No. 13-628

IN THE
Supreme Court of the United States

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

v.

JOHN KERRY, SECRETARY OF STATE,
Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

BRIEF FOR MEMBERS OF THE UNITED STATES HOUSE OF REPRESENTATIVES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Congress routinely delegates limited administrative authority to the Secretary of State when exercising its law-making powers. Section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350 (2002), directs the Secretary of State, on request, to record the birthplace of an American citizen born in Jerusalem as "Israel" on a consular report of birth abroad and on a United States passport.

The question presented is whether Section 214(d) is unconstitutional on the grounds that the President's recognition power is not only exclusive, but also so broad as to authorize the Executive to disregard any duly enacted statute that the President determines, in his discretion, implicates recognition policy.

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INTEREST OF *AMICI CURIAE*

Amici curiae Members of the United States House of Representatives have a fundamental institutional interest in safeguarding Congress's foreign affairs and passport powers from Executive overreach. *Amici* also have a fundamental interest in defending the constitutionality of the statute at issue, which passed overwhelmingly in both Houses of Congress, and in seeing the directives of the Legislative Branch enforced in the courts. The names of individual *amici* are listed in the Appendix.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

The decision below invalidated an Act of Congress on constitutional grounds, and handed the President significant new foreign affairs powers at Congress's expense. It should be reversed.

"It is beyond dispute that Congress's immigration, foreign commerce, and naturalization powers authorize it to regulate passports" and consular reports of birth abroad. *Zivotofsky ex rel. Zivotofsky v. Sec'y of State*, 725 F.3d 197, 221 (D.C. Cir. 2013) (Tatel, J., concurring); *see also* Members of U.S. Senate and U.S. House of Representatives Amicus Brief 5–14, *Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012) (No. 10-699) (discussing over 200 year history of con-

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[1] No party's counsel authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution intended to fund its preparation or submission. The parties have consented to the filing of this brief and copies of their letters of consent have been lodged with the Clerk of the Court.

gressional legislation in the fields of passports and the status of U.S. citizens born abroad, and constitutional authority therefor).

Accordingly, if "the statute [at issue]," Section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350 (2002)—which permits "an American born in Jerusalem [to] choose to have Israel listed as his place of birth on his passport" and report of birth abroad, *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1428 (2012)—"does not trench on the President's powers, then the Secretary [of State] must be ordered to issue Zivotofsky a passport that complies with § 214(d)." *Id.*[2]

In determining whether Section 214(d) "trench[es] on the President's powers," this Court must determine both the scope of any exclusive Executive recognition power, and whether and to what degree, if any, the statute at issue prevents the President from exercising that power.

First, "[n]either the text of the Constitution nor originalist evidence provides much help in answering

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[2] *See also, e.g.*, *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 233 (1986) (executive officers "may not act contrary to the will of Congress when exercised within the bounds of the Constitution."); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 156–59 (1803) ("[It is] the duty of the secretary of state to conform to the law, and in this he is an officer of the United States, bound to obey the laws."). Although the Executive claims some independent authority in the field of passports arising out of its foreign affairs powers, it nevertheless must comply with the statute at issue, so long as the statute does not impermissibly infringe any *exclusive* Executive power.

the question of the scope of the President's recognition power." *Zivotofsky*, 725 F.3d at 206. In such circumstances, the answer must be found in the structure of the Constitution and separation of powers principles. *See N.L.R.B. v. Noel Canning*, 573 U.S. ____, 189 L. Ed. 2d 538 (2014) (slip op. at 26, 40–41); *accord id.* at 3–5, 27 (Scalia, J., concurring in the judgment). These sources of constitutional authority make clear that the recognition power should be construed narrowly, so as not to undermine Congress's legislative authority, and its central role in foreign affairs under our constitutional framework. *See infra* pp. 5–19.

The Constitution grants to Congress a wide array of foreign affairs powers. *See infra* pp. 6–7. In fact, the implementation of foreign policy—including with respect to matters that implicate recognition—depends on Congress's exercise of these powers. *See infra* p. 7. Our constitutional framework contemplates not only cooperation between the branches of government in this arena, but also a measure of tension. Indeed, in its division of powers, the Constitution is "an invitation to struggle for the privilege of directing American foreign policy." Edward S. Corwin, *The President: Office and Powers, 1787–1984* 201 (Randall Bland et al. eds., 5th ed. 1984). Since the Founding, Congress and the President have been engaged in that fruitful and dynamic struggle. The zones of exclusivity for either branch have been drawn narrowly, including with respect to recognition. Congress has thus enacted numerous statutes that touch on, respond to, or register discord with the President's formal recognition policies. *See infra* pp. 8–13.

