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 OF TEXAS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant
Attorney General

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
jonathan.mitchell@
texasattorneygeneral.gov
(512) 936-1700

JONATHAN F. MITCHELL
Solicitor General
Counsel of Record

ANDREW S. OLDHAM
Deputy Solicitor General

EVAN S. GREENE
DOUGLAS D. GEYSER
KYLE D. HIGHFUL
Assistant Solicitors General

Counsel for Amicus Curiae

QUESTION PRESENTED

In 2002 Congress enacted legislation requiring the Secretary of State, upon request, to record the birthplace of a Jerusalem-born U.S. citizen as "Israel" on his passport and consular report of birth abroad. *See* Foreign Relations Authorization Act of 2003, Pub. L. No. 107-228 § 214(d). The President has refused to comply with this statutory directive, and has instructed the Secretary to continue recording "Jerusalem" and not "Israel" as the place of birth for every Jerusalem-born U.S. citizen. The question presented is:

Whether the President holds not merely an inherent but an *exclusive* constitutional prerogative to decide whether to stamp "Jerusalem" or "Israel" as the place of birth on the passports of Jerusalem-born U.S. citizens, without regard to any congressional enactment that purports to legislate on this question.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions and Statutes

Other Authorities

In the Supreme Court of the United States

No. 13-628

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 OF TEXAS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS

The amicus curiae has an interest in ensuring that executive-branch policies remain responsive to Congress—the only branch of the federal government in which the States are represented. The amicus curiae has a further interest in countering executive-branch unilateralism, which erodes the structural hurdles to federal lawmaking that protect individual liberty and state prerogatives.

SUMMARY OF ARGUMENT

Constitutional text emphatically supports Congress's decision to enact section 214(d). Article I, § 8 empowers Congress "to regulate [c]ommerce with foreign nations," and this encompasses the power to issue and regulate the content of passports needed for international travel. Even if one were to accept the broadest possible construction of the President's duty to "receive Ambassadors and other public Ministers," that would show at most that the President's power over Zivotofsky's passport is *concurrent* with Congress—not exclusive of Congress. And there is no text in Article II (or anywhere in the Constitution) that suggests an exclusive Presidential power to determine the boundaries of a foreign state, the names of birthplaces to be stamped on passports, or to establish U.S. policy toward Israel without regard to congressional wishes.

There is also no historical evidence to support an exclusive Presidential prerogative in these areas. The court of appeals could not uncover *any* evidence that anyone who drafted or ratified the Constitution understood that document to confer a so-called "recognition" power on the President that would authorize him to brush aside congressional enactments such as section 214(d). All that the court of appeals could muster were post-ratification anecdotes in which the President recognized foreign countries without congressional authorization. But none of that is evidence of an *exclusive* Presidential power that would allow the executive to countermand an Act of Congress. There is a constitutional chasm between an *inherent* Presidential power to act without congressional

authorization and an *exclusive* Presidential power to act in defiance of an express congressional prohibition. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring); *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006). The court of appeals elided this most basic distinction in separation-of-powers law.

The court of appeals also ignored (or buried in footnotes) the many historical episodes and opinions from this Court indicating the "recognition" power is not exclusive to the President but is shared with Congress. *See* Robert J. Reinstein, *Is The President's Recognition Power Exclusive?*, 86 Temp. L. Rev. 1, 8, 14, 25 (2013). And in all events, it does not follow from an "exclusive" Presidential power to recognize foreign governments that the President holds the additional power to resolve international territorial disputes without regard to congressional wishes. Nor does it follow that the President holds the still further power to prevent Congress from allowing individual citizens to express their dissent from the executive's views on their passports. *Cf. Wooley v. Maynard*, 430 U.S. 705, 713 (1977). The power that the executive asserts in this case is at least three penumbras removed from the President's Article II duty to "receive Ambassadors and other public Ministers," and the Secretary of State cannot cite *any* historical episode or court decision in which this supposed power has been allowed to override an Act of Congress. A ruling for the Secretary will inaugurate a new, substantive-due-process-like doctrine of executive power, where the President is empowered to push aside democratically enacted

legislation in the name of supposed "constitutional" powers that have no textual footing in the document, but that the President nevertheless believes *should* belong exclusively to him.

Finally, to the extent that judicial skepticism toward section 214(d) stems from fears that Congress will be insufficiently attuned to the nation's diplomatic interests, these concerns are unfounded. The requirements imposed by section 214(d) are exceedingly modest. Section 214(d) does not require the President to recognize Israeli sovereignty over Jerusalem; it does not require or allow "Jerusalem, Israel" to appear on U.S. passports; and it requires "Israel" to appear as the place of birth only upon the request of a Jerusalem-born passport holder. And in all events, the Framers of our Constitution were far more concerned with the dangers of executive-branch unilateralism in the field of foreign affairs, where a President's policies can be unduly shaped by international opinion or desires to enhance his legacy rather than what the American people want. In this case, the people's representatives in Congress have spoken clearly and unequivocally in enacting section 214(d). Their decision is entitled to the President's respect, whether he approves of it or not.

ARGUMENT

When the President's actions contradict an Act of Congress, his powers are at their "lowest ebb," and the President "can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Youngstown*, 343 U.S. at 637–38 (Jackson, J., concurring); *see also Medellin v. Texas*, 552 U.S.

491, 524 (2008) ("Justice Jackson's familiar tripartite scheme provides the accepted framework for evaluating executive action"). It is not enough to show that the decision whether to stamp "Jerusalem" or "Israel" on Zivotofsky's passport falls within the President's Article II powers. The Secretary must also show that this decision falls *outside* Congress's Article I powers.

