No. 10-699

IN THE

Supreme Court of the United States

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

Petitioner,

v.

HILLARY RODHAM CLINTON, SECRETARY OF STATE,

Respondent.

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

**BRIEF *AMICI CURIAE* OF
ANTI-DEFAMATION LEAGUE AND ASSOCIATION OF
PROUD AMERICAN CITIZENS BORN IN JERUSALEM, ISRAEL**

IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
INTEREST OF AMICUS CURIAE 1
SUMMARY OF ARGUMENT 1
ARGUMENT 3
A. Congress Does Have The Power To Legislate Regarding The Issuance of Passports 4
B. Congress' Authority To Afford Citizens The Right To Have Their Place Of Birth Recorded As "Israel" Should Not Be Invalidated, As Such Rights Do Not Interfere With Any Power The Executive May Be Argued To Have To Recognize Foreign Governments 5
C. Respondent Already Permits Citizens To Include Information In Their Passports Directly Contrary To U.S. Policy Of Recognition Or Non-recognition Of Foreign Governments 6
D. Congress Acted Within Its Constitutional Authority When It Enacted Section 214(d) 8
E. This Case Can, And Should, Be Decided On Non-Political Grounds 10
CONCLUSION 12

TABLE OF AUTHORITIES

Cases

Almendarez-Torres v. United States,
523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998) 10

Aptheker v. Sec'y of State,
378 U.S. 500, 84 S. Ct. 1659, 12 L. Ed. 2d 992 (1964) 4

Bolling v. Sharpe,
347 U.S. 497, 74 S. Ct. 693, 98 L. Ed. 884 (1954) 8

Brown v. Bd. of Educ. of Topeka, Kan.,
349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955) 8

City of Cleburne, Texas v. Cleburne Living Ctr.,
437 U.S. 432 (1985) 8

Clark v. Martinez,
543 U.S. 371, 125 S. Ct. 716, 160 L. Ed. 2d 734 (2005) 9

Crowell v. Benson,
285 U.S. 22, 52 S. Ct. 285, 76 L. Ed. 598 (1932) 9

Haig v. Agee,
453 U.S. 280, 101 S. Ct. 2766, 69 L. Ed. 2d 640 (1981) 5

Henderson v. Mayor of City of New York,
92 U.S. 259, 23 L. Ed. 543 (1875) 4

Kent v. Dulles,
357 U.S. 116, 78 S. Ct. 1113, 2 L. Ed. 2d 1204 (1958) 4

Miller v. Johnson,
515 U.S. 900 (1995) 9

Nixon v. Adm'r of Gen. Services,
433 U.S. 425, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977) 8

Spector Motor Serv. v. McLaughlin,
323 U.S. 101, 65 S. Ct. 152, 89 L. Ed. 101 (1944) 10

Tenney v. Brandhove,
341 U.S. 367, 71 S. Ct. 783, 95 L. Ed. 1019 (1951) 8, 9

United States v. Nixon,
418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974) 8

Urtetiqui v. D'Arcy,
34 U.S. (9 Pet.) 692 (1835) 5

Zadvydas v. Davis,
533 U.S. 678 (2001) 10

Zemel v. Rusk,
381 U.S. 1, 85 S. Ct. 1271, 14 L. Ed. 2d 179 (1965) 4

Zivotofsky v. Sec'y of State,
571 F.3d 1227 (D.C. Cir. 2009), cert. granted, 131 S. Ct. 2897 (U.S. 2011) ..... passim

Statutes/Regulations

22 U.S.C. §§211a, 212, 213, 214, 214a, 217a, 218 4

22 U.S.C. §2705 ..... 4, 7

Foreign Affairs Manual ("FAM") ..... passim

Section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, *Pub.L. No. 107-228, 116 Stat. 1366 (2002)* (codified at *22 U.S.C. §2651(d) note (2006)*) ..... passim

U.S. Const, Art. I 2, 4

U.S. Const, Art. II, §3 ..... 2, 3

INTEREST OF AMICI CURIAE

The Anti-Defamation League ("ADL") and the Association of Proud American Citizens Born in Jerusalem, Israel (the "Association"), respectfully submit this brief as amici curiae in support of the Petitioner.[1]

Founded in 1913 to "fight the defamation of the Jewish people and to secure justice and fair treatment to all," ADL is the world's leading organization fighting anti-Semitism, racism, and all forms of bigotry through programs and services that counteract hatred and prejudice.

