to receive an ambassador necessarily includes the power to decide whether to acknowledge the government that the minister represents.

The view that receiving a minister entailed recognizing his state and government is fully consistent with contemporary treatises on the law of nations—treatises to which the Washington Cabinet often referred in its conduct of foreign affairs. See, *e.g.*, 25 *Jefferson Papers* 608-619. Under the law of nations, a state to which a minister was sent could decide whether to acknowledge the sending state's sovereignty by receiving the minister. Thus, according to Vattel, receiving a minister was equivalent to acknowledging the sovereign nature of the sending state or government. Emmerich de Vattel, *The Law of Nations* Bk. IV § 68, at 457-458 (Joseph Chitty trans., 1853) (first published 1758) (*Vattel*). Formal reception accordingly entitled the minister to specific protections, such as immunity, that flowed from recognition of the sovereign nature of the sending government, *i.e.*, the principle that the "respect which is due to sovereigns should redound to their representatives."[3] *Id.* § 80, at 463; *id.* § 82, at 465; see 2 Hugo Grotius, *The Rights of War and Peace* 215 (A.C. Campbell trans., 1814) (first published 1625) (only ministers "who are sent by the

[3] See also *The Federalist No. 81*, at 548 (Hamilton) (this Court's original jurisdiction over cases "affecting Ambassadors, other public ministers and consuls" (Art. III, § 2, Cl. 2) reflects "respect to the sovereignties they represent").

sovereigns of independent countries to each other" may be received and accorded protections); 2 Cornelius van Bynkershoek, *Quaestionum Juris Publici Libri Duo* 202-207 (Tenney Frank trans., 1930) (first published 1737). Conversely, to refuse to receive an ambassador was to "contest[] the[] sovereign dignity" of the sending state or government. *Vattel* Bk. IV § 78, at 461. The principle that a foreign minister was entitled to protection arising from the sovereign he represented was also well-recognized under United States law. See *The Schooner Exch.* v. *McFaddon*, 11 U.S. (7 Cranch) 116, 138-139 (1812).

The Washington Administration's understanding of the Reception Clause was also consistent with the Revolutionary-War-era practice of European nations. In 1782, the Netherlands recognized the United States by issuing a resolution directing that John Adams should be formally received as the "minister plenipotentiary" of the United States. 5 Francis Wharton, *The Revolutionary Diplomatic Correspondence of the United States* 319-320, 325 (1889) (excerpt of resolution). Conversely, when John Jay sought recognition from Spain in 1782, Spanish officials met with him informally, so as not to "imply any recognition of the United States." Samuel Flagg Bemis, *The Diplomacy of the American Revolution* 216 (1957); see *id.* at 104.

b. The President's other foreign-affairs powers reinforce his recognition power

The President's recognition power is further grounded in the Constitution's assignment of the bulk of foreign-affairs powers to the President. Article II provides that "[t]he executive Power shall be vested in a President of the United States of America." U.S. Const. Art. II, § 1, Cl. 1. "[T]he historical gloss on the

'executive Power' * * * has recognized the President's 'vast share of responsibility for the conduct of our foreign relations.'" *American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 414 (2003) (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 610-611 (1952) (Frankfurter, J., concurring)).

i. Under the Articles of Confederation, Congress had sole responsibility for foreign-relations, including day-to-day diplomacy. Art. IX, Para. 1. That arrangement proved cumbersome and ineffectual, as Congress was unable to respond quickly or adhere to consistent policies. See Louis Henkin, *Foreign Affairs and the United States Constitution* 27 (2d ed. 1996) (*Henkin*). In the Constitution, the Framers therefore transferred most foreign-affairs powers to the President. As Jefferson observed in 1790, "[t]he transaction of business with foreign nations is Executive altogether. It belongs, then, to the head of that department except as to such portions of it as are specially submitted to the Senate. Exceptions are to be construed strictly." Jefferson's Opinion on the Powers of the Senate Respecting Diplomatic Appointments (Apr. 24, 1790), in 16 *Jefferson Papers* 379 (1961). The first Congress confirmed that the Constitution confers broad foreign-affairs functions on the Executive when it established the Department of Foreign Affairs to perform duties "relative to," among other things, "negotiations with public ministers from foreign States or princes," "memorials or other applications from foreign public ministers," and "such other matters respecting foreign affairs, as the President of the United States shall assign to the said department." Act of July 27, 1789, ch. 4, § 1, 1 Stat. 29.

The Constitution thus establishes the Executive as "the sole organ of the federal government in the field of international relations," with exclusive authority to conduct diplomatic relations. *United States* v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319-320 (1936). Recognition—the decision whether to treat an entity as a state or government in the Nation's foreign relations—falls within the core of the President's sole authority over "[t]he transaction of business with foreign nations." 16 *Jefferson Papers* 379.

ii. Particularly relevant to recognition, the Constitution assigns to the President the power to nominate ambassadors, U.S. Const. Art. II, § 2, Cl. 2, and to "make Treaties," *ibid.*

The Constitution gives the President alone the power to nominate an ambassador. U.S. Const. Art. II, § 2, Cl. 2. The nomination decision encompasses the antecedent questions whether to recognize the foreign state and government, and whether to establish diplomatic relations. In nominating the ambassador, the President implements his recognition decision. While the Senate must consent to appointment of the President's nominee, that determination concerns whether or not the President's nominee is suitable for confirmation, and does not extend to the recognition decision already made by the President. See 16 *Jefferson Papers* 378, 379-380 (Senate's confirmation power does not include the power to "judge * * * the necessity which calls for a mission to any particular place"). Even if the Senate withholds consent to a nominee, moreover, the President may effectuate a recognition decision by engaging in diplomatic relations through officials who do not require confirmation. And the President retains the authority not

to appoint an ambassador even after the Senate has given its advice and consent. Nor does the Constitution contemplate any participation by Congress in the Presidential decision to initiate diplomatic relations; Article II's requirement that Congress establish offices by law (§ 2, Cl. 2) does not apply to ambassadors and other public ministers. And no other constitutional power would authorize Congress to establish diplomatic relations with a foreign entity.

Similarly, the President has the power to "make Treaties" with the advice and consent of the Senate. U.S. Const. Art. II, § 2, Cl. 2. The President has the sole responsibility for negotiating treaties before presenting them to the Senate. See *Curtiss-Wright*, 299 U.S. at 319 ("Into the field of [treaty] negotiation the Senate cannot intrude; and Congress itself is powerless to invade it."). Once the President has completed negotiations, the Senate has the constitutional prerogative to decide whether to consent to ratification. The President, however, retains the ultimate authority to decide whether to ratify and conclude a treaty after the Senate provides its consent. See Restatement (Third) of Foreign Relations Law § 303 cmt. d, at 160 (1987) (Restatement). The President thus has exclusive power to ensure that the United States negotiates and concludes treaties in a manner that fully accords with his recognition policy.

c. The Founding generation understood the Executive's recognition power to include the exclusive authority to decide whether recognition is appropriate

i. Consistent with the contemporaneous understanding and practice at the time of the Founding, the Washington Administration understood the decision

whether to recognize a foreign state or government to require an assessment of whether recognition was appropriate under the circumstances. But cf. Pet. Br. 28. Hamilton thus explained that the Reception Clause "includes th[e power] of judging, in the case of a revolution of government in a foreign country, whether the new rulers are competent organs of the national will, and ought to be recognised, or not." *Pacificus No. 1*, at 12.

As Secretary of State, Jefferson obtained President Washington's approval to establish a recognition policy under which the Executive would acknowledge a government, whatever its form, after determining that it reflected the "will of the nation" and was "invested with [full] powers by the nation to transact it's affairs." Letter from Jefferson to Morris (Dec. 30, 1792), in 24 *Jefferson Papers* 800 (1990); Notes on the Legitimacy of Government (Dec. 30, 1792), *id.* at 802 (Jefferson "la[id] down" the "principle[s]" that were to govern recognition of newly independent states). That policy thus contemplated that the Executive could refuse to recognize a purported government if the stated criteria were not satisfied.

ii. President Washington's Cabinet also understood the Executive's authority to make recognition decisions to be exclusive of Congress. In 1793, Washington and the Cabinet unanimously decided that the President could receive the French ambassador, thereby recognizing the new government of France, without first consulting Congress.[4] Letter from

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[4] Although petitioner asserts (Br. 36) that Washington "never claimed" that the recognition power was exclusive, his actions in receiving Genet indicate that he believed Congress had no a role in the decision. Petitioner also suggests (Br. 35-36 & n.8) that mem-

Washington to the Cabinet (Apr. 18, 1793), in 25 *Jefferson Papers* 568-569. Hamilton reported that "[n]o objection has been made to the president's having acknowledged the republic of France, by the reception of its minister, without having consulted the senate." *Pacificus No. 1*, at 13-14.