The Secretary cannot make this showing. The "recognition" power on which he relies is not an exclusive Presidential power. And even if it were, it would not prevent Congress from giving Zivotofsky the freedom to choose whether to have "Jerusalem" or "Israel" appear as the place of birth on his passport.[1]

I. THE SO-CALLED RECOGNITION POWER IS NOT EXCLUSIVE TO THE PRESIDENT

Constitutional text must be the starting point in any separation-of-powers dispute. Article I gives Congress several powers relevant to the recognition of foreign governments and the content of U.S. passports—such as the power to regulate foreign commerce and the power to establish uniform rules of naturalization. In addition, the necessary-and-proper clause empowers Congress to enact laws "Necessary" to carrying into Execution not only the powers granted to Congress, but *also* the Powers granted to the President or any other "Department or Officer." *See* U.S. Const. art. I, § 8. Yet the court of

[1] Section 214(d) also gives Zivotofsky the right to have "Israel" appear as his place of birth on his consular report of birth abroad. For simplicity, we will refer only to "passports" throughout the brief.

appeals did not even consider Congress's Article I powers before proclaiming that the President "exclusively holds" the power to recognize foreign governments. *See* Pet. App. 20a.

Neither did the Secretary. His brief in the court of appeals discussed the text of Article I only *after* it had declared the President's recognition power to be "exclusive." *See* Brief for Appellee at 45–50, *Zivotofsky ex. rel. Zivotofsky v. Sec'y of State*, 725 F.3d 197 (D.C. Cir. 2013) (No. 07-5347) ("D.C. Cir. Appellee's Br."); *id.* at 50 ("Congress may not act upon a subject that the Constitution commits exclusively to the President."); *see also* Brief for Resp't at 34, *Zivotofsky ex. rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012) (No. 10-699) ("Br. for Resp't").

This is a textbook example of begging the question. Whether the President holds an exclusive or concurrent "recognition" power *depends* on whether Article I empowers Congress to legislate on matters related to the recognition of foreign governments, territorial disputes, and the content of passports. One cannot declare the President's "recognition" power to be exclusive without considering the text of Article I, and then dismiss Zivotofsky's reliance on Article I on the ground that Congress is forbidden to invade the President's "exclusive" powers. Instead, one must consider the text of Article I in the course of deciding whether the "recognition" power is concurrent or exclusive.

A. Constitutional Text Establishes That Any "Recognition" Power Is Concurrent With Congress, Not Exclusive Of Congress.

Congress's Article I prerogatives include the "powers" to "regulate Commerce with foreign Nations," "establish an uniform Rule of Naturalization," and "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. art. I, § 8. Article II, by contrast, provides that "[t]he executive Power shall be vested in a President of the United States of America," and imposes a duty on the President to "receive Ambassadors and other public Ministers." The question is whether these constitutional provisions are most sensibly read to confer a "recognition" power that is: (a) exclusive to the President, or (b) held by or shared with Congress.

The power to "regulate Commerce with foreign Nations," when combined with the necessary-and-proper clause, allows Congress to legislate on recognition-related matters. Even under pre-New Deal case law, the term "commerce" has always been understood to include trade as well as transportation and the movement of persons and goods between nations. *See, e.g.*, *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 72 (1824) ("Commerce, undoubtedly, is traffic, but it is something more: it is intercourse."); *see also* Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 Va. L. Rev. 1387 (1987). And trade agreements with foreign nations cannot occur unless the United States recognizes the foreign govern-

ment as a legitimate sovereign. Recognition is not merely "necessary" in the sense of being "conducive" to foreign-trade regulation, it is strictly necessary for a trade agreement between foreign nations to take place. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 414–15 (1819) (rejecting the view that the necessary-and-proper clause extends only to laws that are "absolutely necessary" to carrying into execution an enumerated power, and holding that a law need only be "conducive" to that end). Recognition is also "necessary" for carrying into execution the power to "make Treaties," and the all-important second part of the necessary-and-proper clause allows Congress to enact laws conducive to executing powers given to "any Department or Officer," including the President. *See Jinks v. Richland Cnty.*, 538 U.S. 456, 462 (2003). The government cannot "make" a treaty without first recognizing the sovereign with whom the treaty is made. *Cf.* Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 Harv. L. Rev. 1867 (2005); *Bond v. United States*, 134 S. Ct. 2077, 2098–2102 (2014) (Scalia, J., concurring). So even under the narrowest constructions of the treaty power, the foreign-commerce clause, and the necessary-and-proper clause, Congress may legislate on recognition-related matters.

The Secretary presents no argument to the contrary. His brief in the court of appeals acknowledged Congresss's enumerated powers "over immigration and foreign commerce," but never explained how those powers (when combined with the necessary-and-proper clause) stop short of authorizing Congress to legislate on recognition-related issues. Indeed, the Secretary did not even

mention the necessary-and-proper clause. The Secretary's only response has been to assert that Congress cannot use its enumerated powers to infringe the President's "exclusive" recognition powers. *See* D.C. Cir. Appellee's Br. at 50 ("Congress may not act upon a subject that the Constitution commits exclusively to the President."). But that simply assumes what is to be decided—whether the President holds an *exclusive* recognition power rather than a concurrent power shared with Congress. And that question cannot be answered without *first* determining the scope of Congress's enumerated powers.[2]

---

[2] Judge Tatel assumed that section 214(d) fell within Congress's enumerated powers, but held that the President's "recognition" power operated as an "independent restriction" on congressional power akin to the First Amendment. *See* Pet. App. 51a. The President's Article II powers, however, do not withdraw or revoke powers that Article I confers on Congress. They either establish concurrent powers (for those that fall within the enumerated legislative powers of Congress) or exclusive powers (for those that fall outside Congress's enumerated powers). *See Youngstown*, 343 U.S. at 635–38 (Jackson, J., concurring). When this Court has invalidated congressional legislation on separation-of-powers grounds, it is not because an overarching "separation of powers" principle imposes independent limitations on Congress's Article I prerogatives, but because Article I did not empower Congress to enact the legislation in the first place. Congress's Article I powers, for example, extend only to "legislative Powers," which necessarily exclude any involvement by Congress in the execution or administration of the laws. *See, e.g.*, *INS v. Chadha*, 462 U.S. 919 (1983); *Bowsher v. Synar*, 478 U.S. 714 (1986); *Myers v. United States*, 272 U.S. 52 (1926); *see also* U.S. Const. art. I, § 1 ("*All legislative Powers herein granted* shall be vested in a Congress of the United States") (emphasis added). To (continued…)