The view of the Executive that the exclusive recognition power stretches so far as to envelop any statute that relates to recognition is irreconcilable with this constitutional structure, and threatens to demote Congress from its intended role as the President's counterweight in foreign affairs to his minion. The recognition power cannot be drawn so broadly as to swallow completely, at the Executive's sole discretion, the exercise of Congress's law-making authority in the fields of immigration, naturalization, foreign commerce, passport control, criminal law, and foreign policy. *See infra* pp. 13–16. The Executive's position is also inconsistent with the purpose of the President's foreign affairs and recognition powers, incompatible with the settled practices of the political branches, and, as adopted by the court of appeals, represents an abrogation of the Judicial Branch's responsibility to independently review and evaluate the constitutional question presented here. *See infra* pp. 16–19.

Second, this Court reviews with suspicion expansive claims of exclusive Executive authority, where the Legislative Branch has acted in furtherance of its own broadly assigned powers. The Constitution does not "requir[e] three airtight departments of government," *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443 (1977) (internal quotation marks omitted), but instead "enjoins upon [the] branches separateness but interdependence, autonomy but reciprocity," *Youngstown Sheet & Tube, Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). Thus, under this Court's separation of powers jurisprudence, Congress acts properly so long as its actions do not "prevent[] the Executive Branch from accomplishing its constitutionally assigned functions." *Nixon*, 433 U.S. at 443; *infra* pp. 19–22.

Section 214(d) in no way prevents or significantly impedes the President from exercising the recognition power. It does not direct the President to alter U.S. recognition policy towards Jerusalem or to consider Jerusalem to be within the borders of Israel as a matter of U.S. foreign policy. It merely instructs the Secretary of State to perform the ministerial act of recording "Israel" as the place of birth on the passport and consular report of birth abroad of an individual who avails himself of the self-identification opportunity presented by the statute. *See infra* pp. 22–25. This is, at most, an example of the kind of "integrat[ion of] the dispersed powers into a workable government," *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring), that is both practically necessary and constitutionally appropriate in our Republic. It is, in fact, the *Executive's* expansive view of the recognition power—adopted by the court of appeals—that interferes with *Congress's* performance of its Article I duties, and upsets the Constitution's careful balance of powers in foreign affairs.

ARGUMENT

I. THE RECOGNITION POWER SHOULD BE CONSTRUED NARROWLY SO AS NOT TO TRENCH ON CONGRESS'S ROLE IN FOREIGN AFFAIRS UNDER OUR CONSTITUTIONAL FRAMEWORK.

The recognition power is the power to define, as a matter of official United States foreign policy, which political body or actor legitimately "speaks as the sovereign authority for the territory it purports to control," *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964), or "to what sovereignty" territory legitimately belongs, *Williams v. Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415, 420 (1839). Limiting the exclu-

sive Executive recognition power to this formal authority sustains the Constitution's system of checks and balances by enabling Congress to exercise levers of authority in the foreign affairs arena assigned to it, while leaving to the Executive the authority to decide the core question of formal recognition. The Executive's contrary position (adopted by the court of appeals)—that the exclusive recognition power envelops any legislation that touches, however tangentially, on recognition policy—usurps Congress's ability to appropriately exercise its Article I powers and threatens to transform Congress from its constitutionally assigned function as the Executive's counterweight in foreign affairs to his minion.

1. "Neither the text of the Constitution nor originalist evidence provides much help in answering the question of the scope of the President's recognition power." *Zivotofsky*, 725 F.3d at 206. In such circumstances, the answer "must be found in the nature of the government created by that instrument," *Downes v. Bidwell*, 182 U.S. 244, 249 (1901)—the "structure" of the Constitution, and separation of powers principles, *Noel Canning*, 573 U.S. ____ (slip op. at 26, 40–41); *accord id.* at 3–5, 27 (Scalia, J., concurring in the judgment).

Under our constitutional structure, authority over the "conduct of the foreign relations of our Government" is shared between "the Executive and Legislative—'the political'—Departments." *Medellin v. Texas*, 552 U.S. 491, 511 (2008) (quoting *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918)); *accord Chicago & S. Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U.S. 103, 111 (1948). The Constitution equips Congress with a plethora of foreign affairs powers—including the power to "regulate Commerce

with foreign Nations," "declare War," "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," "make Rules for the Government and Regulation of the land and naval Forces" (among other military powers), "grant Letters of Marque and Reprisal," and "establish an uniform Rule of Naturalization" (U.S. Const. art. I, § 8)—as well as general law-making and appropriations powers that necessarily implicate foreign policy (*id.* §§ 1, 9). The Constitution also gives Congress foreign affairs powers that it exercises in conjunction with the President, such as treaty-making (*id.* art. II, § 2). Thus, as a matter of constitutional structure and purpose, Congress is assigned a central role in the conduct of foreign affairs.

Indeed, the implementation of foreign policy *depends* on Congress's exercise of its appropriations, foreign trade, immigration, naturalization, and general law-making powers. *See, e.g.*, Consolidated and Further Continuing Appropriations Act, 2013, Pub. L. No. 113-6, §§ 1701-8006, 127 Stat. 198, 427-31 (allocating funds appropriated for the Department of State, Foreign Operations, and Related Programs); Michael D. Ramsey, *The Constitution's Text in Foreign Affairs* 108–14 (2007) (discussing Executive's reliance on the Legislative Branch in the realm of foreign affairs due to the fact that "Congress, not the President, holds lawmaking and funding power"). This is so with respect to recognition policy as well.[3]

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[3] *See, e.g.*, Burmese Freedom and Democracy Act of 2003, Pub. L. No. 108-61, 117 Stat. 864, 865–67 (supporting the U.S. recognition of the National League for Democracy by, *inter alia*, imposing trade and visa bans against Burma's military regime).