As part of its dual commitment to human rights and the security of the Jewish people, ADL is an advocate for the democratic state of Israel, a key American ally and the homeland of the Jewish people. It is these commitments that animate ADL's involvement in this case. Moreover, ADL advocated for passage of the law at issue in this case in order to support the right of an individual to identify the country where he or she was born, a right that is granted to the vast majority of Americans, but not to those born in Jerusalem.

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

As amici in this case, ADL and the Association believe that the narrow issue the case raises can and should be decided without implicating the political question doctrine. However, as a factual matter, it is indisputable that Jerusalem is in Israel. In addition, ADL has long supported the position that Jerusalem is and should remain the undivided and eternal capital of Israel.

SUMMARY OF ARGUMENT

The premise underlying both the majority opinion and the concurrence – that Petitioner is seeking by means of section 214(d) of the Foreign Relations Authorization Act to have the judiciary order the Executive to change United States policy with regard to the status of Jerusalem – is fundamentally mistaken. Whether the dismissal of this case was based on a finding of non-justiciability or violation of the Constitution's separation of powers, it was rooted in that mistaken premise. The premise is unfounded because all Congress did in enacting section 214(d) is afford U.S. citizens born in Jerusalem the right to have their passports and consular

[1] ADL and the Association gave at least ten days' notice of intention to file this brief to counsel of record for the parties. By correspondence with undersigned counsel, the parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund its preparation or submission. No person other than amici or counsel made a monetary contribution intended to fund its preparation or submission.

reports of birth abroad reflect their views regarding their place of birth; it did not direct the President to adopt any policy regarding the status of Jerusalem or otherwise impermissibly impinge on his exclusive powers. That being the case, there is no "political question" raised, nor is there any breach of the separation of powers, and dismissal was therefore unwarranted.

Congress' authority to legislate concerning the issuance of passports is found in Article I of the Constitution. That body has been enacting statutes governing passports since the founding of the republic. Accordingly, the issue is whether enactment of section 214(d) improperly usurped from the Executive branch a power granted exclusively to the President by the Constitution. It did not.

The only Presidential authority claimed by Respondent is the power to recognize or to decline recognition of foreign governments implicitly found in the Article II, §3 grant to the Executive to "receive Ambassadors and other public Ministers." Section 214(d) does not impermissibly intrude on this limited authority, as Respondent's own Manual regarding passports makes abundantly clear. That Manual demonstrates that the passport is not an instrument of foreign policy making. To the contrary, as Respondent herself defines it, the passport is a document attesting to the identity and nationality of the bearer as a U.S. citizen. It is not a means of recognizing a foreign government; rather, it is a statement to any foreign sovereign of a wholly domestic concern, namely, that the bearer is a citizen of this country.

Moreover, Respondent's Manual acknowledges that the purpose of the place of birth designation in the passport is simply to identify the citizen and distinguish him or her from other citizens with similar names or dates of birth. Most importantly, pursuant to other legislation similar to section 214(d), and on her own accord, Respondent already permits citizens to include place of birth information in their passport that is directly contradictory to established Presidential policies regarding the recognition or non-recognition of foreign governments. Accordingly, by her own policies and practices, Respondent acknowledges that Congress has the authority to afford citizens the right to self-identify their place of birth in the passport, and that the existence of this right in citizens does not impermissibly infringe on any power the President may have to recognize foreign sovereigns.

Here, it is not only possible, it is compelling to construe the statute at issue as not presenting any issue of constitutional dimension. Because under well settled principles of construction a statute is to be read so as to avoid a constitutional invalidity wherever reasonably possible, and because that may be done here, the decision of the court below should be reversed and this action should be permitted to proceed.