As President, James Madison followed Washington's lead by refusing, without consulting Congress, to receive Luis Onis of Spain on the ground that it was unclear who was "in actual possession" of the government. Letter from Madison to Rodney (Oct. 22, 1809), in 2 *The Papers of James Madison* 26 (1992) (*Madison Papers*); 4 *Memoirs of John Quincy Adams* 206 (1875) (*Memoirs*). Madison later did receive Onis, in 1815, again without consulting Congress, after he asked Secretary of State Monroe to determine "whether on a view of all the facts known to the Dept. of State," including the United States' foreign-relations interests, "it might not be best to receive" Onis. Founders Online, Nat'l Archives, Letter from Madison to Monroe (Apr. 18, 1815), http://founders.archives.gov/documents/Madison/99-01-02-4273.

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bers of the Washington Administration believed that the law of nations compelled Genet's reception. Petitioner proffers no evidence that Jefferson believed the recognition principles he set forth were preexisting law-of-nations rules that the United States was bound to follow. See 24 *Jefferson Papers* 802, *supra*. Genet's reception, moreover, was consistent with Washington's desire to achieve a "stricter connection" with France. Notes of a Conversation with George Washington on French Affairs (Dec. 27, 1792), *id.* at 793. In any event, the Washington Administration's actions reflect its belief that the Executive alone had the authority and institutional ability to make the assessments necessary to determine whether recognition was appropriate. See pp. 20-21, *supra*.

2. Structural and functional considerations confirm that the President's recognition power is exclusive

a. While the Constitution expressly confers recognition authority on the President through the power to receive ambassadors and other foreign-relations powers, the Constitution contains no provision for Congress to make, or even participate in, recognition decisions. See *Story* § 1560, at 417 ("The constitution has expressly invested the executive with power to receive ambassadors, and other ministers. It has not expressly invested congress with the power, either to repudiate, or acknowledge them."). Nor do any of Congress's enumerated powers encompass the recognition power.[5]

The Constitution commits the recognition power to the Executive alone for the same reason it vests most foreign-affairs powers in the Executive. Congress proved institutionally incapable of conducting foreign relations under the Articles of Confederation, and the Framers understood that the Executive's "unity[,] * * * [d]ecision, activity, secrecy, and dispatch" would enable it to react to international events with

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[5] Congress may regulate foreign commerce and the value of foreign currency, U.S. Const. Art. I, § 8, Cls. 3, 5, but that power does not imply any recognition power, as U.S. persons may engage in commerce in foreign lands regardless of those territories' recognition status. Similarly, Congress's power to declare war, *id.* § 8, Cl. 11, does not include recognition authority, as that decision does not turn on the United States' recognition policy toward the belligerent power. And while Congress, in defining and punishing offenses "against the Law of Nations," *id.* § 8, Cl. 10, might choose to make the involvement of a recognized state or government, or one of its officials or nationals, an element of an offense, that does not imply that Congress could determine *which* entities are recognized.

the necessary alacrity and clarity of purpose. *The Federalist No. 70*, at 472 (Hamilton); see *Story* § 1561, at 418 (Branches' relative institutional capabilities "[p]robably" explain Constitution's conferral of recognition power on the Executive without Senate participation); House Members Amicus Br. 17 (functional considerations justify exclusive Executive recognition power).

b. The decision whether to recognize a foreign state or government requires careful judgments about whether the state or government exists and controls particular territory, as well as judgments about whether recognition (or withholding recognition) will serve the United States' foreign-relations interests. The Executive is far better positioned than the Congress to gather and assess the information needed to make those judgments in a timely and decisive manner, as the President "has his confidential sources of information," and "his agents in the form of diplomatic, consular and other officials." *Curtiss-Wright*, 299 U.S. at 320. With its "vast share of responsibility" for conducting foreign relations, only the Executive has the comprehensive understanding of the United States' contemporaneous foreign-relations objectives that is necessary to decide whether—and when—recognition will advance the United States' interest. *Garamendi*, 539 U.S. at 414 (citation omitted).

In addition, the timing of recognition decisions is often critical to steering international events in a direction that advances the Nation's interests. For instance, President Truman recognized Israel minutes after it proclaimed independence, acting quickly to ensure that Israel would have immediate foreign support and that U.S. recognition would precede Soviet

recognition. Michael J. Cohen, *Truman and Israel* 211, 215, 219 (1990). Indeed, the Executive makes numerous and often nuanced decisions related to recognition, including territorial determinations, in response to evolving events and claims of sovereignty—and each decision entails a careful assessment of the national-security and foreign-relations implications of the decision. See pp. 27-30, *infra*. Congress, which can take legally effective action only by passing a law, through bicameral action and presentment to the President, see *INS* v. *Chadha*, 462 U.S. 919, 955-958 (1983), would be unable to exercise the recognition power with the necessary flexibility and dispatch.

Finally, secrecy can be crucial in determining whether to recognize a state or government, as such decisions often are made against the backdrop of conflict or annexation. Public disclosure of deliberations about recognition could exacerbate international tensions and create confusion regarding the United States' position. While the Executive is well-positioned to keep its deliberations secret, Congress is not. See *Curtiss-Wright*, 299 U.S. at 322.

c. Because recognition is a determination that the United States will treat an entity as a state or government in its foreign relations, it is crucial that the Nation speak with one voice. Cf. *Curtiss-Wright*, 299 U.S. at 319-320. That unity would be impossible, however, if the recognition power were shared between Congress and the Executive, as petitioner contends.

When the Executive and Congress share power over a single foreign-affairs decision—*i.e.*, whether to commit the United States to a treaty—the Constitution expressly delineates the Branches' respective roles. See *Curtiss-Wright*, 299 U.S. at 319 (treaty

power preserves Executive's role as sole organ of foreign relations). But the Constitution contains no such apportionment of responsibility for recognition decisions. Treating the recognition power as shared could therefore set the two Branches at cross-purposes, undermining the Nation's ability to make and implement recognition decisions with the necessary speed and clarity.

Under petitioner's position, which in fact appears to be one of congressional supremacy, Congress would have the authority to reverse any Executive recognition decision—whether it reflected (as here) more than six decades of consistent policy, or a recent judgment in response to a rapidly evolving situation—by passing a law. The prospect of friction between the Branches during Congress's deliberations would create international uncertainty about the United States' position. If Congress passed such a bill, the President might veto it, and the Nation's recognition policy would then hinge on whether Congress overrides the veto. In the event of an override, the President would be bound to follow the recognition policy prescribed by Congress. That recognition decision, embodied in a statute, could not be easily altered or reversed, even if subsequent events rendered the decision detrimental to United States' foreign-relations interests. And any repeal—assuming Congress acted at all—might take weeks or months.

Under such a regime, the United States' apparent recognition position could flip back and forth, preventing the Nation from responding to international events with clarity and decisiveness, and leaving foreign sovereigns to guess at where the United States stands. Suppose, for instance, that after President

Truman recognized the State of Israel, Congress considered whether to reverse that decision, thereby throwing the United States' position into doubt even as the first Arab-Israeli war erupted and the United States attempted to facilitate an end to it. Such a situation would be untenable. Nothing in the Constitution suggests the Framers intended such a state of affairs, which would replicate the institutional failings under the Articles of Confederation.

Even congressional action short of outright reversal of the President's recognition decisions could undermine the Nation's ability to convey and implement a coherent recognition policy. Here, for instance, petitioner contends (Br. 64-65) that Section 214(d) does not require the Executive to reverse the Nation's position on Jerusalem's status. But Section 214(d) would indisputably put the Executive in the position of attempting to maintain the Nation's longstanding position of not recognizing any claim of sovereignty over Jerusalem, while at the same time implementing a policy that requires it to present diplomatic documents on behalf of the United States that contradict that position. The result would be not merely to prevent the Nation from speaking with one voice, but to prevent the *Executive itself* from doing so in its conduct of foreign relations.