2. The Constitution contemplates not only cooperation between the branches in foreign affairs, but also a measure of tension. Indeed, in its sometimes oblique division of powers in this arena, the Constitution is "an invitation to struggle for the privilege of directing American foreign policy." Corwin, *supra*, at 201. Occasional friction between branches provides "'security . . . against a gradual concentration of the several powers in the same department,'" and is thus critical to our system of checks and balances. *Mistretta v. United States*, 488 U.S. 361, 381 (1989) (quoting The Federalist No. 51, at 349 (James Madison) (J. Cooke ed., 1961)).

Since the Founding, Congress and the President have been engaged in that fruitful and dynamic struggle. The zones of exclusivity in foreign affairs for either branch have been drawn narrowly. Congress has thus enacted numerous statutes that touch on, respond to, or register discord with the President's formal recognition policies.

For example, after President Carter recognized the People's Republic of China as the sovereign authority over Taiwan, Congress enacted the Taiwan Relations Act, which provides that non-recognition of Taiwan does "not affect the application of the laws of the [U.S.] with respect to Taiwan," and granted Taiwan many of the rights of recognized sovereigns, including the authority to sue and be sued, the right to own property in the United States, and the ability to obtain export licenses under nuclear non-proliferation and nuclear energy treaties. Pub. L. 96-8, 93 Stat. 14 (1979). Similarly, in advance of the transfer of sovereignty over Hong Kong from the United Kingdom to China, Congress passed the United States-Hong Kong Policy Act of 1992, which

provides that U.S. laws "shall continue to apply" to Hong Kong "[n]otwithstanding any change in . . . sovereignty," unless modified by law or executive order. Pub. L. No. 102-383, 106 Stat. 1448. Congress has also often issued resolutions directed at shaping recognition policy.[4]

Moreover, Congress regularly prohibits or conditions foreign assistance to particular countries, and in accordance with substantive requirements, that, given the Executive's expansive position on recognition, may now be viewed as intruding upon its recognition power. *See, e.g.*, Consolidated Appropriations Act of 2014, Pub. L. No. 113-76, 128 Stat. 5, 494, 500, 502, 509–11 [hereinafter Consolidated App. Act] (prohibiting financial assistance to the government of any country whose "duly elected head of government is deposed by military coup d'état," unless "the President determines and certifies to the Committees on Appropriations that . . . a democratically elected government has taken office"). Congress used these

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[4] Recent examples include the Syria Democracy Transition Act of 2012, S. 2152, 112th Cong. (2012) (calling for "the departure from power of [President] Bashar al-Assad"), and respective Senate and House of Representatives resolutions regarding Libya. *See* Calling for a No-fly Zone and the Recognition of the Transitional National Council in Libya, S. Res. 102, 112th Cong. (2011) (calling on the President to recognize Libya's Transitional National Council (TNC) "as the sole legitimate governing authority in Libya"); Expressing the Sense of the House of Representatives Regarding the Regime of Mu'ammar al-Qadhaffi, H.R. Res. 188, 112th Cong. (2011) (declaring "the sense of the House of Representatives" that the TNC "should be considered the legitimate representatives of the Libyan people and nation").

tools to frustrate President Reagan's support for the Contras by prohibiting the expenditure of funds "for the purpose of overthrowing the Government of Nicaragua," Joint Resolution of Dec. 21, 1982, Pub. L. No. 97-377, § 793, 96 Stat. 1830, 1865, and has similarly influenced foreign policy through such legislation since the Founding. *See* Ramsey, *supra*, at 112 (discussing President Washington's acquiescence to congressional defunding of certain diplomatic posts).

Particularly relevant here, Congress has conditioned funding in support of a Palestinian state, *see* Consolidated App. Act at 518, prohibited funding "to create in any part of Jerusalem a new office . . . of the United States Government for the purpose of conducting official United States Government business with the Palestinian Authority," *id*. at 519, conditioned assistance to the West Bank and Gaza, and to the Palestinian Authority, *id.* at 519–21, and prohibited the funding of any government controlled by, or sharing power with, Hamas, *id*. at 521–22. Congress also frequently conditions or restricts funding to particular governments and entities in response to *de facto* political developments in foreign countries.[5]

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[5] *See, e.g.*, Consolidated App. Act at 525 ("None of the funds appropriated by this Act may be made available for the Lebanese Armed Forces (LAF) if the LAF is controlled by a foreign terrorist organization."); *id*. ("None of the funds appropriated by this Act may be made available for assistance for the central Government of Libya unless the Secretary of State reports to the Committees on Appropriations that such government is cooperating with United States Government efforts to investigate and bring to justice those responsible for the attack on United States personnel and facilities in Benghazi.").