ARGUMENT

BECAUSE THE STATUTE AT ISSUE HERE DOES NOT IMPLICATE ANY FOREIGN POLICY POWER COMMITTED EXCLUSIVELY TO THE EXECUTIVE, BUT RATHER MERELY ACCORDS CITIZENS THE RIGHT TO EXPRESS THEIR VIEWS, THIS ACTION IS JUSTICIABLE, THE STATUTE IS CONSTITUTIONAL AND DISMISSAL WAS IMPROPER.

The opinions rendered by the Court of Appeals, both in the majority and the concurrence, are founded on the same mistaken premise: that by means of section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, *Pub.L. No. 107-228, 116 Stat. 1366 (2002)* (codified at *22 U.S.C. §2651(d) note (2006)*), [2] Petitioner is seeking to have the judiciary order the Executive to alter the nation's foreign policy regarding the status of Jerusalem. Zivotofsky v. Sec'y of State, 571 F.3d 1227, 1228-29 (D.C. Cir. 2009) cert. granted, 131 S. Ct. 2897 (U.S. 2011). [2]

The majority concludes that because Petitioner – who was born in Jerusalem – requests under section 214(d) that the Court order the State Department to record on a passport and a Consular Report of Birth Abroad his place of birth as "Israel," this action implicates the President's exclusive power under Article II, §3 of the Constitution to recognize foreign governments and therefore presents a non-justiciable political question which must be dismissed. Zivotofsky v. Sec'y of State, 571 F.3d 1227, 1231-1232 (D.C. Cir. 2009). The concurrence finds that the issue presented by this case is whether section 214(d) impermissibly intrudes on the President's exclusive power to recognize foreign sovereigns, and that the courts do have the power to determine the constitutionality of a congressional enactment. Zivotofsky v. Sec'y of State, 571 F.3d 1227, 1240 (D.C. Cir. 2009). While finding the matter to be justiciable, the concurrence then determines that section 214(d) does impinge on the Presidents' exclusive authority and is therefore unconstitutional, and that the action should be dismissed for this reason. Zivotofsky v. Sec'y of State, 571 F.3d 1227, 1244-1245 (D.C. Cir. 2009).

It is clear that the dismissal of the action, whether for the reason advanced by the majority or the concurrence, is premised on the determination that *Petitioner's* exercise of the right granted by section 214(d) to have his passport list his place of birth as Israel is inconsistent with the *President's* exclusive constitutional power to recognize foreign sovereigns. However, Amici submit that this premise is incorrect. Accordingly, the dismissal of the action was inappropriate and the lawsuit should be remanded to the district court for further proceedings.

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[2] Section 214(d) provides 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."

A. Congress Does Have The Power To Legislate Regarding The Issuance of Passports.

Congress's power to legislate regarding the issuance of passports is rooted in Article I of the Constitution and is well settled. *See, e.g.*, Zemel v. Rusk, 381 U.S. 1, 7, 85 S. Ct. 1271, 14 L. Ed. 2d 179 (1965) (authority of Secretary of State to refuse to validate the passports of United States citizens for travel to Cuba is derived from Congress' enactment of the Passport Act of 1926, 22 U.S.C.A. § 211a (West)); Zemel v. Rusk, 381 U.S. 1, 21, 85 S. Ct. 1271, 14 L. Ed. 2d 179 (1965) (Black, J., dissenting) ("Article I of the Constitution provides that 'All Legislative Powers herein granted shall be vested in a Congress of the United States. . . . I have no doubt that this provision grants Congress ample power to enact legislation regulating the issuance and use of passports for travel abroad, unless the particular legislation is forbidden by some specific constitutional prohibition. . . .'") (Emphasis in original). Congressional power to regulate the issuance of passports also emanates from the Commerce Clause contained in Article I, Section 8, Clause 3. Aptheker v. Sec'y of State, 378 U.S. 500, 518, 84 S. Ct. 1659, 12 L. Ed. 2d 992 (1964) (Black, J., concurring) ("Congress has . . . broad powers to regulate the issuance of passports under its specific power to regulate commerce with foreign nations"); *see also* Henderson v. Mayor of City of New York, 92 U.S. 259, 270-71, 23 L. Ed. 543 (1875) (transportation of foreigners constitutes foreign commerce, which is in the exclusive domain of Congress).