B. Historical Practice Confirms That The Executive Branch Has Sole Authority Regarding Recognition

More than two hundred years of historical practice confirms what the Constitution's text and structure make clear: The recognition power belongs exclusively to the Executive. See *NLRB* v. *Noel Canning*, 134 S. Ct. 2550, 2559 (2014) ("long settled and established practice is a consideration of great weight in a proper

interpretation of constitutional provisions regulating the relationship between Congress and the President") (brackets and internal quotation marks omitted) (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929)).

From the Washington Administration to the present, Presidents have asserted the sole authority to recognize a foreign state, its government, and the territorial scope of its sovereignty—and have unilaterally made hundreds of recognition decisions. Petitioner is unable to identify a single instance in our history in which Congress has asserted primacy in matters of recognition—either by rejecting a President's recognition decision or by making a decision the President was unwilling to make unilaterally. On a few occasions in the nineteenth century, Members of Congress sought to have Congress effect recognition on its own. But those efforts invariably foundered after the Executive and other Members of Congress insisted that the President had sole recognition authority. In addition, in a handful of instances on which petitioner relies (Br. 57), the President for political reasons chose to seek congressional support before effecting recognition—but in each case, the President determined recognition policy, and Congress acted consistently with his views.

1. The Executive has consistently asserted sole authority over recognition, including recognition of territorial boundaries

a. In 1793, without consulting Congress, President Washington recognized the new government of France by officially receiving Genet. See pp. 20-21, *supra*. Since then, the Executive has routinely made hundreds of unilateral recognition decisions. See, *e.g.*,

1 John Bassett Moore, *A Digest of International Law* §§ 27-58, at 72-163 (1906) (*Moore*) (eighteenth- and nineteenth-century decisions); 1 Green Haywood Hackworth, *Digest of International Law* §§ 35-51, at 195-318 (1940) (twentieth-century decisions); 2 Marjorie M. Whiteman, *Digest of International Law* §§ 6-64, at 133-467 (1963) (twentieth-century decisions). For instance, in 1804, the Jefferson Administration instructed the American minister to France to recognize the new government of Napoleon, "when satisfied that the Empire was in possession and control of the governmental power and territory of the nation," by presenting his credentials to the new government. *Moore* § 43, at 122. From 1809 until 1815, President Madison refused to receive the Spanish minister so as to deny recognition. See p. 21, *supra*. In 1824, President Monroe determined that "no message to Congress would be necessary" before recognizing Brazil, because "the power of recognizing foreign Governments was necessarily implied in that of receiving Ambassadors and public Ministers." 6 *Memoirs* 329, 348, 358-359. Since the beginning of the twentieth century, moreover, the President's sole authority has gone entirely unchallenged, even as Presidents have made scores of high-profile recognition decisions, including in the aftermaths of World War I, World War II, and the fall of the Iron Curtain.

The Executive's exercise of unilateral authority continues today. For instance, in March 2014, the White House released a joint statement with Ukraine, stating that the United States "will not recognize Russia's illegal attempt to annex Crimea." *Joint Statement by the United States and Ukraine*, http://www.whitehouse.gov/the-press-office/2014/03/25/joint-statement

-united-states-and-ukraine. Other examples include the 2013 recognition of the Government of Somalia and the 2011 recognition of the state of South Sudan. U.S. Dep't of State, Hillary Rodham Clinton, Sec'y of State, *Remarks with President of Somalia Hassan Sheikh Mohamud After Their Meeting* (Jan. 17, 2013), http://www.state.gov/secretary/20092013clinton/rm/2013/01/202998.htm; Diplomatic Relations, Succession, Continuity of States, and Other Statehood Issues, *2011 Digest* § 9, at 271, 274.

b. The President's exclusive recognition power has always been understood to include the authority to determine the territorial boundaries of a foreign state. Such judgments are integral to recognition, as one of the criteria of statehood under customary international law is that a state must have "defined territory" (which may be disputed or unsettled in part). Restatement § 201 & cmt. b, at 72-73. Recognition of a state therefore requires the United States to determine its position on the claimed territorial extent of the state's sovereignty (including when the United States' position is that the claim is disputed). See *id.* §§ 202, 203 n.2, at 77, 84; Pet. App. 56a.

The Executive makes decisions about what international boundaries to recognize through an interagency process that is led by the State Department and includes the Department of Defense. Such determinations often have national-security implications. For instance, the Executive must determine the extent to which it recognizes a state's territorial claims to preserve the freedom of movement of the U.S. Armed Forces through air and sea. See U.S. Navy Judge Advocate General's Corps, *Maritime Claims Reference Manual* (2013), http://www.jag.navy.mil/organization/

code_10_mcrm.htm; Under Sec'y of Def. for Policy, Dep't of Def., *Freedom of Navigation Reports*, http://policy.defense.gov/OUSDPOffices/FON.aspx (last visited Sept. 18, 2014). Territorial recognition decisions also may have substantial consequences for U.S. relations with the states involved. The President's refusal to recognize Russia's annexation of Crimea is the most recent example of such a determination.

Weighing the national-security and foreign-relations implications of territorial issues has always been at the core of the historic conception of the recognition power. In 1818, for example, Secretary of State John Quincy Adams explained that the Executive declined to recognize "Buenos Ayres as including the dominion of the whole viceroyalty of the La Plata," because it was unclear that the putative state actually included that territory and recognizing the claim could have adverse foreign-relations consequences. *Moore* § 30, at 77-79. Since then, Presidents have made innumerable such determinations. See, *e.g.*, Diplomatic Relations, Succession, and Continuity of States, *1991-1999 Digest* § 9, at 1146-1147 (borders of Bosnia-Herzegovina, Croatia, and Slovenia).

This Court has also acknowledged that authority to determine territorial boundaries of foreign states is essential to effective exercise of the President's recognition power. In 1838, Justice Story, sitting as Circuit Justice, explained that recognition of a state included determination of its borders. *Williams* v. *Suffolk Ins. Co.*, 29 F. Cas. 1402, 1404 (C.C.D. Mass.) (No. 17,738). This Court affirmed, holding that a determination of territorial sovereignty by the "executive branch of the government" is binding on the "government of the Union." *Williams* v. *Suffolk Ins. Co.*, 38 U.S. (13 Pet.)

415, 420 (1839). This Court has consistently reaffirmed that principle. See, *e.g.*, *Baker* v. *Carr*, 369 U.S. 186, 212 (1962); *Kennett* v. *Chambers*, 55 U.S. (14 How.) 38, 50-51 (1852).

2. Congress has acquiesced in the President's sole recognition power

Members of Congress have occasionally proposed bills that would have asserted a congressional role in recognizing foreign states or governments. But the Executive Branch—and some Members of Congress—opposed those efforts, and they ultimately came to nothing.

a. Beginning in 1818, Henry Clay, the Speaker of the House of Representatives, introduced a series of resolutions designed to recognize the independence from Spain of certain South American provinces.[6] See Samuel Flagg Bemis, *The Latin American Policy of the United States* 40-44 (1943); 36 Annals of Cong. 2223 (1820). In 1821, after his previous attempts failed, Clay proposed an amendment to an appropriations bill to fund such ministers as the President "may send" to South American republics. 37 Annals of Cong. 1042, 1071. That amendment was defeated after debates in which several Members argued that the resolution interfered with the President's exclu-

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[6] For example, an 1818 attempt to appropriate funds for diplomatic ministers failed after concerns were expressed about its constitutionality. *E.g.*, 32 Annals of Cong. 1468-1469, 1539. In 1820, the House passed a resolution stating that it was "expedient" to appropriate funds for such ministers as the "President * * * may send" to newly independent South American republics. It received no further action. 36 Annals of Cong. at 2223, 2229-2230; see 37 Annals of Cong. 1048 (1821) (1820 resolution was not intended to entrench on Executive's recognition prerogative).

sive recognition power. *Id.* at 1046-1047, 1055, 1071, 1073-1074, 1077. Clay, stating that he understood the defeat to have been caused by "considerations of form," *id.* at 1081, then introduced a nonbinding resolution that expressed interest in the success of the independence movement, while acknowledging the President's exclusive recognition authority. *Ibid.* That face-saving measure, which expressed readiness to support "the President of the United States, whenever he may deem it expedient to recognise the sovereignty and independence of any of the said provinces," passed the House. *Id.* at 1081-1082, 1091-1092. Petitioner is thus incorrect in suggesting (Br. 43-44) that concerns about intruding on the President's constitutional prerogative had little effect in the congressional debates.

