No. 13-628

In The
Supreme Court of the United States

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

Petitioner,

v.

JOHN KERRY, SECRETARY OF STATE,

Respondent.

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

BRIEF OF THE INTERNATIONAL ASSOCIATION OF JEWISH LAWYERS AND JURISTS (R.A.) AS *AMICUS CURIAE* SUPPORTING PETITIONER AND REVERSAL

SARAH B. BISER
Counsel of Record
MCCARTER & ENGLISH, LLP
245 Park Avenue
New York, NY 10167
(212) 609-6859
sbiser@mccarter.com

ROBERT N. KRAVITZ
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019
(212) 373-3000
rkravitz@paulweiss.com

Attorneys for Amicus Curiae
The International Association of
Jewish Lawyers and Jurists (R.A.)

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. THE D.C. CIRCUIT IMPROPERLY DEFERRED TO THE STATE DEPARTMENT'S VIEW THAT THERE IS A CONFLICT BETWEEN SECTION 214(d) AND THE EXECUTIVE'S "RECOGNITION POWER" 3

II. PROPERLY VIEWED, THERE IS NO CONFLICT WITH EXECUTIVE AUTHORITY ... 6

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES

American Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003) 10

Ashwander v. Tennessee Valley Auth., 297 U.S. 288 (1936) 5

Blodgett v. Holden, 275 U.S. 142 (1927) 6

Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973) 6

INS v. Chadha, 462 U.S. 919 (1983) 4, 6

Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60 (1803) 3

Mistretta v. United States, 488 U.S. 361 (1989) 5, 6

Powell v. McCormack, 395 U.S. 486 (1969) 5

Rostker v. Goldberg, 453 U.S. 57 (1981) 6, 11

Zivotofsky ex rel. Zivotofsky v. Clinton, 132 S. Ct. 1421 (2012) 4

Zivotofsky ex rel. Zivotofsky v. Sec'y of State, 725 F.3d 197 (D.C. Cir. 2013) ..... *passim*

Zivotofsky v. Sec'y of State, 571 F.3d 1227 (D.C. Cir. 2009) 3

STATUTES

Foreign Relations Authorization Act, Fiscal Year 2003 ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES AND SOURCES

141 CONG. REC. S15476 (daily ed. Oct. 23, 1995) 11

141 CONG. REC. S15533 (daily ed. Oct. 24, 1995) 12

148 CONG. REC. H6470 (daily ed. Sept. 23, 2002) 10

148 CONG. REC. S9401-9404 (daily ed. Sept. 26, 2002) 10

AMERICAN FOREIGN POLICY: BASIC DOCUMENTS 1977-1980 (1983).....8

Bill Summary & Status, 107th Congress (2001-2002), H.R. 1646, All Congressional Actions, September 26, 2002, http://thomas.loc.gov/cgi-bin/bdquery/z?d107:HR01646:@@@X 10

http://dfi.10point10.com/files/HillaryonIsrael.pdf.....12

http://www.state.gov/secretary/rm/2010/03/138722.htm 9

President George H. W. Bush, News Conference with Israeli PM Yitzhak Rabin, August 11, 1992, https://www.jewishvirtuallibrary.org/jsource/US-Israel/Bush_Rabin1.html.....8

President George W. Bush, Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003, 2002 WL 31161653 (Sept. 30, 2002) 9

TABLE OF AUTHORITIES – Continued

Page

President Ronald Reagan, Address to the Nation on United States Policy for Peace in the Middle East, September 1, 1982, http://www.cmep.org/content/reagan-peace-initiative-september-1-1982 8

Press Briefing by Press Secretary Jay Carney, July 26, 2012, http://www.whitehouse.gov/the-press-office/2012/07/26/press-briefing-press-secretary-jay-carney-72612 9

INTEREST OF *AMICUS CURIAE*[1]

The International Association of Jewish Lawyers and Jurists (R.A.) ("IAJLJ") was founded in 1969. Among its founders were Israel Supreme Court Justice Haim Cohn, U.S. Supreme Court Justice Arthur Goldberg, and Nobel Prize laureate René Cassin of France, one of the architects of the Universal Declaration of Human Rights.