In fact, Congress has enacted statutes concerning the issuance of passports since at least 1803, when it passed legislation barring officials from knowingly issuing passports to aliens certifying their status as citizens. *See* Kent v. Dulles, 357 U.S. 116, 122-123, 78 S. Ct. 1113, 2 L. Ed. 2d 1204 (1958). Respondent, by means of the Department of State Foreign Affairs Manual, expressly recognizes that her authority to issue, deny and revoke passports derives directly from Congressional enactments, including 22 U.S.C.A. § 211a (West), *212, 213, 214, 214a, 217a, 218 and 2705. 7 Foreign Affairs Manual (FAM) 1318(a)*. This recognition is further demonstrated by the Manual's reference to Executive Order 11295, which was issued on August 5, 1966 and sets forth rules governing the issuance of passports. The Manual describes that Executive Order as delegating "to the Secretary of State the authority to make regulations regarding passports conferred on the President of the United States by 22 U.S.C. §211a." Zivotofsky v. Sec'y of State, 571 F.3d 1227, 1318 (D.C. Cir. 2009) (Emphasis added).

Because there can be no doubt that Congress has the power to legislate concerning the issuance of passports, the essential issue in this case boils down to a single question: did the Congressional enactment of section 214(d) affording United States citizens born in Jerusalem the right, at their request, to have their place of birth recorded as "Israel" run afoul of any exclusive power that may be enjoyed by the Executive to recognize foreign sovereigns?

B. Congress' Authority To Afford Citizens The Right To Have Their Place Of Birth Recorded As "Israel" Should Not Be Invalidated, As Such Rights Do Not Interfere With Any Power The Executive May Be Argued To Have To Recognize Foreign Governments.

Article II, §3 grants the President the authority to "receive Ambassadors and other public Ministers." Respondent contends that this power implicitly includes the power to recognize or to decline recognition of foreign governments. Zivotofsky v. Sec'y of State, 571 F.3d 1227, 1231 (D.C. Cir. 2009) cert. granted, 131 S. Ct. 2897 (U.S. 2011).[3]

Given the very limited grant asserted by Respondent, it is essential to examine closely the role of passports in order to determine whether section 214(d) impermissibly impacts on this concededly cabined authority. To do so, however, it is necessary to go no further than Respondent's own pronouncements on the matter.

The Department of State's Foreign Affairs Manual defines a United States passport as "a travel document issued under the authority of the Secretary of State attesting to the identity and nationality of the bearer." *7 FAM 1311(b)* (Emphasis added). A passport "[i]dentifies the bearer as a U.S. citizen or non-citizen national." 7 FAM 1311(d) (1). According to Respondent, "[a] U.S. passport is the most valuable travel and identity document in the world because it identifies the bearer as a U.S. citizen/non-citizen national." *7 FAM 1311(g).*

Thus, a passport is not a statement of foreign policy, and it certainly is not a means of official recognition of a foreign government. Quite the contrary, a U.S. passport is a statement to foreign governments of a purely domestic matter, namely, that the bearer is a United States citizen. In a word, the United States passport serves "as proof of U.S. citizenship at home and abroad." *7 FAM 1311(f)(2)*. As this Court noted in Haig v. Agee, 453 U.S. 280, 292, 101 S. Ct. 2766, 69 L. Ed. 2d 640 (1981), the case cited by the concurrence below, Zivotofsky v. Sec'y of State, 571 F.3d 1227, 1242 (D.C. Cir. 2009) cert. granted, 131 S. Ct. 2897 (U.S. 2011), a passport is a document "by which the bearer is recognized, in foreign countries, as an American citizen," quoting Urtetiqui v. D'Arcy, 34 U.S. (9 Pet.) 692, 698 (1835) (emphasis added).

Respondent's Foreign Affairs Manual further demonstrates that the purpose of the place of birth designation in the passport is not to confer recognition (or non-recognition) by the United States of sovereignty on a foreign government. Rather, as the Manual states, "[t]he 'place of birth' designation is an integral part of establishing an individual's identity. It distinguishes that individual from other persons with similar names and/or dates of birth, and helps identify claimants attempting to use another person's identity. The information also facilitates retrieval of passport records to assist the Department in determining citizenship or notifying next of kin or

[3] This asserted implicit power is contested by other amici.

other person designated by the individual to be notified in case of emergency." *7 FAM 1310(g) Appendix D*.

The Manual further indicates that in fact deletion of the place of birth entry entirely from the passport is a matter that "has been discussed extensively among U.S. Government agencies and with the Congress," *7 FAM 1310(g)(4) Appendix D* (emphasis added), and that Congress commissioned studies on the issue.

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

In sum, the place of birth entry on the passport does not exist as a means of expression of United States policy on the recognition of foreign governments – the very limited matter which Respondent asserts the Constitution delegates exclusively to the President. Instead, the place of birth designation exists solely as an additional means for the citizen to provide identifying information about himself that can help differentiate him from similarly named persons or from individuals with the same date of birth. Respondent recognizes that the citizen could either include such information as part of his passport or he could provide that information separately upon arrival at his place of foreign destination. In either event, it is the citizen who is making the statement. The determination has been made to include the information in the passport, but that decision was made only for the convenience of U.S. citizens traveling abroad and to help differentiate the particular citizen from other U.S. citizens.

C. Respondent Already Permits Citizens To Include Information In Their Passports Directly Contrary To U.S. Policy Of Recognition Or Non-Recognition Of Foreign Governments.

Respondent already recognizes that the information provided by the citizen for inclusion in the place of birth entry is just that – a statement of the citizen and not of United States policy. At the request of a citizen, Respondent expressly permits information that is directly contrary to the official United States policy of recognition or non-recognition of foreign governments to be placed in the passport. For example, the United States does not officially recognize Taiwan as a state or country. Indeed, official United States policy recognizes the People's Republic of China as the sole legal government of China and acknowledges the Chinese position that there is but

one China and that Taiwan is a part of China. *7 FAM 1340d(6)(f) Appendix D.* Notwithstanding these policies, and pursuant to Congressional enactment in section 132 of the Foreign Relations Act of 1994, *Pub. L. No. 103-236,* 108 Stat. 395 (1994) as amended by *Pub. L. 103-415, §1(r),* 108 Stat. 4302 *(1994) (codified at* 22 U.S.C.A. § 2705 note (West),[4] Respondent expressly recognizes the citizen's right to require the Department of State to enter Taiwan as his or her place of birth in the passport. *7 FAM 1340d(6)(a) Appendix D.* Thus, Respondent has already acknowledged Congress' authority to legislate regarding the rights of citizens to insert information concerning their place of birth designation in their U.S. passports contrary to the official policies of the Executive and she has followed the mandates of that legislation.[5]

More broadly, Respondent directly recognizes that notwithstanding what the official policy of the President is with regard to the recognition of a foreign government's sovereignty over any particular location, "[a] U.S. citizen born abroad may choose to list the city or town of birth at the time of the applicant's birth or at the present time rather than the country if he or she objects to the country" recognized by the President as having sovereignty over that place. *7 FAM 1380(a) Appendix D* (Emphasis added).[6] The Manual advises citizens that by so objecting to the official policy of recognition, there is a risk "[e]ntry may be denied by border officials based on the city or town designation in the passport." *7 FAM 1300 Appendix D, Exhibit 1380.* But aside from that appeal to the citizen's self-interest in his or her own convenience, Respondent already recognizes that the place of birth entry is not a statement of official United States policy or recognition. Within the passport document itself the citizen is already free to state his or her objection to that policy by rejecting the sovereignty of the country as recognized by the President and insisting that only the city of birth be shown in the passport.

Absent such an objection from the citizen, the place of birth entry in the passport for citizens born abroad would always (and only) state the *country* which the President has recognized as having sovereignty over that city. *7FAM1310f Appendix D.* For example, the passport of a citizen born in Paris will only identify him as having been born in France. Thus, by stating, at the citizen's insistence, only the city of birth – as the Manual expressly permits – there is the exact same risk that a foreign sovereign in that instance could conclude that the President has "changed" foreign policy with respect to sovereignty as is present if a citizen born in

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[4] Section 132 of *Pub. L. No. 103-236, 108 Stat. 395 (1994), as amended Pub. L. 103-415, §1(r), 108 Stat. 4302 (1994),* provides in pertinent part: "For purposes of the registration of birth or certification of nationality of a United States citizen born in Taiwan, the Secretary of State shall permit the place of birth to be recorded as Taiwan."

[5] Plainly, by demanding that the State Department record Taiwan rather than China as his or her place of birth, the citizen is expressing an objection to the view that China has sovereignty over Taiwan, especially since Taiwan is not a city and the President's policy expressly does not recognize Taiwan as either a state or a country. The concurrence's view, Zivotofsky v. Sec'y of State, 571 F.3d 1227, 1244 (D.C. Cir. 2009) cert. granted, 131 S. Ct. 2897 (U.S. 2011), that the recording of Taiwan as the place of birth is somehow "consistent" with the official policy of the government is so much legal hair-splitting. It certainly is as much an objection as those which the Manual expressly recognizes as such and nevertheless permits citizens to record in the place of birth entry notwithstanding their inconsistency with official White House policy on recognition of foreign sovereignty. *See 7 FAM 1380(a) Appendix D and 7 FAM 1300 Appendix D, Exhibit 1380,* discussed immediately *infra.*

[6] The same rule applies to Consular Reports of Birth Abroad. *See 7 FAM 1445.2c Part A Line 5.*

Jerusalem were to be permitted to identify himself as being born in Israel. (Indeed, there is likely less of a "risk," since there would be no obvious reason to conclude that a person listing Israel as his place of birth was necessarily born in Jerusalem, whereas a passport listing "Paris" as the place of birth would of necessity be inconsistent with the President's recognition of France's sovereignty.) Precisely because Respondent has already determined that in the former case there is no interference with the President's power to recognize foreign governments and that citizens will be allowed to express such objection – just as citizens born in Taiwan may do – there is no basis for concluding that the Congress cannot afford a similar right to citizens born in Jerusalem, as it has in fact done by section 214(d).

Accordingly, by her own Manual, Respondent has recognized that the place of birth entry in the passport is not a statement of official United States policy on recognition of foreign governments, and instead is simply a means of identifying and differentiating citizens based on information provided by the citizen himself. Indeed, not only is the place of birth entry not a statement of official United States policy, Respondent expressly acknowledges in that context the citizen's right to object to the recognition policy of the President and instead to insist on placing information in the passport that rejects that policy.

D. Congress Acted Within Its Constitutional Authority When It Enacted Section 214(d).

In light of the role of the place of birth entry in the passport, it is clear that in enacting section 214(d) – which, it must be noted, the President himself signed into law and did not veto – Congress acted within its Constitutional authority to pass legislation regarding the issuance of passports and did not intrude on any asserted power of the Executive. As this Court held in Nixon v. Adm'r of Gen. Services, 433 U.S. 425, 443, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977), in determining whether a Congressional enactment infringes on the powers of the President, the proper inquiry is to focus "on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions" (quoting United States v. Nixon, 418 U.S. 683, 711-12, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974)). *See also* Tenney v. Brandhove, 341 U.S. 367, 378, 71 S. Ct. 783, 95 L. Ed. 1019 (1951) ("to find that a [legislative] committee's investigation has exceeded the bounds of legislative power it must be obvious that there was a usurpation of functions exclusively vested in . . . the Executive"). Respondent's own Manual demonstrates on its face that section 214(d) does not effect any such usurpation.

As Respondent expressly concedes in her Manual, the purpose of the passport generally is not to state foreign policy pronouncements; rather, its purpose is to state who is a citizen of the United States. Similarly, the purpose of the place of birth entry is not to set forth United States policy on recognition of foreign governments. To the contrary, the Manual makes clear that it exists to provide identifying information about the citizen and is for his or her convenience in traveling.

Further, by expressly recognizing in the Manual the right of citizens to insist on including information at variance with official United States recognition of particular sovereigns, Respondent obviously acknowledges that providing such rights does not prevent the Executive from accomplishing any recognition functions. Accordingly, by Respondent's own Manual, it is apparent that the rights afforded to citizens by section 214(d) do not amount to an unconstitutional infringement of the powers of the Executive. In fact, section 214(d) gives rights to citizens to express their views regarding their identification. These rights are similar to the rights afforded to U.S. citizens born in Taiwan by Congress in section 132 of Pub. L. No. 103-236 and acknowledged by Respondent at *7 FAM 1340d(6)(f) Appendix D.* Because these rights afforded to citizens born in Taiwan are already recognized by Respondent not to interfere with the right of the President to exercise his powers of recognition, there is no basis for holding that the similar rights afforded by section 214(d) to citizens born in Jerusalem amount to an "obvious . . . usurpation of functions exclusively vested in . . . the Executive." Tenney v. Brandhove, 341 U.S. 367, 378, 71 S. Ct. 783, 95 L. Ed. 1019 (1951).[7]

Indeed, given that at *7 FAM 1380a Appendix D* Respondent already more broadly affords citizens who object to an actual Presidential decision on recognition the right to instead insert different identifying information in the place of birth entry, *a fortiori* there can be nothing unconstitutional about section 214(d), which affords citizens the right to insert Israel as their place of birth where the President had admittedly not yet even formulated an official view on the status of Jerusalem. Zivotofsky v. Sec'y of State, 571 F.3d 1227, 1228 (D.C. Cir. 2009) cert. granted, 131 S. Ct. 2897 (U.S. 2011). [8]

Petitioner is not, as the Court of Appeals suggested below and as Respondent echoed in her opposition to the petition for certiorari, seeking through section 214(d) to have the judiciary order the Executive "to alter the nation's foreign policy." As shown above, the place of birth entry on the passport is not the platform on which the Executive exercises its purported power of recognition of foreign governments. What Congress has done in section 214(d), and what Respondent does seek from the judiciary in support of that reasonable exercise of Congressional authority over the issuance of passports, is the right to express his view about his identity, just as the Congress and Respondent herself already permit citizens born in Taiwan to do

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[7/] Further, a State Department policy that permits citizens born in Taiwan a greater set of rights than citizens born in Jerusalem cannot withstand the strict scrutiny that must be applied under Fifth Amendment Equal Protection principles where discrimination on the basis of national origin is implicated, as would be the case here where Respondent complies with the requirements of Pub. L. 103-236, as amended, but not with section 214(d). *See, e.g.,* Miller v. Johnson, 515 U.S.900, 904 (1995); City of Cleburne, Texas v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985); Bolling v. Sharpe, 347 U.S. 497, 499, 74 S. Ct. 693, 98 L. Ed. 884 (1954) supplemented sub nom. Brown v. Bd. of Educ. of Topeka, Kan., 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955).