Meanwhile, the Monroe Administration maintained that the Executive possessed sole authority to recognize newly independent states. See 5 *Memoirs* 329 (Administration decided in 1817 that it had exclusive power). Building on Jefferson's recognition policy, Secretary of State John Quincy Adams determined that the United States' interest in avoiding international entanglements would be best served if the President recognized a colony's independence only upon concluding there was virtually no chance that the colonial power could reassert dominion. 4 *The American Secretaries of State and Their Diplomacy* 41-42 (Samuel Flagg Bemis ed., 1958). Accordingly, Adams, without consulting Congress, declined to receive an emissary from Buenos Aires in order to avoid prematurely recognizing the state. 4 *Memoirs* 88, 204-207.

In 1822, President Monroe informed Congress that the Executive had determined that certain South

American republics had achieved independence and that recognition was appropriate. Special Message (Mar. 8, 1822), in 2 *A Compilation of the Messages and Papers of the Presidents 1787-1897*, at 116-118 (1896) (*Messages and Papers*). "Should Congress concur," the President stated, it should appropriate funds for ministers. *Id.* at 118; *id.* at 116 (Branches should cooperate in their "respective rights and duties"). Contrary to petitioner's contention (Br. 42), Monroe's message did not imply that he believed that Congress's appropriation was necessary to effect recognition. See Sen. Hale, *Memorandum upon power to Recognize Independence of a New Foreign State*, 29 Cong. Rec. 663, 675 (1897) (*Hale Memorandum*) (Monroe invoked Executive power to send ministers and recognize governments, and congressional power to provide salary). To the contrary, before Congress passed any appropriations statute, the Secretary of State informed Spain that the United States had recognized the new republics, and informed the Colombian minister that the President would receive him. Letter from Adams to the Minister from Spain (Apr. 6, 1822), in 9 *British and Foreign State Papers 1821-1822*, at 754 (1829); 5 *Memoirs* 495; Act of May 4, 1822, ch. 52, 3 Stat. 678 (appropriating funds "for such missions" as the "President * * * may deem proper").

Petitioner also argues (Br. 44) that Monroe (and subsequent Presidents, *e.g.*, *id.* at 54) applied the law of nations in determining that the republics should be recognized. A recognition decision necessarily entails consideration of whether a newly independent state meets international-law criteria for statehood. See Restatement § 201, at 72. But what matters is that

the Executive consistently asserted, and Congress acquiesced in, exclusive authority to determine whether those criteria were met. The Executive, moreover, imposed additional requirements, including that the fight for independence had to be "manifestly settled" before recognition was appropriate, 2 *Messages and Papers* 117, and, like the Washington and Madison Administrations before it, also considered U.S. foreign-relations interests. See p. 21, *supra*.

b. In 1864, the House passed a proposed joint resolution asserting that acknowledging the Emperor of Mexico would not accord with U.S. policy. Cong. Globe, 38th Cong., 1st Sess. 1408-1409. Concerned that the resolution would provoke France into recognizing the Confederacy, see Julius Goebel, Jr., *The Recognition Policy of the United States* 194-196 (1915), the Secretary of State directed the minister to France to explain that recognition authority is "purely executive." 38th Cong. Globe, 1st Sess. at 2475. Although the House subsequently passed a declaratory resolution asserting congressional recognition authority, Cong. Globe, 38th Cong., 2d Sess. 48 (1865), the Senate did not take up the issue, and the United States' policy remained unchanged. See *Hale Memorandum* 677.

c. In 1896, the Senate considered a joint resolution purporting to recognize "the independence of the Republic of Cuba" from Spain. 29 Cong. Rec. 326, 332 (1896). In response, the Secretary of State asserted that "'[t]he power to recognize the so-called Republic of Cuba as an independent State rests exclusively with the Executive.'" *Congress Powerless*, N.Y. Times, Dec. 19, 1896. The Senate did not act on the resolution. In connection with the ongoing debate over

Cuba, moreover, Senator Hale presented an exhaustive memorandum arguing that the President possessed, and had historically exercised, exclusive recognition power. See *Hale Memorandum* 663-682.

In 1898, President McKinley requested congressional authorization to intervene militarily in Cuba, but he simultaneously informed Congress that "the so-called Cuban Republic" did not yet merit recognition under the principles set forth during the Monroe Administration, and that such recognition was "not necessary * * * to enable the United States to intervene" militarily. Message to Congress (Apr. 11, 1898), in 10 *Messages and Papers* 146 (1899); contra Pet. Br. 54. The House considered a resolution that would have recognized the "republic of Cuba," but voted against it after Members argued that the circumstances did not "justify the executive department of our Government in giving such recognition." 31 Cong. Rec. 3818 (1898). The Senate considered a similar resolution, but several Members expressed doubt about its constitutionality. *Id.* at 3973, 3976, 3991, 3993, 4030; *id.* App. 290. Congress ultimately passed a joint resolution that instead stated that the "people" of Cuba were independent, authorized the President to intervene in Cuba (in what would become the Spanish-American War), and disclaimed an intent to assert dominion over Cuba. J. Res. 24, 30 Stat. 738.

Contrary to petitioner's argument (Br. 55-56), the joint resolution acknowledging the independence of the "people" of Cuba was fully consistent with the President's sole authority to decide not to recognize the Republic of Cuba. The resolution merely expressed the view that the people of Cuba were taking part in a "rebellion" rather than a "treasonable riot,"

31 Cong. Rec. at 3774, and also was likely intended to disavow any U.S. territorial ambitions in Cuba. See Gerald E. Poyo, *"With All, and for the Good of All"* 124 (1989).

d. In 1919, the Senate considered a concurrent resolution "request[ing]" that the President "withdraw * * * the recognition" of the existing government in Mexico. 59 Cong. Rec. 73 (1919). Even though that resolution acknowledged the President's authority over recognition, President Wilson wrote to Congress that the Executive possessed sole recognition authority and the resolution would "constitute a reversal of our constitutional practice which might lead to very grave confusion in regard to the guidance of our foreign affairs." Letter from Wilson to Sen. Fall (Dec. 8, 1919), in S. Doc. No. 285, 66th Cong., 2d Sess. 843D (1920). The Senate dropped the resolution. See *Wilson Rebuffs Senate on Mexico*, N.Y. Times, Dec. 8, 1919.

3. Petitioner's attempt to demonstrate that Congress has exercised recognition power is unavailing

Petitioner cites (Br. 37-41, 45-52) four instances in which, he contends, Congress exercised the recognition power. Contrary to petitioner's arguments, on each occasion Congress's actions were consistent with recognition determinations made by the President.

a. In the early nineteenth century, Congress passed trade statutes that were consistent with the Executive's already-stated position on sovereignty over Haiti.

In 1800, Congress passed a statute suspending "commercial intercourse between the United States and France, and the dependencies thereof," and providing that the "island of Hispaniola shall for pur-

poses of this act be considered as a dependency of the French Republic." Act of Feb. 27, 1800, ch. 10, §§ 1, 7, 2 Stat. 7, 10. That statement tracked President Adams' 1799 proclamation declaring that "St. Domingo"—a name for the whole island that the Executive used interchangeably with "Hispaniola"—should be treated as a French dominion for purposes of an earlier non-intercourse law. A Proclamation (June 26, 1799), in 1 *Messages and Papers* 288-289 (1896). In the Executive's view, France had by treaty gained sovereignty over "the whole of the Island of St. Domingo." Letter from Monroe to Madison (June 3 [ca. July 23], 1795), in 16 *Madison Papers* 38 (1898).

Similarly, an 1806 statute prohibiting trade between the United States and "any part of the island of St. Domingo, not in possession, and under the acknowledged government of France," was consistent with the Executive's position that France retained sovereignty even though Haiti had declared independence and driven the French from portions of the island.[7] Act of Feb. 28, 1806, ch. 9, § 1, 2 Stat. 351; see Letter from Madison to Livingston (Jan. 31, 1804), in 6 *Madison Papers* 410-411 (2002).

b. Congress also acted consistently with the President's stated views in connection with President Jackson's 1837 recognition of Texas's independence from

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[7] *Clark* v. *United States*, 5 F. Cas. 932 (C.C.D. Pa. 1811) (No. 2838), does not support congressional recognition authority. Contra Pet. Br. 40-41. There, the question was whether, as a matter of statutory construction, an 1809 statute criminalizing importation from French territories included St. Domingo. 5 F. Cas. at 931-933. The court's reliance on the 1806 statute as evidence of Congress's intent does not imply any view about whether Congress had recognition power.