Worse, the Secretary has failed to identify *any* constitutional language that establishes an exclusive "recognition" power for the President. The only provision on which the Secretary has relied is the "receive ambassadors" clause in Article II, § 3. *See* D.C. Cir. Appellee's Br. at 2, 10, 16. But even assuming that an executive-branch "recognition" power can be derived from the "receive Ambassadors" clause, that *still* does not establish an exclusive Presidential prerogative. Article II, § 3 imposes a *duty* on the President to receive ambassadors; it is not phrased as a grant of "power" and it does not say that the President holds the sole prerogative to decide which ambassadors to receive (or which countries to recognize) without any regard to congressional wishes. If Congress specifically withholds appropriations needed to establish diplomatic relations with a foreign government, then the President must accede to Congress's wishes. *See* U.S. Const. art. I, § 9. The mere existence of an Article II power does not establish that the power is exclusive of Congress. The President serves as Commander-in-Chief of the armed forces; that does not mean the President can direct the armed forces to torture enemy combatants if Congress, pursuant to its Article I power "[t]o make Rules for the Government and Regulation of the land and naval Forces," has enacted legislation criminalizing torture. *See* 18 U.S.C. §§ 2340–2340A.

---

concede that section 214(d) falls within the powers described in Article I, as Judge Tatel did, is to admit that the presidential powers asserted in this case are concurrent and not exclusive.

The Secretary has also gestured toward Article II's "vesting" clause throughout this litigation. *See* D.C. Cir. Appellee's Br. at 19; Br. for Resp't at 3. But the Secretary has never explained how the "vesting" clause could empower the President to countermand an Act of Congress. Article II's vesting clause gives the President "the *executive* Power"—a power to execute (*i.e.*, to carry out and not violate) the Constitution and laws that Congress enacts. Unless the Secretary can show that section 214(d) is unconstitutional for reasons independent of Article II's vesting clause, the President cannot be claiming to "execute" the laws by disregarding this congressional enactment. The vesting clause, standing alone, gives the President no leverage when he acts in defiance of a federal statute. *See Youngstown*, 343 U.S. at 641 (Jackson, J., concurring) ("I cannot accept the view that [the vesting] clause is a grant in bulk of all conceivable executive power but regard it as an allocation to the presidential office of the generic powers thereafter stated.").

B. Congress Has Repeatedly Enacted Legislation On Matters Of Recognition, And Past Congressional Acquiescence To The President's Unilateral Recognition Decisions Is Not Evidence Of An Exclusive Presidential Recognition Power.

The constitutional text unambiguously supports Congress's decision to enact section 214(d)—or, for that matter, any statute dealing with recognition of foreign governments. Nevertheless, the Secretary and the court of appeals try to concoct a constitutional prohibition against section 214(d) by relying on post-ratification episodes in which Presidents have recognized foreign gov-

ernments without congressional input or authorization. *See* D.C. Cir. Appellee's Br. at 29–44; Br. for Resp't at 18–24; Pet. App. 17a–22a. In their view, this evidence shows that Congress lacks the constitutional authority to legislate on recognition-related matters because past Congresses have been content to allow the President to go it alone. The Secretary's briefing and the court of appeals's opinion bear all the hallmarks of law-office history: incomplete and selective recitation of relevant historical episodes, cursory dismissal of the history supporting Zivotofsky's position, and unsupported assumptions that Congress's past inaction or acquiescence was motivated solely by the belief that Congress lacked constitutional authority to act.

The first problem is that the court of appeals's historical analysis is woefully incomplete. There are many episodes in which Congress has enacted statutes governing recognition of foreign governments—and most of these went unmentioned in the court of appeals's opinion. In 1800, for example, Congress enacted legislation recognizing French sovereignty over the island of Hispaniola—even though Spain continued to govern the eastern half of the island. *See* Act of Feb. 27, 1800, ch. 10, § 7, 2 Stat. 7, 10 ("The whole of the island of Hispaniola shall for the purposes of this act be considered as a dependency of the French Republic."). In 1806, Congress enacted the Haitian Non-Intercourse Act, which reaffirmed French sovereignty over Haiti even though Haiti had recently declared its independence. *See* Act of Feb. 28, 1806, ch. 9, § 1, 2 Stat. 351, 351 (prohibiting trade between the United States and persons "resident within

any part of the island of St. Domingo, not in possession, and under the acknowledged government of France."); *Clark v. United States*, 5 F. Cas. 932, 934 (C.C.D. Pa. 1811) (Washington, J.) ("We view the law of 1806 … as a clear acknowledgement of the sovereignty of France over the island."). These statutes received nary a mention in the court of appeals's opinion.

The court of appeals barely acknowledged Congress's 1862 legislation recognizing Haiti and Liberia. *See* Act of June 5, 1862, ch. 96, 12 Stat. 421 ("An Act to authorize the President of the United States to appoint Diplomatic Representatives to the Republics of Hayti and Liberia"). The court of appeals tried to pass off this statute as a mere appropriations law, but the statute says that it "authorize[s]" the President to appoint diplomats to those countries—indicating that the President would *not* have had this authority absent the statute. *Id.* And even if this were nothing more than an appropriations law, that would only confirm that Congress may participate in recognition decisions by deciding whether to appropriate funds needed to implement the President's policy. This statute (along with the 1800 and 1806 statutes recognizing French sovereignty over Hispaniola and Haiti) proves that there is no "longstanding and consistent practice" excluding Congress from recognition decisions.

Then there is the congressional joint resolution of 1898 recognizing Cuba's independence from Spain. *See* Act of Apr. 20, 1898, ch. 24, 30 Stat. 738, 738. Entitled "Joint Resolution For the recognition of the independence of the people of Cuba," this resolution declared that "the people of the Island of Cuba are, and of right ought

to be, free and independent." *Id.* The court of appeals noted that the Senate "did not act" on a *different* joint resolution proposed by the House, but omitted any acknowledgement or discussion of the joint resolution that *was* enacted after being approved by each House of Congress and signed by President McKinley.

Finally, the court of appeals never bothered to mention the most significant piece of congressional recognition legislation: the Taiwan Relations Act of 1979. *See* Pub. L. No. 96-8, 93 Stat. 14 (1979) (codified as amended at 22 U.S.C. §§ 3301–3316 (2012)). Congress enacted this law shortly after President Carter recognized the communist regime on mainland China, and although this act does not formally recognize Taiwan, it nevertheless requires Taiwan to be treated as the functional equivalent of a sovereign nation. The Act allows Taiwan to assert foreign sovereign immunity and the "act of state" doctrine in U.S. courts, and establishes an embassy-like entity for conducting diplomatic relations. The Secretary claims that the President holds the exclusive authority not only to decide whether to recognize foreign governments but also "to determine the policies that govern recognition questions." D.C. Cir. Appellee's Br. at 18; *see also* Br. for Resp't at 29 ("The President's recognition power … includes the power to determine the policy which is to govern the question of recognition and the power to ensure that recognition policy is consistent with the United States' foreign-policy interests.") (citations and internal quotation marks omitted). The Taiwan Relations Act could not survive this assertion of exclusive executive power, as it purports to establish the "polic[y]

that govern[s]" recognition questions surrounding Taiwan and mainland China. The continued existence of this act refutes any claim that "longstanding and consistent practice" leaves all recognition-related policy decisions exclusively with the President.

The second problem with the court of appeals's opinion is that episodes of congressional "acquiescence" do not indicate that Congress believed it lacked constitutional authority to act. The court of appeals cited several episodes in which Congress backed away from enacting recognition legislation in the face of objections from the President. *See* Pet. App. 21a–24a. But these laws could have failed for any number of reasons unrelated to beliefs about Congress's constitutional powers. *See* William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 Mich. L. Rev. 67 (1988). Perhaps these proposals failed because the recognition policies were too controversial to obtain majority support. Perhaps the President persuaded legislators that the proposed recognition policy was misguided. Perhaps political horsetrading caused members of Congress to back the President in exchange for concessions on other issues. It is untenable to assume that these proposals all failed because of some belief that recognition decisions are none of Congress's business. *See* Robert J. Reinstein, *Is The President's Recognition Power Exclusive?*, 86 Temp. L. Rev. 1, 26, 33 (2013) (providing evidence that these proposals failed for other reasons). That members of Congress have continued to propose and enact recognition-related legislation after these incidents suggests the opposite.

The third and most serious problem is that the Secretary's evidence of past congressional acquiescence is irrelevant to a claim of *exclusive* executive power. The President has never exercised this so-called recognition power in the teeth of a congressional prohibition, so the historical episodes cited by the Secretary support (at most) an inherent or concurrent recognition power that the President may exercise without awaiting specific congressional authorization. That is a far cry from an *exclusive* recognition power that licenses the President to disregard an Act of Congress.

Presidents do not acquire "exclusive" constitutional powers through acts of adverse possession. Past episodes of congressional acquiescence to executive-branch unilateralism may serve as evidence that Congress has implicitly approved or authorized the President's unilateral actions. *See, e.g.*, *Dames & Moore v. Regan*, 453 U.S. 654, 678–79 (1981). But they do not and cannot change the scope of Congress's constitutional powers vis-à-vis the executive. For more than 50 years Presidents acquiesced to "legislative vetoes"; it was not until 1976 that President Ford decided that this practice infringed his constitutional powers and started to resist Congress's encroachments. *See* Statement on Signing the Department of Defense Appropriation Act of 1976, 1 Pub. Papers 242 (Feb. 10, 1976). Yet this Court invalidated the legislative veto in *INS v. Chadha* by relying solely on constitutional text and structure; the executive's past acquiescence to "legislative vetoes" was irrelevant. *See Chadha*, 462 U.S. at 946, 959. Congress's acquiescence to past executive-branch "recognition" decisions are equally irrelevant

here. Congress cannot augment its constitutional powers through repeated acts of aggression against a supine executive; neither can it relinquish its prerogatives through continual acts of passivity. The President would not lose his constitutional power to issue pardons if a century's worth of Presidents decided (for whatever reason) to stop issuing them.

What's more, *Youngstown* considered and rejected the notion that past acts of *unilateral* Presidential actions and congressional acquiescence can establish an *exclusive* Presidential power that disables Congress from legislating on the subject. When President Truman defended his seizure of the steel mills by pointing to past Presidential seizures of businesses undertaken without congressional authorization, this Court would have none of it:

> It is said that other Presidents without congressional authority have taken possession of private business enterprises in order to settle labor disputes. But even if this be true, Congress has not thereby lost its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution "in the Government of the United States, or in any Department or Officer thereof."

Youngstown, 343 U.S. at 588–89. Congress does not lose its Article I powers through erosion or atrophy.[3]

Most importantly, Congress has *not* acquiesced to the President's decision to stamp "Jerusalem" rather than "Israel" on the passports of every Jerusalem-born U.S. citizen. So even if the Secretary were correct to assert that previous Congresses uniformly "acquiesced" to the notion that anything related to recognition falls exclusively in the President's bailiwick, the Congress that enacted section 214(d) did not share that view. And Congress is allowed to change its views on what the Constitution means—no less than the President and this Court, who have jettisoned constitutional views espoused by their predecessors. *See, e.g.*, *Citizens United v. Fed.*

---

[3] *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), offers no help to the Secretary's efforts to establish an *exclusive* Presidential recognition power. *Noel Canning* is (at worst) a Category Two case in Justice Jackson's framework—where the President acts "in absence of either a congressional grant or denial of authority." *Youngstown*, 343 U.S. at 637. It is entirely appropriate to consider past executive practice and past congressional acquiescence when dealing with those types of executive-power claims. *See Dames & Moore*, 453 U.S. at 654. This is a Category 3 case—where the President asserts the right to act in defiance of an Act of Congress. Past congressional acquiescence is relevant only to the extent that Congress has acquiesced to the President's violations of congressional enactments. Nothing in *Noel Canning* purports to authorize the President to disregard an appropriations law that seeks to curb his use of recess appointments—even if those appointments comply with the majority opinion's interpretation of the recess-appointments clause. *See* 5 U.S.C. § 5503(a)(1) (withholding salaries from certain recess appointees).

Election Comm'n., 558 U.S. 310, 365 (2010); Letter regarding the Defense of Marriage Act from Eric Holder, U.S. Attorney Gen., to John Boehner, Speaker of the House (Feb. 23, 2011). Why Congress should be boxed into the constitutional views allegedly held by its predecessors—while the President and the Supreme Court remain free to abandon even longstanding constitutional interpretations held by those institutions—has never been explained. *See United States v. Winstar Corp.*, 518 U.S. 839, 872 (1996) ("[O]ne legislature may not bind the legislative authority of its successors.") (citing 1 William Blackstone, Commentaries *90). "Longstanding practices" can be changed—so long as they remain consistent with constitutional text and structure. The Secretary seems to believe that post-ratification practice is a ratchet that turns only in the direction of expanded executive power.

C. This Court Has Never Held That The Recognition Power Is Exclusive Of Congress.

Without any constitutional text or historical evidence to support an exclusive Presidential recognition power, the Secretary and the court of appeals rely on two lines of court decisions. The first involves decisions upholding Presidential decisions to recognize foreign governments without first obtaining congressional authorization. *See, e.g.*, *United States v. Belmont*, 301 U.S. 324 (1937); *United States v. Pink*, 315 U.S. 203 (1942). The second involves cases in which this Court has described the President as either the "sole organ" of the nation in foreign affairs, *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936), or as one who holds the "vast share

of responsibility" for our foreign relations, *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003) (quoting *Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring)). None of these cases establish that Congress is forbidden to legislate on recognition policy.

Consider first the *Belmont* and *Pink* line of decisions. These cases held only that the President may recognize foreign governments without first securing congressional authorization. *See Belmont*, 301 U.S. at 761; *Pink*, 315 U.S. at 229–30. They did not hold or imply that Congress was disabled from using its Article I powers to legislate on recognition-related matters, and they did not consider that question because there were no federal statutes prohibiting the President's actions. Using these cases to support an *exclusive* Presidential recognition power is sophistry. No one is contending that the President must await explicit congressional permission before deciding whether to recognize Israel's sovereignty over Jerusalem.

The court of appeals was aware of the fact that *Belmont*, *Pink*, and similar cases held only that the President may wield the recognition power without congressional authorization—not that the President holds an "exclusive" recognition power that can dispatch congressional legislation on the subject. *See* Pet. App. at 30a ("[T]he [Supreme] Court has not *held* that the President exclusively holds the [recognition] power."); *id.* at 53a ("[T]he Supreme Court has had no occasion to definitively resolve the political branches' competing claims to recognition power.") (Tatel, J., concurring). Yet the court of appeals nevertheless held that it was *compelled* by

these cases to enforce an *exclusive* Presidential recognition power and nullify section 214(d). According to the court of appeals, this Court has stated in "carefully considered … dictum" that the President's recognition power is exclusive of Congress, and these dicta (according to the court of appeals) must be obeyed by inferior courts. *See id.* at 30a; *id.* at 54a (Tatel, J., concurring). There are three problems with this analysis.

First, the "dicta" on which the court of appeals relied were not "carefully considered." None of the opinions considers or discusses whether *Congress* can legislate on recognition. And to the extent these opinions refer to an "exclusive" recognition power, they do so only in the context of holding that *courts* lack the authority to second-guess the executive's recognition decisions. *See, e.g.*, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964) ("Political recognition is exclusively a function of the Executive.").

Second, there are plenty of "dicta" from this Court going in the opposite direction. *See, e.g.*, *Belmont*, 301 U.S. at 328 ("[W]ho is the sovereign of a territory is not a judicial question, but one the determination of which by *the political departments* conclusively binds the courts.") (emphasis added); *Jones v. United States*, 137 U.S. 202, 212 (1890) ("Who is the sovereign … of a territory, is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges …"); *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 643 (1818) ("[T]he courts of the union must view such newly constituted government as it is viewed by the legislative

and executive departments of the government of the United States."). Although it is understandable that the court of appeals would choose to follow the dicta from this Court that support its desired result, it still must provide *reasons* for choosing to follow that line of dicta over the other.

Finally, even if the court of appeals could pretend that its hands were tied by dicta in cases like *Sabbatino*, this Court is assuredly not bound by those dicta, which receive no weight beyond their ability to persuade. *See, e.g.*, *Central Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006) ("[W]e are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated."). Any decision to establish an "exclusive" Presidential recognition power must be defended on its merits, not by acting as if this Court had long ago resolved the issue.

That leaves the Secretary and the court of appeals to fall back on *Curtiss-Wright*-type statements that foreign affairs are the sole responsibility of the executive. *See Curtiss-Wright*, 299 U.S. at 319 ("The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.") (quoting 6 Annals of Cong. 613 (1800)); *Garamendi*, 539 U.S. at 414 (recognizing the President's "vast share of responsibility for the conduct of our foreign relations") (quoting *Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring)); *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950) ("The President is exclusively responsible" for the "conduct of diplomatic and foreign affairs"); *Haig v. Agee*, 453 U.S. 280, 289 n.17 (1981) (noting the "delicate, plena-

ry and exclusive power of the President as the sole organ of the federal government in the field of international relations"). This Court, however, has *never* held that the President may disregard an act of Congress by asserting that he is the "sole organ" of the nation when it comes to foreign affairs. And for good reason: the idea that Congress is constitutionally forbidden to legislate on matters affecting international relations is preposterous. Congress holds the power to declare war, regulate foreign commerce, establish a uniform rule of naturalization, and define and punish offenses against the law of nations. Congress further holds the power to withhold appropriations from foreign policies that it disapproves, and even the most unabashed executive-power enthusiasts acknowledge that the President must comply with funding restrictions imposed by Congress. *See* John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 Cal. L. Rev. 167 (1996). *Curtiss-Wright*'s "sole organ" language cannot mean that the President may push aside any Act of Congress that interferes with his authority to conduct foreign relations.

The Secretary has been vague about what he thinks *Curtiss-Wright* actually means. The Secretary prudently acknowledges that "[t]he Constitution distributes the powers over external affairs between the Executive and Legislative Branches." D.C. Cir. Appellee's Br. at 19; Br. for Resp't at 3. Yet the Secretary cannot resist invoking *Curtiss-Wright* and the "plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations." *Id.* at 27 (cit-

ing *Curtiss-Wright*, 299 U.S. at 319–20). One would think that these are mutually exclusive propositions. If the President is indeed the "*sole* organ of the federal government in the field of international relations," then it would not be correct to simultaneously assert (as the Secretary does) that "[t]he Constitution distributes the powers over external affairs between the Executive and Legislative Branches." The only way to reconcile these statements is to acknowledge that the President acts as the "sole organ" of the nation in its foreign relations—but only when Congress has authorized or acquiesced in his actions. *See Youngstown*, 343 U.S. at 588–89; *id.* at 635–37 (Jackson, J., concurring). But the Secretary is not citing *Curtiss-Wright* to support that more limited conception of executive power, because everyone in this case acknowledges that section 214(d) prohibits the President's actions.

The only way that *Curtiss-Wright* can help the Secretary is if the President's supposed status as the "sole organ" in foreign relations allows him to act not only in the absence of congressional authorization but also in the teeth of a specific congressional prohibition. This view of *Curtiss-Wright* would make the President an elected monarch over everything related to foreign affairs, and allow him to disregard not only section 214(d) but any other statute that the President deems to interfere with his conduct of foreign relations. Perhaps the Secretary is invoking *Curtiss-Wright* only as a fallback argument, but the Secretary still has an obligation to explain just how far he thinks this *Curtiss-Wright* dispensing power should extend. Congress legislates all the time on mat-

ters affecting international relations—and often does so against the President's wishes. Does the Secretary believe that President Reagan could have disregarded the statute imposing sanctions on South Africa that Congress enacted over his veto?

In all events, *Youngstown* rejected the notion that *Curtiss-Wright* might allow the President to displace an Act of Congress, and limited *Curtiss-Wright* to situations in which Congress has delegated authority to the President or acquiesced in his actions. *See id.* at 587–89; *id.* at 635 n.2 (Jackson, J., concurring) ("*Curtiss-Wright* … involved, not the question of the President's power to act without congressional authority, but the question of his right to act under and in accord with an Act of Congress."). But that has not stopped executive-branch lawyers from invoking *Curtiss-Wright* to justify the President's disregard of congressional enactments. Indeed, the Secretary has barely mentioned *Youngstown* in his briefing to this point. The brief in opposition filed by the Solicitor General does not cite *Youngstown*, and the brief filed in the court of appeals does not mention Justice Jackson's framework until page 50. *See* D.C. Cir. Appellee's Br. at 50. The Jackson framework is, however, the starting point for all claims of executive power—even when that framework is not conducive to the claims that the President is making. *See Medellin*, 552 U.S. at 524; *Hamdan*, 548 U.S. at 638 (Kennedy, J., concurring).

II. EVEN IF THE PRESIDENT HOLDS AN EXCLUSIVE "RECOGNITION" POWER, SECTION 214(d) DOES NOT INFRINGE THAT POWER

Even if one assumes that the Secretary could somehow establish an *exclusive* Presidential "recognition" power from its post-ratification anecdotes and cases, section 214(d) is still constitutional because it does not require the President to recognize Israel's sovereignty over Jerusalem. Section 214(d) simply provides an outlet for individual passport holders to express their own views about how their place of birth should be characterized. And it avoids the unseemly (and constitutionally dubious) spectacle of forcing international travelers to carry and present documents espousing a message of which they strongly disapprove. *Cf. Wooley v. Maynard*, 430 U.S. 705, 713 (1977). Section 214(d) is consistent with our long tradition of respecting the freedom of conscience of every American—even when their views diverge from official government policy. This congressional effort to accommodate dissidents does not recognize Israel's sovereignty over Jerusalem.

Statutes such as section 214(d) are hardly unprecedented. U.S. citizens born in Taiwan have the right to choose whether to have "Taiwan" or "China" marked as the place of birth on their passports—even though the executive branch does not recognize Taiwan as a country and acknowledges that "there is only one China, and that Taiwan is part of China." *See* Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 132, 108 Stat. 382 (1994) (as amended by State Department: Technical Amendments, Pub. L. No. 103-415,

§ 1(r), 108 Stat. 4299, 4302 (1994)); 7 FAM § 1340 App. D d(6); Joint Communique on the Establishment of Diplomatic Relations between the United States of America and the People's Republic of China (January 1, 1979). The State Department also allows people born in Israel to designate their place of birth as a town or village rather than "Israel." *See* Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, § 214(d), 116 Stat. 1350, 1366 (2002); 7 FAM § 1360 App. D (g); 7 FAM § 1380 App. D (a). The United States is not rejecting Israel's sovereignty over Tel Aviv by giving individuals born there the freedom to choose whether to keep "Israel" off their passport. Neither is it recognizing Israel's sovereignty over Jerusalem by offering Zivotofsky the choice provided in section 214(d). So long as that decision belongs to private individuals and is not dictated by Congress, the Secretary has no plausible claim that section 214(d) recognizes Israel's sovereignty over Jerusalem or infringes the President's alleged prerogative to decide whether to recognize foreign governments.

The court of appeals's opinion does not even address this point. Judge Tatel (to his credit) attempted to answer this argument in his concurrence, but his effort falls far short. *See* Pet. App. 57a–61a. Judge Tatel tried to distinguish the Taiwan statute and other allowances by observing that these policies entitle individuals to substitute a city or region for the country in which they were born, while section 214(d) runs in the opposite direction—allowing Zivotofsky to use the name of a country when the United States denies that country's sovereignty over his city of birth. *See id.* at 58a. True enough,

but that does not answer Zivotofsky's argument that a statute that merely gives an individual the freedom to choose how he will characterize his place of birth is not an official act of recognition.

Judge Tatel offered only two arguments to support his claim that section 214(d) "implicates recognition." First, he noted that the Secretary has claimed that implementing section 214(d) would have "adverse foreign policy consequences." *Id.* at 59a. But that has no bearing on whether section 214(d) is an act of recognition. Many decisions to recognize (or not to recognize) foreign governments have no adverse foreign-policy consequences. And many decisions that have adverse foreign-policy consequences have nothing to do with recognition. *See, e.g.*, *Medellin*, 552 U.S. 491 (executing foreign nationals); *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298 (1994) (taxing multinational corporations). The Secretary cannot nullify section 214(d) by predicting dire consequences for American foreign policy. The Secretary must instead show how section 214(d) constitutes an act of recognition—and that inquiry is independent of the alleged harms that will befall American diplomacy.

Second, Judge Tatel relied on legislative history and surrounding statutory provisions to assert that "Congress intended section 214(d) to alter recognition policy with respect to Jerusalem." Pet. App. 61. This too is a non-sequitur. Whether section 214(d) is constitutional depends on what the statute does, not on what may have going on in the minds of the legislators who voted for it. *See, e.g.*, *United States v. O'Brien*, 391 U.S. 367, 383 (1968) ("It is a familiar principle of constitutional law

that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."). Judge Tatel relied on floor statements and conference reports, but these cannot be attributed to Congress as a whole. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 558 (1993) (Scalia, J., concurring) ("[I]t is virtually impossible to determine the singular 'motive' of a collective legislative body."). Finally, federal statutory subsections are presumed severable, so a court should not invalidate section 214(d) on the guilt-by-association theory propounded by Judge Tatel. *See, e.g., Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987). Would section 214(d) become constitutional if Congress were to re-enact it, shorn of the surrounding statutory provisions and the conference report describing it as "related to the recognition of Jerusalem as Israel's capital"? *See* Pet. App. 60a–61a.

The Secretary, like the panel opinion, makes no attempt to explain how offering passport holders a choice in how they characterize their place of birth is an act of recognition—other than to assert that the President holds the exclusive power not only to recognize foreign governments but also to resolve any "questions of U.S. policy regarding the State." D.C. Cir. Appellee's Br. at 17. By now, however, the Secretary has strayed far beyond a power to recognize foreign governments and into an exclusive Presidential power to decide any policy question related to a recognized foreign state—and to countermand any Act of Congress that gets in his way. The history and cases on which the Secretary relies offer no support for *this* type of Presidential prerogative, even

if one assumes that those sources could establish an exclusive Presidential power to recognize foreign governments (and they don't). It is important to remember that the constitutional text on which the Secretary relies provides only that the President "shall receive Ambassadors and other public Ministers." From that piece of constitutional text the Secretary has purported to derive a penumbral power to recognize foreign governments, and then a power to determine the boundaries of foreign states in the emanations from that penumbra, and then finally a power to dictate the "place of birth" designations on the passports of U.S. citizens in the penumbra of that emanation from the original penumbra. This is more than a penumbra too far. Even if one were to accept the Secretary's dubious assertion that an *exclusive* Presidential power to recognize foreign governments can be derived from past episodes in which Presidents have recognized foreign governments without specific congressional authorization, that can support *at most* a prerogative to decide whether or not to recognize a foreign government—not to resolve every question of U.S. policy tangentially related to foreign boundary disputes.

In the end, the Secretary's grievance against section 214(d) is not that it recognizes Israel's sovereignty over Jerusalem but that it might ruffle diplomatic feathers or interfere with U.S. peacemaking efforts in the Middle East. *See* D.C. Cir. Appellee's Br. at 10 ("Recording 'Israel' as the place of birth of U.S. citizens born in Jerusalem *would be perceived internationally as* a reversal of U.S. policy on Jerusalem's status") (emphasis added) (citation and internal quotation marks omitted); *id.* at 14

("[I]f 'Israel' were to be recorded as the place of birth of a person born in Jerusalem, such unilateral action by the United States on one of the most sensitive issues in the negotiations between Israelis and Palestinians would critically compromise the United States' ability to help further the Middle East peace process.") (citation and internal quotation marks omitted). That is not a basis on which a court can invalidate an Act of Congress. *Cf. Medellin*, 552 U.S. at 525–26. A passport that simply marks "Israel" as the place of birth—and only at the request of the passport holder—does not signify recognition of Israeli sovereignty over Jerusalem, and the policy in section 214(d) can easily co-exist with the President's calculated agnosticism on the status of Jerusalem. Section 214(d) is an eminently reasonable compromise that accommodates the conscience of Jerusalem-born passport holders who believe that Jerusalem belongs to the state of Israel, while allowing the President to maintain his policy that the status of Jerusalem should be resolved through negotiations.

III. CONGRESS HAS LEGISLATED RESPONSIBLY ON ISRAEL-RELATED MATTERS

Without any constitutional text that contradicts section 214(d), and without any history or case law to establish an exclusive Presidential prerogative over the contents of Zivotofsky's passport, there is no basis for declaring section 214(d) "unconstitutional"—even if it may be imprudent from the standpoint of diplomacy. Throw in the presumption of constitutionality that attaches to an Act of Congress and this should not be a close case. *See Ogden v. Saunders*, 25 U.S. 213, 270 (1827) ("It is but a

decent respect due to the … legislative body, by which any law is passed, to presume in favo[]r of its validity, until its violation of the constitution is proved beyond all reasonable doubt.").

Yet every D.C. Circuit judge to have considered the constitutionality of section 214(d) has voted to invalidate it. *See* Pet. App. 48a, 61a; *Zivotofsky v. Secretary of State*, 571 F.3d 1227, 1245 (D.C. Cir. 2009) (Edwards, J., concurring) (vacated by *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012)). Some of the judicial hostility to this statute may reflect an institutional belief that Congress will be tone-deaf to the nation's diplomatic needs if it is allowed to enact statutes such as section 214(d). This attitude proceeds from a jaundiced perception of Congress, viewing its members as parochial and interested primarily in scoring political points with powerful interest groups. And it takes an overly romanticized view of the executive, seeing the President as one who looks out for the interests of the nation or the world.

There is nothing to support this cynical and all-too-common view of the relative institutional capacities of Congress and the executive. *See* Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. Rev. 1217 (2006). Congress has shown itself to be acutely sensitive to the foreign-policy implications of statutes relating to Israel, often amending its proposed legislation to accommodate the President's concerns. When Congress considered the Jerusalem Embassy Act in 1995, the initial proposal would have required the President to move the U.S. embassy to Jerusalem. But when President Clinton argued that this

could harm the Middle East peace process, Congress watered down the law and allowed the President to issue continuous six-month waivers of the re-location requirement. *See* 141 Cong. Rec. 28965–66 (1995) (remarks of Sen. Feinstein concerning executive concerns); *id.* at 28967–68 (letter from the Secretary of State expressing administration concerns); *id.* at 28994 (introduction of Sen. Dole's amended version of the Act). Presidents Clinton, Bush, and Obama have repeatedly invoked those waivers, and Congress has not forced the President to re-locate the embassy.

Congress also took a measured approach in enacting section 214(d). Sensitive to the foreign-policy implications, Congress did not require "Jerusalem, Israel" to appear on passports but only "Israel," and then only at the request of the individual passport holder. Those who view the passport will have no reason to know whether the passport holder was born in Jerusalem, so an "Israel"-stamped passport will not signify anything regarding the status of Jerusalem.

Although the President continues to object even to this limited measure, Congress is allowed to conclude that the executive's concerns are not persuasive, or that it is more important to respect the freedom of conscience of citizens like Menachem Zivotofsky and his parents, who believe strongly that Jerusalem belongs to Israel, and who should not be forced to carry badges espousing the President's belief that Jerusalem is no-man's land. Congress is entitled to decide that diplomacy should take a back seat to other important values.

Finally, the Framers of our Constitution were far more concerned with the opposite institutional problem: that the President's foreign policy (if left unchecked by Congress) will become unduly influenced by self-serving legacy concerns or international opinion rather than what the American people want. *See* The Federalist No. 75 ("An ambitious man might make his own aggrandizement, by the aid of a foreign power, the price of his treachery to his constituents."). The power to declare war was given to Congress, rather than the President, because of concern that Presidents (like European monarchs) would be tempted to start wars over petty squabbles with foreign leaders. *See* Letter from James Madison to Thomas Jefferson (Apr. 2, 1798), in 2 *Letters and Other Writings of James Madison*, 1794–1815, 131 (1865). In like manner, Presidents can become too conciliatory to foreign opinion—especially second-term Presidents who will no longer face the electorate. The Constitution ensures that the President's policies will remain accountable to Congress and therefore to the people in whom ultimate sovereignty resides. That remains the case even if the views adopted by the people depart from what counts as politically correct opinion on the international stage.

IV. A RULING THAT INVALIDATES SECTION 214(d) WILL ESTABLISH A DANGEROUS PRECEDENT

This Court has never before held that the President's foreign-affairs powers may trump an Act of Congress. A ruling for the Secretary will establish a new and potentially far-reaching doctrine of executive power, which could be used to justify all manner of Presidential disre-

gard of congressional enactments. It is hard to imagine how this Court could write a narrow opinion in the Secretary's favor, because the power that the Secretary asserts has no textual basis in Article II and is (at best) only marginally related to the President's time-honored practice of recognizing foreign governments without congressional authorization.

The Secretary is asking this Court to establish a substantive-due-process-like doctrine for executive power, which would allow Presidents to nullify democratically enacted legislation based not on the text of the Constitution but on "longstanding practice[s]." D.C. Cir. Appellee's Br. at 44; *cf. Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997). Substantive due process is controversial enough in the individual-rights context. *See, e.g.*, *Moore v. East Cleveland*, 431 U.S. 494, 544 (1977) (White, J., dissenting) ("[T]his Court is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution."). Its mode of reasoning should not be extended into executive-power disputes.

First, as this case demonstrates, Presidents will attempt to expand the scope of their powers by defining "longstanding practice" at a high level of abstraction. The historical evidence cited by the Secretary shows only that the President has recognized foreign governments without congressional authorization. Yet the Secretary has used this evidence to defend a much broader Presidential prerogative: the power to resolve "other questions of U.S. policy regarding the [recognized]

state," without regard to whether Congress has authorized, acquiesced in, or prohibited his actions. D.C. Cir. Appellee's Br. at 17. The Secretary is seeking to expand Presidential power by boosting the level of generality at which he defines the relevant "longstanding practice"—just as some jurists have sought to expand judicial power in substantive-due-process cases by defining traditionally respected rights at higher levels of abstraction. *Compare Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (opinion of Scalia, J.), *with id.* at 137–41 (Brennan, J., dissenting). Even if this Court were to demand that the "longstanding practice[s]" be defined with specificity, that will not ensure that future Presidents or courts will follow the instruction—especially when a ruling for the Secretary will require this Court to resort to *some* degree of abstraction.

Second, the President already has a means for enforcing the non-textual prerogatives that he believes he should have, and that is his veto power. *See* Thomas Jefferson, Opinion Against the Constitutionality of a National Bank (1791) in 3 *Writings of Thomas Jefferson* ("The negative of the President is the shield provided by the Constitution to protect against the invasions of the legislature"). Whatever the merits of recognizing atextual substantive-due-process rights in the individual-rights context, there is no justification for courts to invoke atextual Presidential powers as a reason to nullify an Act of Congress. The President (unlike individual litigants) is armed with a veto power, and he was given that power to protect not only his textual constitutional prerogatives but also the extra-constitutional powers that he believes

his office should have. The courts should not step in to nullify congressional legislation except to enforce the enumerated Presidential powers in Article II.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant
Attorney General

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
jonathan.mitchell@
texasattorneygeneral.gov
(512) 936-1700

JONATHAN F. MITCHELL
Solicitor General
Counsel of Record

ANDREW S. OLDHAM
Deputy Solicitor General

EVAN S. GREENE
DOUGLAS D. GEYSER
KYLE D. HIGHFUL
Assistant Solicitors General

July 2014