These restrictions are in force without regard for whether they are in congruence with or run contrary to the Executive's determinations regarding the legitimacy or recognition of these entities and governments.

3. In addition, Congress has enacted legislation in a variety of foreign affairs contexts that expressly governs both recognized and unrecognized sovereigns. For example, Congress has established immigration caps and guidelines by country that apply without regard for whether a region is recognized or not. *See, e.g.*, Refugee Relief Act of 1953, Pub. L. No. 83-203, § 4, 67 Stat. 400, 402 (establishing quotas for visas issued to, *inter alia*, Palestinian refugees); Immigration and Nationality Act of 1952, Pub L. No. 82-414, § 202(d), 66 Stat. 163, 167, 168 [hereinafter INA] (representatives of foreign governments are not deemed "immigrants," whether or not the governments are "recognized de jure"); Immigration Act of 1924, Pub. L. No. 68-139, § 12, 43 Stat. 153, 161 (setting guidelines for treatment of immigrants from new countries and regions in which political boundaries have changed, even if change "has not been recognized" by the United States). At the same time, Congress has made clear that such legislation about a particular non-recognized sovereign "shall not constitute . . . recognition of a government not recognized by the United States." INA § 202(d).

And for the purposes of criminal law, Congress has for almost a century expressly defined "foreign government" to include "any Government, faction, or body of insurgents within a country with which the

United States is at peace," whether or not "recognized by the United States as a Government."[6] It continues to do so today, 18 U.S.C. § 11, in order to ensure that crimes relating to chemical weapons development and use (*id.* §§ 229, 229F(5)), counterfeiting (*id.* § 478), smuggling (*id.* § 546), and espionage (*id.* §§ 792–798), among many others, apply regardless of whether the foreign entity involved is formally recognized by the United States.[7]

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[6] An Act to Punish Acts of Interference with the Foreign Relations, the Neutrality, and the Foreign Commerce of the United States, to Punish Espionage, and Better to Enforce the Criminal Laws of the United States, and for Other Purposes, 1917, Pub. L. No. 65-24, 40 Stat. 217, 226. *See also, e.g.*, Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 99-399, § 1306, 100 Stat. 853, 898 (requiring forfeiture of certain illicitly obtained property from any "foreign government . . . whether recognized or unrecognized by the United States"); Act for the Protection of Foreign Officials and Official Guests of the United States, Pub. L. 92-539, § 101, 86 Stat. 1070, 1071 (1972) (criminalizing the murder of an "officer of cabinet rank or above" of "the government of a foreign country, irrespective of recognition by the United States"); Crimes and Criminal Procedure Act, 1948, Pub. L. No. 80-772, §794, 62 Stat. 683, 737 (criminalizing the communication, with the intent to injure the United States, of material relating to the national defense of the United States to "any foreign government . . . whether recognized or unrecognized by the United States").

[7] Title 18 similarly criminalizes the assault (18 U.S.C. § 112), extortion (*id.* § 878), property destruction (*id.* § 970), murder (*id.* § 1116), and kidnapping (*id.* § 1201) of any foreign official, whether of a recognized government or not. *See id.* § 1116(b)(2) ("'Foreign government' means the government of a foreign country, irrespective of recognition by the United States.");

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Legislative enactments of this type (including Section 214(d))—whether touching on, responding to, or in tension with formal recognition policy—are consistent with, and supported by, the Constitution's distribution of powers in foreign affairs and its overarching structure. Indeed, drawing the exclusive Executive recognition power narrowly sustains the Constitution's system of checks and balances by enabling Congress to exercise levers of authority in the foreign affairs arena assigned to it, while leaving to the Executive the authority to decide the core question of formal recognition.

4. The Executive nevertheless argues that any statute "the Executive believes . . . constitutes . . . an incident of recognition" is "within the scope of the Executive's power." Transcript of Oral Argument 33:5–25, *Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012) [hereinafter Transcript of Oral Argument].[8] The court below adopted this view of the scope of the exclusive Executive recognition power, *Zivotofsky*, 725 F.3d at 213, 219 (holding that the Executive's recognition power "'includes the power to determine the

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id. §§ 112, 878, 970 (incorporating this definition of foreign government).

[8] Similarly, on remand, the Executive asserted that because the "State Department [] determined" that listing "Israel" as the place of birth on a passport "would be an official act of recognition," Section 214(d) is an "unconstitutional encroachment" on the President's authority to recognize foreign sovereigns. Brief for Appellee 50, 52, *Zivotofsky v. Sec'y of State*, 725 F.3d 197 (D.C. Cir. 2013) (No. 07-5347) (internal quotation marks omitted).

policy which is to govern the question of recognition'") (quoting *United States v. Pink*, 315 U.S. 203, 229 (1942)), and it has not been disavowed by the Executive.[9] Thus, it is now in the President's hands to decide whether a statute falls within the exclusive Executive recognition power—and to ignore any statute thus categorized.