Mexico. Contra Pet. Br. 45-49. In 1836, Jackson informed Congress that on "the ground of expediency," he believed Congress should decide when recognition would be appropriate, and that his own view was that recognition should be "suspended" pending a threatened invasion by Mexico. Message (Dec. 21, 1836), in 3 *Messages and Papers* 265-271. He reserved the question of the Executive's exclusive authority. *Ibid.* After the invasion failed, Cong. Globe, 24th Cong., 2d Sess. 33 (1837), Congress appropriated funds for a minister "whenever the President * * * shall deem it expedient." Act of Mar. 3, 1837, ch. 33, 5 Stat. 170. Jackson then appointed a minister. Message (Mar. 3, 1837), in 3 *Messages and Papers* 281-282. Congress thus implemented the recognition policy the President established.

c. In 1862, Congress facilitated President Lincoln's decision to recognize Haiti and Liberia. Contra Pet. Br. 50-52. In light of the political sensitivity of recognizing Haiti and Liberia during the Civil War, Lincoln decided that it would be prudent to enlist congressional support for his recognition decision. Rayford W. Logan, *The Diplomatic Relations of the United States With Haiti 1776-1891*, at 299 (1941). Lincoln informed Congress that he believed the countries should be recognized but was unwilling to inaugurate a "novel policy" in that respect without congressional agreement, and he requested an appropriation for ministers to the "new States." First Annual Message (Dec. 3, 1861), in 6 *Messages and Papers* 47 (1897). After debates in which the bill's sponsor observed that congressional action was unnecessary to permit the President to recognize the republics, Cong. Globe, 37th Cong., 2d Sess. 1773 (1862) (Sen. Sumner), Con-

gress authorized the appointment of diplomatic representatives to Liberia and Haiti. Act of June 5, 1862, ch. 96, 12 Stat. 421.

d. Finally, the Executive did not, as petitioner asserts (Br. 49-50), acknowledge congressional recognition authority in considering whether to recognize Hungary in 1849. During the Hungarian independence movement, the President gave a diplomatic agent the power to recognize Hungary's independence by negotiating a treaty with the new government. Power to Mr. Mann to Negotiate with Hungary (June 18, 1849), in 38 *British and Foreign State Papers 1849-1850*, at 264 (1862). In that context, the Secretary of State's statement that the President would also "recommend" recognition "to Congress," *id.* at 263-264, is best read to suggest that the President would seek congressional support for the recognition decision he had already made. After the revolution failed, the President informed Congress that he would have recognized Hungary had he deemed it warranted "according to the usages and settled principles of this Government." S. Doc. No. 279, 61st Cong., 2d Sess. 2 (1910).

C. This Court And Individual Justices Have Repeatedly Stated That The Constitution Assigns Recognition Authority To The President Alone

1. This Court and individual Justices have many times stated that the Executive has sole authority to make recognition decisions. In 1817, Chief Justice Marshall, sitting as Circuit Justice, held that "as our executive had never recognized the independence of Buenos Ayres, it was not competent to the court to pronounce its independence." *United States* v. *Hutchings*, 26 F. Cas. 440, 442 (C.C.D. Va. 1817) (No.

15,429). In 1838, Justice Story concluded that "[i]t is very clear, that it belongs exclusively to the executive department of our government to recognise, from time to time, any new governments."[8] *Williams*, 29 F. Cas. at 1404. Later decisions have reaffirmed the point. See *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 410 (1964); *Baker*, 369 U.S. at 212; *National City Bank* v. *Republic of China*, 348 U.S. 356, 358 (1955); *United States* v. *Pink*, 315 U.S. 203, 229 (1942); *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 137-138 (1938); *United States* v. *Belmont*, 301 U.S. 324, 330 (1937).

Although these decisions held that the President had "sole" authority to recognize a foreign government, *Belmont*, 301 U.S. at 330, and that such action is "conclusive" on the courts, *Guaranty Trust*, 304 U.S. at 138, they did not specifically address a congressional attempt to constrain the President's recognition power. In light of Congress's historical acquiescence in the Executive's exclusive exercise of that power, however, it is unsurprising that the Court had no occasion to address a dispute between the Branches.

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[8] Petitioner is incorrect in contending (Br. 34) that Justice Story expressed a contrary view in his *Commentaries on the Constitution of the United States*. Story stated that there was "little doubt" that the recognition power "could not properly be conferred" on any Branch other than the Executive. *Story* § 1561, at 417; see pp. 22-23, *supra*. He also noted that "it is said" that Congress may override the President's recognition decision, but he did not endorse that view, describing it as an "abstract" argument "open to discussion." *Story* § 1560, at 416-417. Story was referring to William Rawle's unsupported assertion to that effect. See *id.* at 416 n.1; William Rawle, *A View of the Constitution of the United States of America* 96 (Philip H. Nicklin ed., 2d ed. 1829); contra Pet. Br. 32.

At the same time, it is significant that the Court never suggested a role for Congress in recognizing foreign states or governments.

2. Petitioner contends (Br. 59-60) that "[*d*]*icta* in opinions of this Court" assign the recognition power jointly to the President and to Congress. But the decisions on which petitioner relies did not involve the power to recognize foreign states or governments. Those decisions dealt with the status of territories controlled or acquired by the United States, a matter over which Congress has authority under the Territories Clause of the Constitution. See U.S. Const. Art. IV, § 3, Cl. 2; *Henkin* 72; *Jones* v. *United States*, 137 U.S. 202, 212, 216-217 (1890) ("legislative and executive departments" determined whether islands were "in the possession of the United States"); *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377, 378, 380-381 (1948); *Boumediene* v. *Bush*, 553 U.S. 723, 753 (2008) (U.S. sovereignty at Guantanamo Bay).[9]

Finally, petitioner also relies (Br. 30-31) on *United States* v. *Palmer*, 16 U.S. (3 Wheat.) 610 (1818), but that decision is inapposite. There, Chief Justice Marshall—who had concluded in *Hutchings* that recognition decisions were made by the Executive, 26 F. Cas. at 442—stated that in applying the piracy statute to actions that would be acts of war (rather than

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[9] In *Oetjen* v. *Central Leather Co.*, 246 U.S. 297 (1918), a case involving actions by the Mexican government, the Court quoted *Jones* in asserting that the determination of sovereignty "by the legislative and executive departments of any government conclusively binds the judges." *Id.* at 302 (citation omitted). There were no legislative actions at issue, however, as the Court relied on the Executive's unilateral recognition of the Mexican government. *Id.* at 301.

crimes) if committed by agents of a government fighting for independence, the courts "must view such newly constituted government as it is viewed by the legislative and executive departments of the government." 16 U.S. (3 Wheat.) at 643. Because criminal offenses must be defined by statute, *id.* at 634-635, the Court's point was that distinguishing between acts of piracy and acts of war would involve analyzing Congress's intent in enacting the piracy statute, as well as the United States' recognition position. *Palmer* therefore does not suggest that the Court believed Congress shared in the recognition power.

II. SECTION 214(d) UNCONSTITUTIONALLY INTERFERES WITH THE PRESIDENT'S EXCLUSIVE RECOGNITION POWER

Section 214(d) requires the Executive, upon request by individual citizens, to treat Jerusalem as within Israeli sovereignty in issuing U.S. passports, which are official documents addressed to foreign sovereigns. Because passports are diplomatic communications, the Executive has long used its inherent constitutional authority over the content of passports to ensure that their birthplace designations conform to the President's recognition decisions. By reversing that practice with respect to Jerusalem, Section 214(d) infringes the core of the President's exclusive recognition power. Since Israel's founding, every President has adhered to the position that the status of Jerusalem should not be unilaterally determined by any party. Section 214(d) would require the Executive simultaneously to express precisely the opposite position in a subset of the Executive's official communications with foreign sovereigns, and to do so at the behest of individual citizens seeking to express their

personal views on what the Nation's position should be.