[8] Moreover, it must be noted that requiring the citizen to simply state "Jerusalem" as his place of birth would actually defeat Respondent's stated primary purpose for the place of birth entry, which is to distinguish the applicant "from other persons with similar names and/or date of birth." *7 FAM 1310g Appendix D.* This is because in addition to Israel, there are nineteen other countries that have locations also named "Jerusalem." *See* report of National Geospatial-Intelligence Agency, http://geonames.nga.mil.ggmaviewer. There are also twenty places in the United States called Jerusalem in twelve different states. *See* http://jerusalem-usa.blogspot.com.

notwithstanding the President's official policy on "One" China. Indeed, and as noted previously by *7 FAM 1380(a) Appendix D,* Respondent has already acknowledged that affording United States citizens the right to express views in this area that may differ from those policies established by the President is wholly concordant with the highest principles of our democracy. Nor is it invasive of the President's right to set policies in those spheres given over to the Executive branch by the Constitution. By section 214(d) Congress has specifically legislated that citizens born in Jerusalem are to have that same right of expression. Such enactments are well within the powers given to Congress to pass laws regarding the issuance of passports – something which Congress has been regulating virtually since the nation's birth. Because the issue here is whether such an enactment "obviously usurps" the Executive, and because Respondent's own Manual and actual practices demonstrate that such is not the case, the decision below should be reversed and Petitioner permitted to proceed with his case.[9]

E. This Case Can, And Should, Be Decided On Non-Political Grounds.

Amici has a firm and consistent view on what American policy should be with regard to the status of Jerusalem. However, it is precisely because, as shown above, this case does not ask the Court to address that issue or to determine which branch of government can address the issue, that the decision below should be reversed.

It is well settled that this Court will try wherever fairly possible to construe an act of Congress so as to avoid having to invalidate the legislation on constitutional grounds. *See, e.g.*, Clark v. Martinez, 543 U.S. 371, 381, 125 S. Ct. 716, 160 L. Ed. 2d 734 (2005); Zadvydas v. Davis, 533 U.S. 678, 689 (2001); Almendarez-Torres v. United States, 523 U.S. 224, 238, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998); Spector Motor Serv. v. McLaughlin, 323 U.S. 101, 105, 65 S. Ct. 152, 89 L. Ed. 101 (1944); Crowell v. Benson, 285 U.S. 22, 62, 52 S. Ct. 285, 76 L. Ed. 598 (1932). Here, it is no stretch to construe section 214(d) as permitting citizens to set forth their personal views regarding their place of birth and not otherwise interfering with the Executive's constitutional authority to recognize foreign sovereigns.

Indeed, as discussed above, it is apparent from Respondent's Manual that she herself properly understands that the place of birth entry on the passport is not a forum for the expression of the Executive recognition power and that citizens can there express views that are

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[9] The majority opinion below observes that despite the statement by the President in signing the statute containing section 214(d) into law that U.S. policy regarding Jerusalem had not changed, which message was reaffirmed by the U.S. Consulate in Jerusalem, "[e]nactment of the law provoked confusion and criticism overseas." Zivotofsky v. Sec'y of State, 571 F.3d 1227, 1229 (D.C. Cir. 2009) cert. granted, 131 S. Ct. 2897 (U.S. 2011). Amici counsel is not aware of any authority holding that our nation's constitutional jurisprudence may, or should, turn on "criticism" from interested factions abroad, especially when that criticism is, as the majority opinion notes, wholly mistaken. The response to such "confusion" can only be further education. Surrender of the rights of U.S. citizens to express their views – the purpose of section 214(d) – cannot be the acceptable solution. No doubt many foreigners are "confused" and "critical" when they see Americans on federal property protesting White House policies which those foreigners find favorable to their viewpoint. It cannot seriously be suggested that the constitutionally appropriate response to such confusion and criticism is to curtail the protest rights of American citizens in the name of securing the foreign policy powers of the Executive.

at odds with the official policies of the President without thereby impermissibly interfering with the recognition functions of the Executive. Because section 214(d) fairly can be read as an enactment that, like other similar statutes Respondent already follows, operates merely to afford citizens the right to indicate their choice and not as a mandate to the President to alter his foreign policy, under the doctrine long followed by this Court the statute should not be construed in a manner as to put it on a constitutional collision course with a co-equal branch of government. And even more so, precisely because this case can be decided on ministerial grounds, there is no need for the Court to reach into any aspect of the conflict in the Middle East. The resolution of this matter is independent of region or politics, and can and should be obtained through the application of long established principles of construction.

CONCLUSION

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

Respectfully submitted,

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