The Executive's expansive position on the recognition power (adopted by the court of appeals) threatens to undermine Congress's ability to appropriately exercise its Article I powers. The Executive can now assert that it will ignore any legislation passed by Congress that the President, in his sole discretion, deems to be in tension with the President's recognition authority. Indeed, the Executive has *already* taken the position that it should not be bound by restrictions and conditions placed on the Executive by Congress through its "appropriations authority" that are at odds with recognition policy.[10] Such conditions and restrictions are a central and long-exercised feature of Congress's foreign affairs powers. *See supra* pp. 9–10. The Executive could similarly now refuse to implement the statehood-like

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[9] The Executive asserts only that this Court need not reach the question of scope, Brief for Respondent in Opposition 23 n.10, Feb. 21, 2014 [hereinafter Br. in Opp.], leaving intact the lower court's view on that issue.

[10] *See* Transcript of Oral Argument 42:3–10 ("It is the position of the executive . . . that there could be circumstances in which Congress could try to exercise its appropriations authority in a way that would preclude the executive from exercising . . . its recognition power, and that – the executive would . . . in some circumstances believe that it had the authority to move ahead despite those actions by Congress.").

benefits and protections conferred on Taiwan and Hong Kong by Congress, *see supra* pp. 8–9, or take an equivalent position with respect to laws governing immigration from unrecognized countries, *see supra* p. 11, or crimes committed against the officials of unrecognized sovereigns, *see supra* pp. 11–12.[11]

The "impediment" that such an "absolute, unqualified" recognition power "would place in the way of the primary constitutional duty" of the Legislative Branch to make law, including with respect to foreign affairs, "would plainly conflict with the function" of the Legislative Branch under Article I. *United States v. Nixon*, 418 U.S. 683, 707 (1974) (discussing conflict between claimed "absolute, unqualified" Executive privileged and the function of the courts under Article III). While the President properly takes the lead with respect to recognition policy, the exclusive recognition power cannot be so broad as to render unenforceable any action by Congress that implicates the subject of recognition. Such an "absolute negative on the legislature" in the hands of the Executive has from the very Founding been condemned for its potential to be "perfidiously abused," The Federalist No. 51, at 291 (James Madison) (Clinton Rossiter ed., 1999) [hereinafter The

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[11] In light of the Executive's position here, it is also likely that criminal defendants will now raise as a defense that Congress has exceeded its powers in passing criminal statutes that govern conduct relating to unrecognized territories, particularly if the defendant passed secrets to or assaulted an official of an unrecognized government. *See supra* pp. 11–12; *Bond v. United State*s, 131 S. Ct. 2355, 2360 (2011) (holding that criminal defendants have standing to raise structural constitutional challenges to federal criminal law).

Federalist], and should be rejected here. The Legislative and Executive Branches must be permitted to exercise their constitutionally-assigned foreign affairs powers in concert and in conflict, as they have done throughout our Nation's history.

5. The Executive's expansive view of the recognition power is not only inconsistent with the constitutional structure and with Congress's constitutionally assigned powers and authority in foreign affairs, *see supra* pp. 5–16, but also (a) makes little sense in light of the purposes of the President's foreign affairs powers and of the recognition power; (b) is irreconcilable with the historical practices of the political branches; and (c) its adoption by the court of appeals represents an abdication of that court's responsibility to independently examine and resolve the separation of powers question presented by this case.

a. The President is assigned those foreign affairs responsibilities that, from a functional perspective, are most properly held by an individual executive, who is institutionally situated to act quickly and decisively in response to developments overseas, and who is permanently situated in Washington, D.C. *See* The Federalist Nos. 69 & 70 (Alexander Hamilton). Thus he is the Commander-in-Chief and is assigned the responsibility to formally receive ambassadors and other dignitaries. He is also the *instrument* of foreign affairs, *i.e.*, the individual tasked with carrying out foreign policy.[12] But "to be

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[12] *See* Br. in Opp. 22–23 (asserting that "the Executive is the 'sole organ' of the Nation in foreign affairs" (quoting *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936))). *But see* Donald L. Robinson, *Presidential Prerogative*

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the sole instrument [of the U.S.] and to determine the foreign policy are two quite different things." Transcript of Oral Argument 38:7–9 (Scalia, J.). The constitutional text, structure, and purpose equip and authorize Congress to play a robust role in the latter. *See supra* pp. 6–13.