Congress's attempt to force the Executive into that Janus-like posture is an unconstitutional impingement on the Executive's recognition power and its conduct of foreign affairs based on that power. The effective exercise of the recognition power—the prerogative to determine and communicate the position of the United States on matters of recognition—turns on the Executive's ability to be the single authoritative voice of the United States' position. A decision by this Court requiring the Executive to implement Section 214(d) would force the Executive to take inconsistent positions in conducting foreign relations on behalf of the United States, thereby undermining the President's credibility and his conduct of sensitive diplomatic efforts.

A. The Executive Has Constitutional Authority To Determine The Content Of Passports As It Relates to Recognition

1. The Executive possesses constitutional authority over passports as instruments of diplomacy

a. A passport, this Court has explained, is an instrument of diplomacy, see *Haig* v. *Agee*, 453 U.S. 280, 292-293 (1981), through which the President, on behalf of the United States, "in effect request[s] foreign powers to allow the bearer to enter and to pass freely and safely, recognizing the right of the bearer to the protection and good offices of American diplomatic and consular officers," *United States* v. *Laub*, 385 U.S. 475, 481 (1967); J.A. 22 (reproducing petitioner's passport). Thus, although a passport functions on one level as a "travel control document" that provides

"proof of identity and proof of allegiance to the United States," it is also an official communication "by which the Government vouches for the bearer and for his conduct." *Agee*, 453 U.S. at 293; see also *Urtetiqui* v. *D'Arcy*, 34 U.S. (9 Pet.) 692, 699 (1835).

Because a passport is a document through which the President communicates with foreign sovereigns, the authority to issue passports historically has been understood to flow directly from his inherent constitutional power regarding "the national security and foreign policy of the United States." *Agee*, 453 U.S. at 293. From the time of the Founding, the Executive Branch has issued passports, even though no statute addressed its authority to do so until 1856. See, *e.g.*, U.S. Dep't of State, *The American Passport* 8-21 (1898); *Urtetiqui*, 34 U.S. (9 Pet.) at 699. The Executive also determined the content of those passports insofar as that content relates to the conduct of diplomacy, see *The American Passport* 77-86, an authority that flowed naturally from passports' character as instruments of official communication to other nations.

Congress historically has "endorsed not only the underlying premise of Executive authority in the areas of foreign policy and national security, but also its specific application to the subject of passports." *Agee*, 453 U.S. at 294. When Congress enacted the first Passport Act in 1856, it did so to "confirm[] an authority already possessed and exercised by the Secretary of State" and to establish that the Secretary's authority was exclusive of state and local governments. *Id.* at 294-295 & n.27 (citation omitted). Accordingly, the 1856 statute, using "broad and permissive language," *id.* at 294, provided that "the Secretary of State shall be authorized to grant and issue

passports * * * under such rules as the President shall designate." Act of Aug. 18, 1856, ch. 127, § 23, 11 Stat. 60; see Rev. Stat. § 4075 (1875) (replacing "shall be authorized" with "may").

b. Petitioner misreads this Court's decisions in contending (Br. 22-24) that the Executive may regulate passports only pursuant to congressional authorization. In *Agee*, the Court held that the Secretary of State has broad statutory authority to revoke passports on national-security grounds. 453 U.S. at 295, 297-298. The Court relied on passports' diplomatic character, the historical understanding that the Executive's passport authority arose directly from the Constitution, and the Executive's unique expertise in the foreign-relations arena. *Ibid.* Those same considerations equally support the conclusion that the Executive exercises inherent constitutional authority to use passports as instruments of foreign policy, but in light of its statutory holding, the Court had no occasion to reach that question. *Id.* at 289 n.17. Similarly, in *Zemel* v. *Rusk*, 381 U.S. 1, 3 (1965), the Court held that the Executive Branch had statutory authority to refuse to validate certain passports on national-security grounds, without addressing the extent of the Executive's constitutional authority.

2. Any passport legislation must be in furtherance of Congress's enumerated powers, and may not interfere with the Executive's recognition determinations

a. Although Article I of the Constitution does not expressly confer any "passport power" on Congress, that body has the authority to regulate passports in furtherance of its enumerated powers, including its powers over immigration and foreign commerce. But because a passport is a diplomatic document, and the

Executive Branch has long exercised constitutional authority to determine the content of passports insofar as it pertains to the conduct of diplomacy, separation-of-powers principles prohibit Congress from exercising its authority over the content of passports in a manner that interferes with the President's exclusive authority.

That conclusion is reinforced by Congress's historic acknowledgment of the Executive's broad authority over the content and use of passports. See pp. 44-45, *supra*. The current Passports Act continues that tradition, as it provides that the Secretary of State "may grant and issue passports * * * under such rules as the President shall designate and prescribe." 22 U.S.C. 211a; see 22 C.F.R. 51.1-51.74; 7 FAM 1300 (2014).

b. The relatively few statutes that Congress has passed governing passports demonstrate the extent to which Congress has left the content of passports, and their use as instruments of diplomacy, to the Executive. Those statutes also demonstrate how radically Section 214(d) departs from the traditional realm of passport legislation.

For example, Congress has exercised its powers over foreign commerce and border control to enact statutes requiring passports for certain travel or limiting particular persons' travel, as well as prohibitions on application fraud and passport tampering. See, *e.g.*, 8 U.S.C. 1185(b); 22 U.S.C. 212a, 2714; 42 U.S.C. 652(k); 8 U.S.C. 1365b, 1504, 1732; 18 U.S.C. 1542-1544. Congress has also regulated the issuance of passports to aliens abroad and the use of passports as proof of citizenship, in aid of its control over immigration and naturalization. 22 U.S.C. 212, 2705, 2721.

None of those statutes purports to regulate passports' content, much less the Executive's authority to determine that content as it relates to the United States' foreign-relations interests.

Congress has also enacted passport legislation that assists the Executive in implementing its authority over passports. See U.S. Const. Art. I, § 8, Cl. 14. For instance, Congress has prohibited passport issuance by anyone but the Secretary of State, 22 U.S.C. 211a, and it has also regulated fees, 22 U.S.C. 214, 214a; 10 U.S.C. 2602, and time limits, 22 U.S.C. 217a.[10]

In vivid contrast to those statutes, Section 214(d) purports to regulate passport content by requiring the Executive, upon request, to designate "Israel" as the birthplace of U.S. citizens born in Jerusalem. In enacting Section 214(d), Congress did not suggest, as the Senate now does in its amicus brief (at 2), that the provision was necessary and proper to further Congress's powers over foreign commerce and naturalization. Rather, Section 214(d) is part of a section entitled "United States policy with respect to Jerusalem as the capital of Israel," a title that petitioner concedes "sounds more in foreign policy than in passport regulation." Pet. Br. 19. Even accepting the contention (Senate Amicus Br. 25) that, despite its title, Section 214(d) seeks only to facilitate "self-

[10] On the rare occasion when Congress attempted to regulate issuance of diplomatic passports in a manner that interfered with the President's exclusive authority to conduct diplomacy, the Executive declined to enforce the provisions. See, *e.g.*, George H.W. Bush, *Statement on Signing the Foreign Relations Authorization Act, Fiscal Years 1992 and 1993*, 1991 Pub. Papers 1344-1345 (Oct. 28, 1991); *Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports*, 16 Op. O.L.C. 18, 22 (1992).

identification" of U.S. citizens (but see p. 56, *infra*), it is difficult to discern even an attenuated connection between that purpose and naturalization (*i.e.*, setting the conditions on which individuals may become citizens) or foreign commerce (*i.e.*, controlling travel or entry). Section 214(d) bears so little resemblance to the passport regulations Congress has traditionally enacted that it can fairly be characterized as "passport legislation" (Pet. Br. 19) only in the sense that it uses passports as a vehicle to achieve a recognition-related objective.

B. Section 214(d) Unconstitutionally Forces The Executive To Communicate To Foreign Sovereigns That The United States Views Israel As Exercising Sovereignty Over Jerusalem

By requiring the President to contradict his recognition position regarding Jerusalem in official communications with foreign sovereigns, Section 214(d) unconstitutionally encroaches on the President's core recognition authority. See, *e.g.*, *Chadha*, 462 U.S. at 946-948; *Buckley* v. *Valeo*, 424 U.S. 1, 129 (1976); *Bowsher* v. *Synar*, 478 U.S. 714, 726 (1986); *United States* v. *Klein*, 80 U.S. (13 Wall.) 128, 148 (1871).