IAJLJ strives to advance human rights everywhere, including the prevention of war crimes, the punishment of war criminals, the prohibition of weapons of mass destruction, and international cooperation based on the rule of law and the fair implementation of international covenants and conventions. IAJLJ is especially committed to issues that are on the agenda of the Jewish people, and works to combat racism, xenophobia, anti-Semitism, Holocaust denial, and negation of the State of Israel.

IAJLJ has a strong interest in United States policy toward Israel and Jerusalem – Israel's capital and a city that has been central to the Jewish faith for more than 3,000 years. Both Congress and the Executive Branch play a vital role in shaping United

[1] This brief *amicus curiae* is filed with the consent of all parties. Counsel for *amicus* affirm, pursuant to Supreme Court Rule 37.6, that no counsel for any party authored this brief in whole or in part, and that no party, counsel for any party, or any other person other than *amicus* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

States policy toward Israel, and it is important to strike the proper balance between those two branches of government. In IAJLJ's view, the opinion of the United States Court of Appeals for the D.C. Circuit in this case does not strike the right balance and should be reversed.

SUMMARY OF ARGUMENT

The International Association of Jewish Lawyers and Jurists submits this brief in support of Petitioner and urges reversal of the decision of the United States Court of Appeals for the D.C. Circuit.

On remand, the D.C. Circuit once again improperly deferred to the State Department on the issue of whether Section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, impermissibly conflicts with Executive power.

Properly viewed, there is no conflict. Section 214(d) does not require the Executive to change its repeatedly enunciated position with respect to Jerusalem, nor does it enunciate a contrary position. It does nothing more than allow U.S. citizens born in Jerusalem to express their own view on the issue by choosing how to describe their place of birth in their passport.

ARGUMENT

I. THE D.C. CIRCUIT IMPROPERLY DEFERRED TO THE STATE DEPARTMENT'S VIEW THAT THERE IS A CONFLICT BETWEEN SECTION 214(d) AND THE EXECUTIVE'S "RECOGNITION POWER"

To borrow a phrase from Yogi Berra, the Court of Appeals for the D.C. Circuit's opinion on remand is "déjà vu all over again."

In its first opinion, the D.C. Circuit refused to decide whether the Executive's "recognition" authority allowed the State Department to nullify an act of Congress allowing American citizens born in Jerusalem to have their passports state their place of birth as "Jerusalem, Israel." The court concluded: "The President's exercise of the recognition power granted solely to him by the Constitution cannot be reviewed by the courts." *Zivotofsky v. Sec'y of State*, 571 F.3d 1227, 1231 (D.C. Cir. 2009) ("*Zivotofsky I*").

This Court disagreed, stating:

> At least since *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803), we have recognized that when an Act of Congress is alleged to conflict with the Constitution, "[i]t is emphatically the province of the judicial department to say what the law is." *Id.*, at 177. That duty will sometimes involve the "[r]esolution of litigation challenging the constitutional authority of one of the three branches," but courts cannot avoid their responsibility merely "because the issues have

> political implications." *INS v. Chadha*, 462 U.S. 919, 943 (1983).

Zivotofsky ex rel. Zivotofsky v. Clinton, 132 S. Ct. 1421, 1427-28 (2012).

On remand, however, the D.C. Circuit shirked its responsibility again. Although it no longer invoked the "political question" doctrine, the court again simply deferred to the State Department as to whether Section 214(d) impermissibly conflicts with the Executive's foreign policy powers – the constitutional question that this Court ruled was an issue for the Judiciary, not the Executive. Thus, the D.C. Circuit ruled:

> [W]e are not equipped to second-guess the Executive regarding foreign policy consequences of section 214(d). As the Executive – the "sole organ of the nation in its external relations" – is the one branch of the federal government before us and both the current Executive branch as well as its predecessor believe that section 214(d) would cause adverse foreign policy consequences (and in fact presented evidence that it had caused foreign policy consequences), that view is conclusive on us.

Zivotofsky ex rel. Zivotofsky v. Sec'y of State, 725 F.3d 197, 219 (D.C. Cir. 2013) ("*Zivotofsky II*") (internal citations omitted).

That decision is wrong, and dangerously tilts the separation of powers in favor of the Executive not

only vis-à-vis Congress, but vis-à-vis the Judiciary as well. As this Court stated, it is the responsibility of the courts to interpret the law, particularly when a conflict is claimed between one branch of government and another. "Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility." *Powell v. McCormack*, 395 U.S. 486, 549 (1969).

The courts may not abdicate that responsibility and simply defer to the Executive's own say-so that an act of Congress conflicts with Executive authority. The D.C. Circuit's ruling effectively gives the Executive the power to disregard any legislation at all, simply on the Executive's own say-so that the legislation conflicts with the Executive's own approach to foreign policy, and on the Executive's own say-so that some overseas constituency finds the legislation objectionable.

As Justice Brandeis wrote: "The Court has frequently called attention to the 'great gravity and delicacy' of its function in passing on the validity of an act of Congress." *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 345 (1936) (concurring opinion). Similarly, in *Mistretta v. United States*, 488 U.S. 361 (1989), the Court ruled: " 'When this Court is asked to invalidate a statutory provision that has been approved by both Houses of the Congress and signed by

the President . . . it should only do so for the most compelling constitutional reasons.'" *Id.* at 384 (quoting *Bowsher v. Synar*, 478 U.S. 714, 736 (1986) (opinion concurring in judgment)).[2]

The D.C. Circuit identified no compelling reason to invalidate Section 214(d). By simply deferring to the Executive, the D.C. Circuit acted with neither gravity nor delicacy, but rather curtailed both its own judicial function and Congress' legislative function in one fell swoop.

As Justice Powell wrote, this Court "has been mindful that the boundaries between each branch [of government] should be fixed 'according to common sense and the inherent necessities of the governmental coordination.'" *INS v. Chadha*, 462 U.S. 919, 962 (1983) (concurring opinion) (quoting *J.W. Hampton & Co. v. United States*, 276 U.S. 394 (1928)).

II. PROPERLY VIEWED, THERE IS NO CONFLICT WITH EXECUTIVE AUTHORITY

A common sense approach shows that there is no conflict between Section 214(d) and the Executive's

[2] *See also Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) ("Whenever called upon to judge the constitutionality of an Act of Congress – 'the gravest and most delicate duty that this Court is called upon to perform,' – the Court accords 'great weight to the decisions of Congress.'" (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J.) and *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 102 (1973)).

"recognition power" or any other purportedly exclusive Executive authority in the area of foreign affairs.

The State Department asserts that Section 214(d) "runs headlong into a carefully calibrated and longstanding Executive branch policy of neutrality toward Jerusalem. Since 1948, American presidents have steadfastly declined to recognize any foreign nation's sovereignty over that city." *Zivotofsky II*, 725 F.3d at 216-17. Common sense suggests otherwise.

Section 214(d) provides simply that, if a United States citizen born in Jerusalem wants his or her passport to list his or her place of birth as "Jerusalem, Israel," the Passport Office must honor that request. It does not provide that, in so doing, the United States itself recognizes Jerusalem as the capital of Jerusalem or as Israeli territory. It simply grants U.S. citizens born in Jerusalem the right to make such a claim themselves by identifying their birthplace as "Jerusalem, Israel" in their passport.

No one could reasonably interpret such an entry in Menachem Zivotofsky's passport as stating the official position of the United States on Jerusalem when, as the D.C. Circuit itself recognized, "Presidents from Truman on have consistently declined to recognize Israel's – or any country's – sovereignty over Jerusalem." *Zivotofsky II*, 725 F.3d at 200. Thus, for example:

- In proceedings before the United Nations in 1967, the United States ambassador stated that the "continuing policy of the United States Government"

was that "the status of Jerusalem . . . should be decided not unilaterally but in consultation with all concerned." *Id.* at 200.

- In 1980, President Jimmy Carter stated: "As to Jerusalem, we strongly believe that Jerusalem should be undivided, with free access to the holy places for all faiths, and that its status should be determined in negotiations for a comprehensive peace settlement."[3]
- In 1982, President Ronald Reagan stated: "[W]e remain convinced that Jerusalem must remain undivided, but its final status should be decided through negotiations."[4]
- In 1992, President George Bush stated: "Let me just say that our policy on Jerusalem remains unchanged. It must never be divided again, and its final status must be resolved through negotiation."[5]
- In 2010, Secretary of State Hillary Clinton stated that the status of Jerusalem is a "permanent

---

[3] AMERICAN FOREIGN POLICY: BASIC DOCUMENTS 1977-1980 (1983), "Statement by the President, March 3, 1980, Explanation of the United States Vote for the Security Council Resolution on the Occupied Territories," p. 705.

[4] Address to the Nation on United States Policy for Peace in the Middle East, September 1, 1982, http://www.cmep.org/content/reagan-peace-initiative-september-1-1982.

[5] President George H. W. Bush, News Conference with Israeli PM Yitzhak Rabin, August 11, 1992, https://www.jewishvirtuallibrary.org/jsource/US-Israel/Bush_Rabin1.html.

status issue[ ]" that must be resolved through "good faith negotiations [between] the parties."[6]

- In 2012, White House spokesman Jay Carney issued a written statement saying: "The status of Jerusalem is an issue that should be resolved in final status negotiations between Israelis and Palestinians."[7]

And if those pronouncements of official United States policy were not clear enough, President George W. Bush clarified the issue once and for all when he signed into law the very act at issue in this case, the Foreign Relations Authorization Act, Fiscal Year 2003. Even as he signed the legislation into law, he stated unequivocally: "*U.S. policy regarding Jerusalem has not changed.*" Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003, 2002 WL 31161653 (Sept. 30, 2002) (emphasis added).

Thus, if Section 214(d) posed any potential conflict with the Executive's "recognition power" by suggesting that U.S. policy in regard to Jerusalem may have changed, President Bush removed that potential conflict *ab initio* by stating unequivocally that U.S. policy regarding Jerusalem had *not* changed.

---

[6] http://www.state.gov/secretary/rm/ 2010/03/ 138722.htm.

[7] Press Briefing by Press Secretary Jay Carney, July 26, 2012, http://www.whitehouse.gov/the-press-office/2012/07/26/press-briefing-press-secretary-jay-carney-72612. The Justice Department's brief in opposition to the petition for certiorari contains citations to additional presidential statements along the same lines. *See* Brief for Respondent in Opposition, at p.2 n.1.

If any foreign power or constituency wants to know the position of the United States in regard to Jerusalem, the place to find it is in the President's signing statement and other policy statements emanating from the White House and the State Department – not in Menachem Zivotofsky's passport. Sustaining Section 214(d) thus "would not compromise the President's ability to speak with one voice for the Nation." *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 442 (2003) (dissenting opinion of Justice Ginsburg).

Further, it appears that, as senators, Secretary of State Kerry and former Secretary of State Hillary Clinton – the current and former defendants in this case – themselves saw no conflict between Section 214(d) and Executive authority. Then-Senator Kerry was one of the Senate Managers in the Conference Committee that reported the legislation (along with then-Senators Joe Biden (now Vice President) and Chuck Hagel (now Secretary of Defense)).[8] And the Senate, which, at the time, included both then-Senator Kerry and then-Senator Clinton, then approved the legislation by unanimous consent.[9]

---

[8] 148 CONG. REC. H6470 (daily ed. Sept. 23, 2002); 148 CONG. REC. S9401-9404 (daily ed. Sept. 26, 2002).

[9] Bill Summary & Status, 107th Congress (2001-2002), H.R. 1646, All Congressional Actions, September 26, 2002 ("Senate agreed to conference report by Unanimous Consent."), http://thomas.loc.gov/cgi-bin/bdquery/z?d107:HR 01646:@@@X.

"Congress is a coequal branch of government whose Members take the same oath [as the members of the Supreme Court] do to uphold the Constitution of the United States." *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981). It must be presumed, therefore, that Senators Kerry and Clinton would not have voted for the legislation if they believed it posed an unconstitutional conflict with Executive authority.