The authority to formally recognize foreign sovereigns, though not found in the text of the Constitution, aligns well with these practical considerations: With quickly shifting governments and borders in foreign lands, it makes sense that the responsibility to decide which sovereign to formally recognize would rest in the hands of a single decision-maker with eyes and ears across the globe and a permanent residence in Washington, D.C. But the recognition power should not be permitted to expand from the narrow sphere in which it fulfills this functional purpose to swallow Congress's enumerated Article I powers, and its central role in the fields of immigration, naturalization, foreign trade, and foreign affairs generally.

b. The broad recognition power now claimed by the Executive also cannot be squared with the actual practice of the political branches across our Nation's history. The parties in this case muster conflicting history as to whether the recognition power is held exclusively by the President, or is shared with Con-

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and the Spirit of American Constitutionalism, in *The Constitution and the Conduct of American Foreign Policy* 114, 121–22 (David Gray Adler & Larry N. George eds., 1996) (explaining that *Curtiss-Wright* has "been ridiculed by historians and other commentators," and is rarely relied on by the courts).

gress.[13] Whatever the answer to the exclusivity question, there is an unbroken, uniform, and unchallenged set of practices with respect to the *scope* of the recognition power: Congress has regularly legislated in ways that touch on, and even register discord with, official recognition policy, in the proper exercise of its foreign affairs, immigration, naturalization, passport, appropriations, and general lawmaking powers. *See supra* pp. 8–13. None of this "abundant statutory precedent" has ever "been considered invalid as an invasion of [the President's] autonomy." *Nixon*, 433 U.S. at 445.

c. Finally, the centralization of power in the hands of the President in the form of an unchecked recognition power represents an abdication of the lower court's responsibility to decide the constitutional question presented here, and cannot be squared with this Court's prior holding on the political question issue. *See Zivotofsky*, 132 S. Ct. at 1427 (criticizing the D.C. Circuit for treating the political question and constitutionality questions as "one and the same," left to the Executive's "unreviewable" discretion (internal quotation marks omitted)). For whatever exclusive power the President may have to recognize foreign sovereigns, "there is, of course, no exclusive commitment to the Executive of the power to determine the constitutionality of a statute." *Id*.

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[13] While this Court looks to longstanding and consistent post-ratification practice to discern constitutional meaning, *see, e.g.*, *Mistretta*, 488 U.S. at 401; *Marsh v. Chambers*, 463 U.S. 783, 790 (1983), it stands equally ready to set aside such evidence when it is "conflicting," *Clinton v. Jones*, 520 U.S. 681, 682, 696 (1997).

at 1428. Any deference that might in other circumstances be afforded the Executive is balanced out by the equal respect and deference due to Congress, which is presumed to act within the bounds of the Constitution. *See, e.g.*, *Bush v. Vera*, 517 U.S. 952, 991–92 (1996) (O'Connor, J., concurring); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

Indeed, it is "'emphatically the province and duty of the judicial department to say what the law is,'" *Zivotofsky*, 132 S. Ct. at 1427–28 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)), even when Congress and the Executive agree on the scope of their respective powers. *See INS v. Chadha*, 462 U.S. 919, 941–42 (1983). Where, as here, Congress and the Executive are at odds, the Judicial Branch must, with extra care, independently evaluate the scope of the asserted powers in order to determine "whether Congress or the Executive is 'aggrandizing its power at the expense of the other branch.'" *Zivotofsky*, 132 S. Ct. at 1428 (quoting *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 878 (1991)). In light of the Constitution's text, structure, and purpose, it is clear that the exclusive recognition power should be drawn narrowly by this Court so as not to trench on or engulf Congress's Article I powers.

II. SECTION 214(D) IS PROPER UNDER SEPARATION OF POWERS PRINCIPLES BECAUSE IT DOES NOT PREVENT THE EXECUTIVE FROM ACCOMPLISHING ITS CONSTITUTIONALLY ASSIGNED FUNCTIONS.

Congress does not act outside the bounds of the Constitution by legislating in ways that touch on, or even register discord with, Executive recognition policy, so long as Congress does not "prevent[] the Ex-

ecutive Branch from accomplishing its constitutionally assigned functions." *Nixon*, 433 U.S. at 443. Section 214(d) does no such thing.

The Executive's attempt to draw an impenetrable circle around any matter that touches, however faintly, upon an issue of recognition—rendering any such legislation unconstitutional as an impermissible interference with the exercise of the recognition power—is fundamentally at odds with separation of powers principles. Such a novel veto power over Congressional action that, at most, responds to Executive recognition policy without directing the President in the act of recognition, threatens to upset "the equilibrium established by our constitutional system," *Youngstown*, 343 U.S. at 638 (Jackson, J., concurring), and should be rejected.

1. "In designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence." *Nixon*, 418 U.S. at 707. Separation of powers therefore does not "requir[e] three airtight departments of government." *Nixon*, 433 U.S. at 443 (internal quotation marks omitted); *see also* The Federalist No. 48, at 276 (James Madison) (rejecting notion of "wholly unconnected" legislative, executive and judicial departments). Rather, the Constitution "contemplates that practice will integrate the dispersed powers into a workable government," *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring). It thus "enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Id*. The Constitution "provides for a degree of intermingling" not as a mere

concession to practicality, but "to ensure accountability and preclude the exercise of arbitrary power." *Weiss v. United States*, 510 U.S. 163, 186 (1994) (Souter, J., concurring) (internal quotation marks omitted).

Accordingly, "[t]he Court, when applying [structural] provisions, has interpreted them generously in terms of the institutional arrangements that they permit." *Clinton v. City of New York*, 524 U.S. 417, 471 (1998) (Breyer, J., dissenting). One branch cannot, of course, usurp or assume a function "belonging to one of the [other] departments," The Federalist No. 48, at 276 (James Madison); *see also Chadha*, 462 U.S. at 963 (Powell, J., concurring), nor can it "interfere impermissibly with the other's performance of its constitutionally assigned function." *Chadha*, 462 U.S. at 963 (Powell, J., concurring). But where a branch acts in furtherance of its own broadly assigned powers, it does so properly so long as its actions are not unduly disruptive of the constitutionally assigned functions of the first branch. *Morrison v. Olson*, 487 U.S. 654, 691–93 (1988). Assertions of exclusive authority in such cases are treated with suspicion. *See generally id.*; *Freytag,* 501 U.S. 868.

Thus, a claim that Congress has "impermissibly interfere[d]" with an exclusive Executive prerogative is "readily resolved" in favor of constitutionality where the asserted intrusion is limited. *Nixon*, 433 U.S. at 451 (upholding statute that required former President to turn over documents, despite implied "presumptive confidentiality" for Executive communications); *see also Morrison*, 487 U.S. at 691–93 (rejecting President's contention that legislative "good cause" requirement for the removal of independent

counsel impermissibly interfered with his Article II duties). In such a case, Congress impermissibly interferes with the Executive only when it "prevents the Executive Branch from accomplishing its constitutionally assigned functions," *Nixon*, 433 U.S. at 443, and thus "significantly alter[s] the constitutional balance." *Noel Canning*, 573 U.S. ___ (slip. op. at 39) (rejecting interference-with-Executive argument rooted in *Nixon*); *accord Morrison*, 487 U.S. at 691–92 (statute violates separation of powers only when it "impede[s] the President's ability to perform his constitutional duty" or "unduly trammels on executive authority").

2. Section 214(d) does not in any way—and certainly not in any significant way—prevent or impede the Executive from accomplishing its constitutionally signed functions. Section 214(d) does not direct the President to alter U.S. recognition policy towards Jerusalem or to consider Jerusalem to be within the borders of Israel as a matter of U.S. foreign policy. It does not mandate or forbid the exercise of the recognition power at all. It merely provides a U.S. citizen with the opportunity to self-identify as being born in Israel in that citizen's travel and personal status documents.[14] To facilitate that opportunity, the statute instructs the Secretary of State to perform the ministerial act of recording "Israel" as the place of birth on the passport and consular report of birth

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[14] Indeed, in the context of passports and reports of birth abroad, the purpose of the "place of birth" designation is expressly "to assist in identifying the individual." 7 Foreign Affairs Manual 1300 et seq. App'x D (Nov. 2010) [hereinafter 7 F.A.M.] at 1310(g)(2).

abroad of an individual who avails himself of the option presented by the statute. This is, at most, an example of the kind of "integrat[ion of] the dispersed powers into a workable government," *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring); *cf. Marbury*, 5 U.S. at 156–59 (executive officer must perform "a ministerial act which the law enjoins" on him), that is both practically necessary and constitutionally appropriate in our Republic.

Section 214(d) is thus utterly unremarkable. Indeed, the State Department already permits this act of passport self-identification in certain circumstances for U.S. citizens born in the West Bank and the Gaza Strip, 7 F.A.M. at 1360(c) & (d)—neither of which are recognized sovereigns, *see id.* at 1360(a) ("U.S. policy recognizes that . . . the West Bank and the Gaza Strip are territories whose final status must be determined by negotiations"). Thus, a U.S. citizen born before 1948 in either of those territories, as well as in Israel proper, Jerusalem, or the Golan Heights (now recognized as part of Syria), may elect to list "Palestine" as his place of birth, despite the State Department's "general policy of showing the birthplace as the country having present sovereignty." *See id.* at 1360(g). Similarly, a passport applicant born in Israel, the West Bank, the Gaza Strip, or the Golan Heights who "objects" to a place of birth listing based on present sovereignty may, regardless of date of birth, "elect" to list instead the local area or city name. *Id.* at 1360(i).

Congress also directed the Secretary of State to include "Taiwan" as the place of birth on passports and reports of birth abroad, when requested to do so by applicants born there, Foreign Relations Authorization Act, Fiscal Years 1994 & 1995, Pub. L. No.

103-236, § 132, 108 Stat. 382 (1994), even though the United States does not recognize Taiwan as a state or country, and instead takes the official position that "Taiwan is a part of China." 7 F.A.M. at 1340(d)(6)(f); *see also id.* at 1310(h) (place names described in the 7 F.A.M. appendix are also used for issuance of reports of birth abroad). In that instance—unlike this one—the Executive has complied with the directive from Congress to permit such passport self-identification. *Id*. at 1340(d)(6)(d).