1. The place-of-birth designation on passports and reports of birth abroad implements the Executive's recognition policy

In order to implement its recognition policy regarding Jerusalem, the Executive Branch takes care to ensure that its communications with foreign sovereigns and other public statements express a consistent message: The United States does not recognize any sovereignty, including Israeli sovereignty, over Jerusalem. The State Department's policy of listing "Je-

rusalem," not "Israel," as the birthplace in passports and reports of birth abroad for U.S. citizens born in Jerusalem is one expression of the United States' recognition policy. J.A. 49-50. It is also an exercise of the President's constitutional authority to determine the content of passports insofar as that content pertains to his conduct of diplomacy.[11]

a. To be sure, the primary function of the place-of-birth entry on a passport is to assist in identifying the passport holder and to distinguish the individual from other persons having similar names. J.A. 70, 78. But the decision as to how to describe the place of birth—*i.e.*, to list a particular country name, or to designate a particular city or region as being within a country—necessarily operates as an official statement of whether the United States recognizes a state's sovereignty over a territorial area. By its nature, a passport is not a document that expresses the views of its bearer on matters of recognition. It is a document that expresses the official position of the United States.

Accordingly, the State Department has long maintained rules that align place-of-birth designations with U.S. recognition policies. See generally J.A. 109-149 (7 FAM 1383). Such designations have been included in U.S. passports since the early twentieth century. J.A. 202. When individuals have protested the country

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[11] Petitioner has not raised separate arguments concerning reports of birth abroad. Pet. App. 10a n.3. Regardless, reports of birth abroad are official documents intended to serve as proof of nationality for foreign and domestic audiences, including foreign government officials. The designation of a birthplace on a report of birth is an implementation of the recognition power insofar as it identifies, on an official document, which foreign state (if any) has sovereignty over that place.

listed on their passports—particularly when boundaries shifted after World War II—the Department has uniformly explained that its policy is to ensure that the birthplace designation is consistent with the present "sovereignty recognized by our Government." J.A. 204, 207-209 (citation omitted). That policy continues in force today: While the Department generally lists the "country of the applicant's birth" in passports, the Department will refrain from designating a country whose sovereignty over the relevant territory the United States does not recognize. J.A. 111. The State Department accordingly maintains detailed rules governing place-of-birth designations. J.A. 109-149. The designation of "Jerusalem" in passports and consular reports of birth abroad is a specific—and particularly sensitive—application of the Executive's foreign-policy and recognition decisions.

b. Petitioner's arguments (Br. 21-22, 25-26) that the State Department's place-of-birth rules do not implement recognition policy are unavailing.

Petitioner first argues (Br. 25) that the FAM permits the listing of localities that are not sovereignties. That is beside the point. The Department's policy does not require a recognized sovereign to be listed; rather, it simply prohibits listing as a place of birth a country whose sovereignty over the relevant territory the United States does not recognize. J.A. 111. Thus, a "city or area" may be listed in cases of disputed territory.[12] *Ibid.*

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[12] Petitioner misunderstands (Br. 25) the rule permitting U.S. citizens born before May 1948 to designate "Palestine" as their birthplace. That policy is a limited exception to the general rule of listing only "the country having present sovereignty." J.A. 112.

Petitioner also challenges the State Department's policy of giving citizens some flexibility to choose to have the Department list a city rather than the state with recognized sovereignty. J.A. 114. By listing only a city, the Department *avoids* taking a position on sovereignty. Contrary to petitioner's argument (Br. 26), that practice of accommodation applies neutrally to all U.S. citizens born abroad, whether they are supporters of Israel born in the Golan Heights, J.A. 112, supporters of the Palestinian people born in Haifa, J.A. 114, or Catalan-independence supporters born in Barcelona, *ibid.*

Finally, contrary to petitioner's arguments (Br. 21-22), the State Department's policy regarding the designation of Taiwan as a birthplace is fully consistent with the Executive's general position on birthplace designations. In 1994, Congress provided for the Department to permit U.S. citizens born on Taiwan to request that "Taiwan" be recorded as their birthplace rather than "China." See Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 132, 108 Stat. 395, as amended by Act of Oct. 25, 1994, Pub. L. No. 103-415, § 1(r), 108 Stat. 4302. The United States recognizes the People's Republic of China as the sole legal government of China, but it merely acknowledges the Chinese position that there is only one China and that Taiwan is part of China. J.A. 154. Because the United States does not take a position on the latter issue, the Department concluded that listing either "Taiwan" or "China" would convey a message consistent with the President's recognition policy—either option involves a

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Designating "Palestine" thus does not express a position on currently recognized states or boundaries.

geographic description, not an assertion that Taiwan is or is not part of sovereign China. Here, by contrast, the State Department has concluded that designating "Israel" as the place of birth would directly conflict with the United States' refusal to recognize Israeli sovereignty over Jerusalem. The Department's decisions concerning Jerusalem and Taiwan demonstrate the fact-specific foreign-policy judgments that the Department must make in ensuring that passports are consistent with the President's recognition policy. See, *e.g.*, *Regan* v. *Wald*, 468 U.S. 222, 242-243 (1984).

2. Section 214(d) unconstitutionally interferes with the Executive's core recognition power

a. Section 214(d) requires the Executive to alter its official passport policy with respect to Jerusalem. Its enforcement would result in the Executive's issuing passports acknowledging Israel's sovereignty over Jerusalem.

That message would arise not simply from the individual passports themselves, but from the context of the Executive's passport policy and Section 214. Foreign sovereigns (and other foreign and domestic audiences) understand that the United States does not identify a state as a birthplace on passports unless doing so is consistent with U.S. recognition policy. See J.A. 88, 228-229. Foreign sovereigns would also be aware that the Executive is designating "Israel" pursuant to a statute whose explicit purpose is to express "United States policy with respect to Jerusalem as the capital of Israel." § 214, 116 Stat. 1365 (capitalization altered). Section 214's other subsections reinforce the point, as they require the President to take other steps—relocating the U.S. embassy and memorializing Jerusalem's asserted status in

official documents—that would connote recognition of Jerusalem as Israel's capital. § 214(a), (b), (c), 116 Stat. 1365-1366. And the legislative history reiterates that Section 214 "contains four provisions related to the recognition of Jerusalem as Israel's capital." See H.R. Conf. Rep. No. 671, 107th Cong., 2d Sess. 123 (2002).

For those reasons, the Executive has determined that complying with Section 214(d) would communicate that the United States has "prejudg[ed]" Jerusalem's status and reversed its decades-long policy of not taking any official action that could be perceived as constituting recognition of Israeli sovereignty over Jerusalem. J.A. 55-56. That conclusion is a foreign-relations judgment entitled to substantial deference. See, *e.g.*, *Regan*, 468 U.S. at 242-243; *Curtiss-Wright*, 299 U.S. at 319. It is also indisputable, as the reaction that ensued when Section 214 was enacted demonstrates. See J.A. 57-58 (Palestinian officials condemned Section 214 as "undervaluing" Palestinian and Arab "rights in Jerusalem") (citation omitted); J.A. 230-234.

By forcing the Executive to communicate in official government documents that Israel has sovereignty over Jerusalem, Section 214(d) infringes the President's core recognition power. The President's exclusive authority to decide the United States' recognition policy would be greatly undermined if Congress, disagreeing with that policy, could force the Executive Branch to make official statements in foreign-relations that are inconsistent with the Executive's determinations. Other sovereigns would be unable to rely on the President's assurances, which would prevent the Executive from using its recognition position

to advance U.S. foreign-relations interests. There are few contexts in which the President's role as the "sole organ" of the Nation in foreign affairs is more crucial. *Curtiss-Wright*, 299 U.S. at 319-320.[13]

These consequences would be particularly severe in the extraordinarily sensitive context of this case. The United States' position on Jerusalem has always been a crucial principle undergirding U.S. foreign policy in the region, and since 1948 each President has taken care to articulate that position clearly and precisely. See pp. 2-4, *supra*. Section 214 has already damaged the President's ability to convey his position on Jerusalem, as many in the Arab world discounted President Bush's assurances, in his signing statement, that U.S. policy had not changed. J.A. 231-234. Doubt that the United States remains committed to negotiations on Jerusalem's status would only deepen if this Court were to require the Executive to implement Section 214(d) and begin asserting in official documents that Jerusalem is under Israeli sovereignty. Because U.S. policy toward Jerusalem is inextricably linked to this Nation's broader foreign policy in the region, confusion about the President's recognition position could undermine the United States' credibility with the parties to the peace process. Compliance with Section 214(d) also "could provoke uproar throughout the Arab and Muslim world and seriously damage our relations with friendly Arab and Islamic governments,

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[13] Contrary to the Senate's argument (Br. 28-30), the fact that Section 214(d) does not also purport to prescribe certain domestic consequences customarily associated with recognition (such as the judicial treatment of Jerusalem) is irrelevant. Section 214(d) directly interferes with the President's ability to convey and implement his policy on the international stage.

adversely affecting relations on a range of bilateral issues, including trade and treatment of Americans abroad." J.A. 59.