Indeed, one of the biggest ironies in this case is that, not only did Secretary Kerry and former Secretary Clinton support this legislation when they were senators, but they and other members of the current administration have themselves stated publicly that Jerusalem is Israel's capital and should be recognized as such. For example, as a senator, Secretary Kerry joined 92 other senators in sending a letter to then-Secretary of State Warren Christopher stating: "We believe that Jerusalem is and shall remain the undivided capital of the State of Israel," and that "[t]he search for peace [will] only be hindered by raising utterly unrealistic hopes about the future status of Jerusalem among the Palestinians."[10]

Similarly, then-Senator, now Vice President Joe Biden stated in 1995 that "it is unconscionable for us to refuse to recognize the right of the Jewish people

[10] 141 CONG. REC. S15476 (daily ed. Oct. 23, 1995).

to choose their own capital. . . . Regardless of what others may think, Jerusalem is the capital of Israel."[11]

And former Secretary Clinton, the original defendant in this case, wrote in a position paper in 2007 that "Israel's right to exist in safety as a Jewish state, with defensible borders and *an undivided Jerusalem as its capital* . . . must never be questioned."[12]

Simply allowing Menachem Zivotofsky and other U.S. citizens born in Jerusalem the right to have their passports describe their birthplace as "Jerusalem, Israel," as Congress has authorized them to do, is no more of a "conflict" with U.S. foreign policy than Secretary Kerry's, former Secretary Clinton's, and Vice President Biden's own statements on this issue.

The D.C. Circuit expressed concern about the State Department's assertion that "various Palestinian groups issued statements asserting that section 214 'undermine[d] the role of the U.S. as a sponsor of the peace process,' 'undervalue[ed] . . . Palestinian, Arab and Islamic rights in Jerusalem' and 'rais[ed] question about the real position of the U.S. Administration vis-à-vis Jerusalem.'" *Zivotofsky II*, 725 F.3d at 218.

As an initial matter, the D.C. Circuit cited no evidence that any Palestinian group was responding to

---

[11] 141 CONG. REC. S15533 (daily ed. Oct. 24, 1995).

[12] http://dfi.10point10.com/files/HillaryonIsrael.pdf (emphasis added).

Section 214(d), the only section of the legislation at issue here, as opposed to Section 214(a), which urges the President to begin the process of relocating the United States Embassy in Israel to Jerusalem. In any event, both the State Department and the D.C. Circuit surely must know that "various Palestinian groups" oppose *everything* Congress does that, in their jaundiced view, is favorable to Israel.

Just as the D.C. Circuit should not have deferred to the State Department on the issue of whether Section 214(d) impermissibly conflicts with Executive authority, it should not have deferred to the views of "various Palestinian groups" on that issue, either. The courts may not give the State Department *carte blanche* to disregard duly enacted legislation simply because it may displease some group whose views are of concern to the State Department, without a court making its own determination as to whether a true conflict with Executive authority exists.

Virtually every matter that Congress acts upon – whether it be the environment, civil rights, health care, or the economy – may be objectionable to some overseas constituency on one ground or another. That cannot be a sufficient ground for the State Department to override such legislation with no judicial scrutiny whatsoever – which was the D.C. Circuit's approach.

The D.C. Circuit was also swayed by evidence that "[v]arious members of Congress explained that the purpose of section 214(d) was to affect United

States policy toward Jerusalem and Israel." 725 F.3d at 218.

In fact, however, none of the statements the D.C. Circuit quotes deals specifically with Section 214(d), as opposed to the other parts of Section 214. And, even aside from that, the *intent* of certain members of Congress – or even of every member of Congress who voted for the legislation – does not make legislation an unconstitutional infringement on Executive power. No matter what the intent, only an actual conflict can make legislation unconstitutional, and here there is none.

The bottom line, therefore, is that this Court need not decide the thorny constitutional issue of whether the Executive's "recognition power" is exclusive. Whether the Executive's "recognition power" is exclusive or not, Section 214(d) simply does not conflict with it. Accordingly, there is no basis for the Court to take the extraordinary step of invalidating this act of Congress that has been duly enacted into law based on a non-existent conflict.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed with instructions to enter judgment for Petitioner.

Respectfully submitted,

SARAH B. BISER
Counsel of Record
MCCARTER & ENGLISH, LLP
245 Park Avenue
New York, NY 10167
(212) 609-6859
sbiser@mccarter.com

ROBERT N. KRAVITZ
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019
(212) 373-3000
rkravitz@paulweiss.com

Attorneys for Amicus Curiae
The International Association of
Jewish Lawyers and Jurists (R.A.)

July 22, 2014