3. The Executive's emphasis on the title of Section 214 (Br. in Opp. 5, 10, 23, 23 n.10)—arguing that it transforms this case into one that implicates the "core" of the recognition power because it "expressly purports to alter the President's recognition policy" (*id.* at 23 n.10)—is misplaced. Headings of statutes—and certainly titles of an entire section of a statute, rather than the provision at issue—do not have any bearing on statutory construction when the plain text of the relevant provision is clear. *See, e.g., United States v. Quality Stores, Inc.*, 134 S. Ct. 1395, 1402 (2014) (finding that the party "cannot rely on the statutory heading to support its argument" where the statutory text is unambiguous); *see also Lawson v. FMR LLC*, 134 S. Ct. 1158, 1169 (2014) (reversing lower court's decision in part because of its reliance on statutory headings). Here, where "the parties do not dispute the interpretation of § 214(d)," *Zivotofsky*, 132 S. Ct. at 1427, the heading of Section 214 should be given no interpretational weight.

Further, it is the statute's actual operation—not its title—that that is the basis on which its constitutionality must be evaluated. *See Clinton*, 524 U.S. at 479 (Breyer, J., dissenting) (finding Line Item Veto Act constitutional because it is not "a true line item

veto (despite the Act's title)"); *cf. Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2595 (2012) ("Th[e] constitutional question [is] not controlled by Congress's choice of label."). Here, the statutory provision at issue, 214(d), does not in its operation alter or purport to alter official recognition policy. Nor does the Executive argue that it does.

In any case, the Executive misreads the heading in arguing that it "expressly purports to alter the President's recognition policy." Br. in Opp. 23 n.10. At most, it indicates that Section 214 as a whole was motivated in some part by the current state of "United States policy with respect to Jerusalem as the capital of Israel." Section 214 (Title). Likely it was. But Congress did not purport to alter that policy. It meant to and did no more than employ the legislative authority granted to it by the Constitution to respond to that policy by giving a U.S. citizen the opportunity to self-identify as being born in Israel. Congress does not act outside the bounds of the Constitution by legislating in ways that touch on, react to, or even register discord with, Executive recognition policy, so long as it does not prevent or significantly impede the President from exercising the recognition power. *See supra* pp. 19–22. Section 214(d) in no way does that. *See supra* pp. 22–25. To the contrary, it is the *President's* position on the breadth of the recognition power, adopted by the court of appeals, that interferes significantly with *Congress's* performance of its Article I duties, and threatens to meaningfully alter the constitutional balance in favor of the Executive.

CONCLUSION

The judgment of the United States Court of Appeals for the District of Columbia Circuit should be reversed.

Respectfully submitted.

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APPENDIX

APPENDIX A:

Amici Curiae Members of The United States House of Representatives

The following members of The United States House of Representatives respectfully submit the foregoing brief as *amici curiae*:

Rep. Ed Royce (R-CA-39)
Chairman, House Committee on Foreign Affairs

Rep. Eliot L. Engel (D-NY-16)
Ranking Member, House Committee on Foreign Affairs

Rep. Michele Bachmann (R-MN-6)

Rep. Steve Chabot (R-OH-1)

Rep. Curt Clawson (R-FL-19)

Rep. Chris Collins (R-NY-27)

Rep. Paul Cook (R-CA-8)

Rep. Tom Cotton (R-AR-4)

Rep. Joseph Crowley (D-NY-14)

Rep. Ted Deutch (D-FL-21)

Rep. Sean Duffy (R-WI-7)

Rep. Eni F. H. Faleomavaega (D-Am. Samoa)

Rep. Lois Frankel (D-FL-22)

Rep. Trent Franks (R-AZ-8)

Rep. Tulsi Gabbard (D-HI-2)

Rep. Scott Garrett (R-NJ-5)

Rep. Alan Grayson (D-FL-9)

Rep. Gene Green (D-TX-29)

Rep. Janice Hahn (D-CA-44)

Rep. Steve Israel (D-NY-3)

Rep. Doug Lamborn (R-CO-5)

Rep. Leonard Lance (R-NJ-7)

Rep. Carolyn B. Maloney (D-NY-12)

Rep. Michael T. McCaul (R-TX-10)

Rep. David McKinley (R-WV-1)

Rep. Grace Meng (D-NY-6)

Rep. Luke Messer (R-IN-6)

Rep. Jeff Miller (R-FL-1)

Rep. Jerrold Nadler (D-NY-10)

Rep. Bill Pascrell, Jr. (D-NJ-9)

Rep. Erik Paulsen (R-MN-3)

Rep. Ted Poe (R-TX-2)

Rep. Ileana Ros-Lehtinen (R-FL-27)

Rep. Matt Salmon (R-AZ-5)

Rep. Adam Schiff (D-CA-28)

Rep. Aaron Schock (R-IL-18)

Rep. David Schweikert (R-AZ-6)

Rep. Brad Sherman (D-CA-30)

Rep. Pat Tiberi (R-OH-12)

Rep. Juan Vargas (D-CA-51)

Rep. Henry A. Waxman (D-CA-33)

Rep. Randy Weber (R-TX-14)