Because Section 214(d) interferes with the President's core recognition power, it is unconstitutional. Amici House Members argue, however, that Section 214(d) should be held invalid only if it "prevents the Executive Branch from accomplishing its constitutionally assigned functions," and there is no "overriding need" to promote objectives within Congress's authority. House Members Amicus Br. 21-22 (quoting *Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977)). But "where the Constitution by explicit text commits the power at issue to the exclusive control of the President," the Court has "refused to tolerate any intrusion by the Legislative Branch." *Public Citizen* v. *DOJ*, 491 U.S. 440, 485, 486-487 (1989) (Kennedy, J., concurring in the judgment); see also *Chadha*, 462 U.S. at 945; *Morrison* v. *Olson*, 487 U.S. 654, 711-712 (1988) (Scalia, J., dissenting). In any event, Section 214(d) does prevent the Executive from accomplishing its constitutionally assigned function of establishing recognition policy concerning Jerusalem. And petitioner and his amici have not identified anything close to an "overriding need" to permit private citizens, who have no individual rights in the conduct of the Nation's foreign relations, see *Kennett*, 55 U.S. (14 How.) at 49-50, to use the birthplace designation on their passports to express their personal views, at the expense of the Nation's established policy. Indeed, because Section 214(d) gives private citizens an option, it would not even establish a uniform rule in its sphere of operation.

b. Petitioner's and amici's remaining arguments that Section 214(d) does not interfere with the President's recognition power lack merit.

Petitioner, joined by the Senate and House Members as amici, argues that Section 214(d) merely permits individuals to "identify themselves as born in 'Israel.'" Pet. Br. 16; House Members Amicus Br. 25; Senate Amicus Br. 21. Section 214's text and operation refute that argument. The statute's express purpose is to establish "United States policy with respect to Jerusalem as the capital of Israel." See pp. 47-48, *supra*. And Section 214(d)'s one-sided operation—it does not permit Palestinian-Americans born in Jerusalem after 1948 to self-identify as being born in "Palestine"—is inconsistent with fostering "self-identification." In any event, even if Section 214(d) had a "self-identification" component, it is one that requires public endorsement by the Executive—in official documents.

Petitioner also contends (Br. 19) that constitutional-avoidance principles support disregarding Section 214's title and its other subsections. Those principles are inapposite here. There is no dispute that Section 214(d) would require the Executive, upon request, to designate "Israel" in the passports and reports of birth abroad of U.S. citizens born in Jerusalem. The question in this case is whether that mandate impermissibly interferes with the President's exclusive recognition power. Cf. *National Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566, 2598 (2012). The answer to that question would be "yes" even if Section 214 had a more innocuous title. The title exacerbates Section 214(d)'s unconstitutional effect by confirming to the world that Congress intended to require the

Executive to take steps in furtherance of recognizing Jerusalem as the capital of Israel.

Petitioner next contends (Br. 63) that implementation of Section 214(d) would have "negligible" foreign policy consequences. The President's recognition power, however, does not depend on a showing that a particular recognition determination is necessary to avoid adverse foreign-relations consequences. In any event, the Executive has determined, exercising its expertise as the Branch responsible for diplomacy, that deviating from longstanding passport practice would have severe adverse foreign-relations consequences.[14] J.A. 53. That judgment is entitled to substantial deference. See *Regan*, 468 U.S. at 242-243.

Relatedly, petitioner argues (Br. 17) that any harm to the United States' foreign-relations interests would be the result of "misperception" by the Arab world, which could be mitigated by American reassurances. But anger and confusion among foreign entities would be the direct result of Section 214(d)'s requirement that the Executive contradict its recognition position —not mere "misperceptions." Simply reaffirming the President's recognition policy—while being compelled to implement Section 214(d)—is no remedy. Section 214(d)'s mandate makes the Executive's reaffirmance of its longstanding Jerusalem policy less credible and therefore less likely to be effective. J.A. 232-234. That is precisely why it is unconstitutional.

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[14] Petitioner maintains that no adverse consequences have followed when State Department officials have occasionally mistakenly listed "Israel" in passports of U.S. citizens born in Jerusalem. Pet. Br. 65 n.14; see Zionist Org. of Am. Amicus Br. 4-26. That is because they are clerical errors, and can be explained as such and quickly corrected.

Finally, petitioner argues (Br. 62), relying on Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co.* v. *Sawyer*, *supra*, that Section 214(d) is constitutional because the President's power is "at its lowest ebb" when he "takes measures incompatible with the expressed or implied will of Congress." 343 U.S. at 637-638. But as Justice Jackson explained, Congress may not act upon a subject that the Constitution commits exclusively to the President. *Ibid.* Congress, moreover, lacks any enumerated powers over recognition. In such situations, the President may rely on his "exclusive power" notwithstanding Congress's contrary views. *Id.* at 638 n.4.

c. Contrary to the amici House Members' argument (Br. 4-5), holding Section 214(d) unconstitutional would not suggest that Congress's proper exercise of its enumerated powers cannot touch on subjects that relate to recognition.

Congress has unquestioned authority to legislate on certain matters affecting foreign affairs, including in ways that may bear a relation to recognition, so long as such statutes do not impermissibly interfere with the Executive's recognition power. Thus, for example, Congress has enacted immigration laws that acknowledge the Executive's recognition authority, see, *e.g.*, 8 U.S.C. 1152(d); criminal offenses that apply regardless of recognition, *e.g.*, 18 U.S.C. 1116(b)(2); spending statutes that limit assistance to particular foreign entities without taking a position on recognition, House Members Amicus Br. 10; and tariff statutes that do not take a position on recognition, including one that permits the President to extend duty-free treatment to goods originating in the West Bank or Gaza Strip, see Pub. L. No. 104-234, § 1, 110 Stat.

3058. Finally, at the Executive's urging, Congress enacted the Taiwan Relations Act in the wake of the President's recognition of the People's Republic of China. Pub. L. No. 96-8, 93 Stat. 14 (22 U.S.C. 3301 *et seq.*). That statute confirms the United States' unofficial relationship with Taiwan, including by providing that the "absence of diplomatic relations or recognition shall not affect the application of the laws of the United States with respect to Taiwan." 22 U.S.C. 3303(a). That statute does not purport to prescribe any recognition policy concerning Taiwan, and it is consistent with the Executive's existing treatment of Taiwan.

Unlike those statutes, Section 214(d) directly infringes the President's core recognition power, threatening to provoke grave foreign-relations consequences and undermine the Executive's ability to facilitate peace negotiations.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. U.S. Const. Art. II, Section 1, Cl. 1 provides in relevant part:

> The executive Power shall be vested in a President of the United States of America.

2. U.S. Const. Art. II, Section 2, Cl. 2 provides:

> He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

3. U.S. Const. Art. II, Section 3 provides:

> He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take

Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

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

UNITED STATES POLICY WITH RESPECT TO JERUSALEM AS THE CAPITAL OF ISRAEL.

(a) Congressional Statement of Policy.—The Congress maintains its commitment to relocating the United States Embassy in Israel to Jerusalem and urges the President, pursuant to the Jerusalem Embassy Act of 1995 (Public Law 104-45; 109 Stat. 398), to immediately begin the process of relocating the United States Embassy in Israel to Jerusalem.

(b) Limitation on Use of Funds for Consulate in Jerusalem.—None of the funds authorized to be appropriated by this Act may be expended for the operation of a United States consulate or diplomatic facility in Jerusalem unless such consulate or diplomatic facility is under the supervision of the United States Ambassador to Israel.

(c) Limitation on Use of Funds for Publications.—None of the funds authorized to be appropriated by this Act may be available for the publication of any official government document which lists countries and their capital cities unless the publication identifies Jerusalem as the capital of Israel.

(d) Record of Place of Birth as Israel for Passport Purposes.—For purposes of the registration of birth,

certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel.