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 THE AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether Section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, impermissibly infringes the President's power to recognize foreign sovereigns. Section 214(d) states that "[f]or purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel." 116 Stat. 1366.

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INTEREST OF *AMICUS CURIAE* [1]

The American-Arab Anti-Discrimination Committee ("ADC") is the country's largest Arab American civil rights organization. As a non-profit grassroots organization, ADC is bipartisan and secular. Founded in 1980 by U.S. Senator James Abourezk, ADC consists of members from all 50 states and has multiple chapters nationwide. ADC has been at the forefront of protecting the Arab-American community for over thirty years against discrimination, racism, and stereotyping. ADC seeks to preserve and defend the rights of those whose Constitutional rights are violated in the United States ("U.S.").

ADC's interest in this case arises from Section 214(d)'s discriminatory intent and effect on Arab Americans, specifically Palestinian Americans. ADC has growing concerns of Congress pushing forward discriminatory and biased legislation in favor of Israeli Americans and against Palestinian Americans, even when that legislation is unconstitutional. Section 214(d) of the Foreign Relations Authorization Act, Pub. L. No. 107-228, 116 Stat. 1350 is unconstitutional and an example of discriminatory and biased legislation.

The sensitive status of Jerusalem is a central issue in the Israeli-Palestinian conflict, and therefore is central to the foreign policy strategies set forth by the President to the United States via the Executive

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[1] This *amici curiae* is filed with consent from both parties pursuant to Rule 37.3(a). No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici curiae or their counsel made a monetary contribution to its preparation or submission of this brief.

Powers granted by the Constitution. The U.S. policy on the status of Jerusalem has always been to remain neutral. The mishandling of the status of Jerusalem will negatively impact any prospects for peace in the Middle East. Arab Americans have a stake and interest in the peace process as this has a direct impact on their personal lives.

Jerusalem is also very important to those in the Arab American community, as Arab Americans are composed of persons of both the Christian and Muslim faiths.[2] Jerusalem for centuries has been at the epicenter of debates of the Abrahamic religions: Christianity, Islam, and Judaism.[3] Thus, a unilateral decision by Congress to concretely and/or symbolically recognize Jerusalem as under Israel territory implicates foreign policy concerns not suited for decision-making by Congress.[4]

As the nation's largest Arab-American civil rights organization, ADC has a duty to voice the concerns on behalf of our constituents and the Arab-American community. The rights of ADC's constituents will be fundamentally affected by the Court's determination of the Constitutionality of Congress enactment of Section 214(d) because it effectively excludes Palestinian Americans born in Jerusalem from rights and/or benefits bestowed to other American citizens born in Jerusalem.

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[2] *See* PBS, *Caught in the Crossfire, available* at http://www.pbs.org/itvs/caughtinthecrossfire/arab_americans.html (noting that "the majority of Arab-Americans are Christian").

[3] JIMMY CARTER, PALESTINE: PEACE NOTE APARTHEID 19 (2006), *citing* JIMMY CARTER, THE BLOOD OF ABRAHAM: INSIGHTS INTO THE MIDDLE EAST (1985).

[4] *United States v. Curtiss-Wright Exp. Corp*., 299 U.S. 304 (1936).

STATEMENT

The purpose of the *Amicus* is to urge this Court to affirm the Court of Appeal's holding that Section 214(d) of the Foreign Relations Authorization Act is unconstitutional because Section 214(d) impermissibly infringes on the executive's exclusive Constitutional authority to decide whether and on what terms to recognize a foreign government. *Zivotofsky v. Secretary of State*, 725 F. 3d 197 (D.C. Cir. 2013).

First, the *Amicus* argues that the United States ("U.S.") President has exclusive power to recognize foreign sovereigns and their territorial boundaries and that Section 214(d) infringes on the Executive's powers. Second, the *Amicus* argues that Section 214(d) is an unconstitutional delegation of Congress' legislative power and/or regulatory authority to private citizens. Lastly, the *Amicus* argues Section 214(d) violates the Equal Protection Clause.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT THAT SECTION 214(D) IMPERMISSIBLE INFRINGES ON THE EXECUTIVE BRANCH'S EXCLUSIVE AUTHORITY TO RECOGNIZE FOREIGN SOVEREIGNS AND DECIDE THEIR TERRITORIAL BOUNDARIES.

A. The Executive Branch has the Exclusive Power to Recognize Foreign Sovereigns.

1. Constitutional Text

Article II of the United States Constitution grants the President foreign affairs power, including the

power to recognize foreign governments. Article II §2 grants the President the power of Commander in Chief of the United States Army and Navy, the power to make treaties, and the power to appoint ambassadors.[5] Further, Article II, §3 of the Constitution provides that the President "shall receive Ambassadors and other public Ministers."[6] These powers make the President the nation's principal organ of foreign affairs. As Alexander Hamilton explained, "[t]he Legislative Department is not the *organ* of intercourse between the United States and foreign Nations. It is charged with neither with *making* nor interpreting Treaties. It is therefore not naturally that Organ of the Government which is to pronounce the existing condition of the Nation, with regard to foreign Powers."[7] Rather, "[t]he right of the Executive to receive ambassadors and other public Ministers. . . . includes that of judging, in the case of a Revolution of Government in a foreign Country, whether the new rulers are competent organs of the National Will and ought to be recognized or not."[8] The power to recognize foreign governments is a function of the Executive's duty to preserve the peace by maintaining a state of neutrality until war is declared and part of the duty to receive ambassadors, as receipt of ambassador indicates recognition of ambassador's country.[9]

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[5] U.S. CONST., art. II, § 2,

[6] U.S. CONST., art. II, § 3.

[7] Alexander Hamilton, *Pacificus No. 1,* U.S. National Archives (June 29, 1793), *available at* http://founders.archives.gov/documents/Hamilton/01-15-02-0038.

[8] *Id.*

[9] *Id.*

2. U.S. Supreme Court Jurisprudence

This Court has consistently affirmed the Executive's exclusive recognition power as the sole organ of foreign policy.[10] As former Chief Justice John Marshall stated on March 7, 1800 before the U.S. House of Representatives, "[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."[11] The President is the sole organ because, "[i]n this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates."[12]

This Court has also consistently affirmed the President's exclusive role to formally recognize foreign governments.[13] This Court stated in *Banco Nacional de Cuba v. Sabbatino*, that "[p]olitical recognition is exclusively a function of the

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[10] *United States v. Curtiss-Wright Exp. Corp*., 299 U.S. 304, 319 (1936) (The Executive is the "sole organ of the nation in its external relations"); *see Dep't of Navy v. Egan,* 484 U.S. 518, 529 (1988) ("[F]oreign policy [is] the province and responsibility of the Executive"); *see Clinton v. City of New York,* 524 U.S. 417, 445 (1998).

[11] Annals, 6th Cong., col. 613.

[12] *Curtiss-Wright*, 299 U.S. at 319.

[13] *Williams v. Suffolk Ins. Co*., 38 U.S. 415, 420 (1839) ("It is very clear, that it belongs exclusively to the executive department of our government to recognize, from time to time, any new governments"); *United States v. Belmont*, 301 U.S. 324, 330 (1937) ("[T]he Executive had authority to speak as the sole organ of th[e] government" in matters of "recognition").

Executive."[14] But not only is it the Executive's role to determine recognition, but also to determine the 'underlying policy' governing the question of recognition.[15] It is better for the Executive to determine the underlying policy of recognition because, "[the President], not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war."[16] Given that Israel and Palestine are frequently in a 'time of war' and have been in an ongoing conflict since 1948,[17] the President is in a better position than Congress to determine the appropriate policy underlying recognition of Jerusalem, especially since the status of Jerusalem is one of the chief disputes of the Israeli-Palestinian conflict and the corresponding negotiations for peace.

3. Custom and Balance of Powers Analysis

Centuries-long Executive branch practice of recognition power and congressional acquiescence to the Executive's practice, confirm that the Executive possesses the exclusive recognition power.[18] As

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[14] *Banco Nacional de Cuba v. Sabbatino* 376 U.S. 398, 410 (1964).

[15] *Guar. Trust Co. v. United States*, 304 U.S. 126, 137–38 (1938); *United States* v. *Pink*, 315 U.S. 203, 207 (1942).

[16] *Curtiss-Wright*, 299 U.S. at 320.

[17] *See* NOAM CHOMSKY & ILAN PAPPE, GAZA IN CRISIS: REFLECTIONS ON THE U.S.-ISRAELI WAR ON THE PALESTINIANS, (Revised and updated Ed. 2013).

[18] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 204 (1987) (stating that recognition power belongs exclusively to the President); JULIUS GOEBEL, JR., THE RECOGNITION POLICY OF THE UNITED STATES 121 (1915).

Congress conceded in it's Brief in Support of the Petitioner, the "President properly takes the lead in performing the ceremonial act of recognition, in his role as the instrument of foreign policy," yet "Congress plays an integral role in shaping that policy."[19] Indeed, the decision of the Court of Appeals to recognize the President's exclusive recognition power does not demote Congress from the President's counterweight in foreign affairs to his minion as Congress claims.[20] The Constitution equips Congress with a variety of foreign affairs powers which it can properly utilize without "purporting to direct the Executive to alter formal recognition policy" as it has in this case.[21]

Congress' 'power of the purse', taxing and spending,[22] and appropriations powers[23] provide Congress with the power to balance the President's foreign affairs power, without infringing on the President's exclusive recognition power.[24] As James Madison articulated, "This power over the purse may,

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[19] Brief for Members of the United States Senate and the United States House of Representatives as *Amici Curiae* in Support of Petitioner on Petition for writ of Certiorari at 12, *Zivotofsky v. Kerry*, (No. 13-628) (2014) [hereinafter *Congress Brief*].

[20] *Id.* at 11.

[21] *Id.* at 13; U.S. CONST. art. I, §8; U.S. CONST. art. I, §8, cl. 18 (Necessary and Proper Clause); U.S. CONST. art. I, §8, cl. 3 (Commerce Clause); *McCulloch v. Maryland*, 17 U.S. 316 (1819) (granting Congress broad implied powers to make laws based on the Necessary and Proper Clause).

[22] U. S. CONST. art. I, §8, cl. 1.

[23] U.S. CONST. art. I, §9, cl. 7.

[24] Peter Raven-Hansen and William C. Banks, *Pulling The Purse Strings of the Commander in Chief*, 80 VA. L. REV. 833, 897 (1994).

in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people."[25] Separation of powers requires a balance between Congress' power of the purse and the President's foreign affairs power, neither of which are plenary.[26] Petitioners argue that Congress in the past has passed legislation that deals with recognition. However, the issue is not whether Congress can pass legislation that touches on recognition, but whether Congress can officially usurp the President's recognition power through legislation such as Section 214(d). "The acknowledgement of the independence of a new Power is an exercise of Executive authority; consequently, for Congress to direct the Executive how he shall exercise this power, is an act of usurpation." Section 214(d) directs the Executive how to exercise his power and recognize Jerusalem within the territory of Israel.[27]

Congress can pass legislation touching on recognition so long as it does not act to usurp the Executive's policy on recognition.[28] For example, in 1800, Congress passed legislation touching on recognition by declaring that St. Domingo (Haiti) was still a colony of France. However this was the same as Jefferson's Executive determination, so the legislation did not infringe on the Executive recognition power. Addi-

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[25] The Federalist No. 58, at 359 (Madison) (Gary Wills ed., 1982).

[26] Raven-Hansen, *supra* note 23, at 943.

[27] Section 214(d) purported to establish "U.S. policy with respect to Jerusalem as the capital of Israel." *Zivotofsky,* 725 F.3d 197.

[28] *See* Robert J. Reinstein, *Is the President's Recognition Power Exclusive?*, 86 TEMP. L. REV. 1, 14–30 (2013).

tionally, in 1837, Congress passed legislation appropriating funds for a salary for a diplomatic agent to Texas "whenever the President of the United States may receive satisfactory evidence that Texas is an independent power, and shall deem it expedient to appoint such a minister."[29] Thus, this appropriations legislation left authority for recognizing Texas as an independent power with the Executive.[30]

In 1979, the United States formally recognized the Government of the People's Republic of China as the sole legal government of China.[31] Following the Executive's decision, Congress utilized its power to pass the Taiwan Relations Act of 1979 ("TRA").[32] The TRA provided many benefits to Taiwan, but the TRA still left open the official decision of formal recognition of the Government of China to the Executive.[33] Unlike the legislation in this Case, the TRA did not intrude on the President's exclusive recognition power.[34] The Executive's "strategic ambiguity" in the TRA left room for Congress to pass legislation without infringing on the Executive's power to conduct foreign relations.[35]

Petitioner's argument that President Clinton's signing of 1994 legislation that permitted U.S. citizen's born in Taiwan to list "Taiwan" as their place

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[29] Appropriations for the support of Government for 1837, ch. 33, 5 Stat. 163, 170 (1837).

[30] *Id.*

[31] *See* Reinstein, *supra* note 28, at 27.

[32] *Id.*

[33] U.S. DEPARTMENT OF STATE, BUREAU OF EAST ASIAN AND PACIFIC AFFAIRS, U.S. RELATIONS WITH TAIWAN (2014) *available at*: http://www.state.gov/r/pa/ei/bgn/35855.htm.

[34] Reinstein, *supra* note 26, at 49 (2013).

[35] *Id*. at 302-303.

of birth on passports sets precedent for Section 214(d), however this analysis is flawed.[36] When Congress passed a passport statute affecting Taiwan in 1994, the State Department complied "only after determining that doing so was consistent with United States policy that Taiwan is a part of China."[37] In contrast, President George W. Bush stated that if Section 214 imposed a mandate, it would "impermissibly interfere with the President's constitutional authority to formulate the position of the United States, speak for the nation in international affairs, and determine the terms on which recognition is given to foreign states."[38] Section 214(d) is inconsistent with U.S. policy and thus infringes on the executive's exclusive power.

Similarly, the 1898 joint resolution regarding the status of Cuba did not infringe on the Executive's recognition power, as the resolution did not recognize Cuba as a sovereign nation.[39] Nor did the joint resolution recognize the insurgent government as the legitimate government of Cuba.[40] The resolution merely provided that the United States did not recognize Spain's sovereignty over Cuba as a colony

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[36] Brief of the Petitioner on the Merits at 12, *Zivotofsky v. Kerry* (No. 13-628) (July 15, 2014).

[37] An act to make certain technical amendments relating to the State Department Basic Authorities Act of 1956, 108 Stat. 4299 (1994); *Zivotofsky ex rel. Zivotofsky v. Sec'y of State*, 725 F.3d 197, 216 n.18 (D.C. Cir. 2013).

[38] *Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003,* 2002 Pub. Papers of the Presidents of the United States: George W. Bush (Sept. 30, 2002) [hereinafter *Bush Statement*].

[39] Joint Resolution For the recognition of the independence of the people of Cuba, no. 24, 30 Stat. 738 (1898).

[40] *Id.*; *see* Reinstein, 86 Temp. L. Rev. at 253.

and the "people" of Cuba were independent.[41] Further, President McKinley opposed the inclusion of the "recognition of Cuba" language and only signed the joint legislation into law after this language was removed.[42] Once again the 1898 joint resolution did not infringe on the Executive's exclusive recognition power because there was no recognition, consistent with U.S. foreign policy. Whereas, Section 214(d) provides recognition even if just symbolic in nature, and is inconsistent with U.S. foreign policy.

B. Section 214(d) impermissibly infringes on the Executive's power to conduct foreign relations.

The Constitution "contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."[43] While Congress has significant power over influencing foreign affairs and shaping foreign policy, Congress "must often accord to the President a degree of discretion and freedom from statutory restriction that would not be admissible were domestic affairs alone involved."[44] Further, while Congress has the power to enact passport legislation, this legislation presents a separation of powers problem if it infringes

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[41] *See id.*

[42] *See id.*

[43] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952).

[44] *Curtiss-Wright Export Corp.,* 299 U.S. at 320; *accord Zemel v. Rusk*, 381 U.S. 1, 17–18 (1965).

on Executive authority to conduct foreign affairs.[45] By enacting Section 214(d) of the Foreign Relations Authorization Act, Congress has impermissibly infringed on the President's power to conduct foreign relations.[46]

Congress downplays the significance of the statute by arguing that it "merely provides a U.S. citizen with the opportunity to fill in a particular field in that citizen's travel documents in a particular manner."[47] President Obama administeration's brief filed in February correctly asserts that the U.S. passport is a political statement on behalf of the U.S. Section 214(d) will have "grave foreign-relations and national-security consequences."[48] Indeed, this Court in *Urtetiqui v. D'Arcy* and *Haig v. Agee* noted that a passport "is addressed to foreign powers" and "is to be considered in the character of a political document."[49] Former President George W. Bush was against this infringement on the Executive's power as well, as he warned of the potentially problematic directive from Congress in Section 214(d).[50] President Bush stated that if Section 214 imposed a mandate, it would

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[45] *Zivotofsky*, 725 F.3d at 216; *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010); *Bowsher v. Synar*, 478 U.S. 714, 769 (1986).

[46] Foreign Relations Authorization Act of 2003, Pub. L. No. 107-228, §214(d), 116 Stat. 1350, 1366; GOEBEL, *supra* note 17, at 121.

[47] *Congress Brief*, *supra* note 19, at 15.

[48] Brief for the Respondent in Opposition of Writ of Certiorari at 12, *Zivotofsky v. Kerry* (No. 05-1631) (2014).

[49] *Urtetiqui v. D'Arcy*, 34 U.S. 692, 699 (1835); *Haig v. Agee,* 453 U.S. 280, 292-93 (1981).

[50] *Bush Statement*, *supra* note 38.

"impermissibly interfere with the President's constitutional authority to formulate the position of the United States, speak for the nation in international affairs, and determine the terms on which recognition is given to foreign states."[51]

Section 214(d) clearly purports to make a political statement. On its face, Section 214 is entitled "United States Policy with Respect to Jerusalem as the Capital of Israel."[52] Subsection (a) requests the relocation of the United States Embassy to Jerusalem; Subsection (b) provides that the operation of funds at the Jerusalem embassy can be only used by U.S. Ambassador to Israel; Subsection (c) requires that no funds are used for any publication of any official government document unless the publication identifies Jerusalem as the capital of Israel.[53] Further, the congressional record reveals the intent to make a political statement as Representative Diaz Balart stated, "[t]his legislation requires compliance with existing U.S. law that recognizes Jerusalem as the capital of Israel, which has been the capital of that country since 1950."[54] The aggregation of these strategically drafted sections and the congressional record prove Congress' intent to make a political statement recognizing Jerusalem under Israel.

Section 214(d) overrides the Executive's authority to conduct foreign relations, its authority to recognize other nations and their territorial boundaries, and has broad implications on the separation of powers

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[51] *Id.*

[52] 116 Stat. 1366 §214.

[53] 116 Stat. 1365–1366.

[54] H.R Rep. No. 107-123, at 89 (2002). Rep. Hyde and Rep. Lantos made similar statements, *Id.* at 93.

and U.S. foreign policy. By enacting Section 214(d), Congress has taken the lead in performing the ceremonial act of recognition and amounts to an act of usurpation of executive authority.[55]

C. Section 214(d) implications on the Executive Power are intertwined with the sensitive status of Jerusalem.

Amici would be remiss to fail to articulate the implications of Section 214(d) of the Foreign Relations Authorization Act on the sensitive status of Jerusalem. Recognizing Jerusalem as part of Israel will directly impede on the 'peaceful and negotiated settlement of border disputes'—Jerusalem being at the center of those negotiated border disputes. Section 214 makes a unilateral political statement that would "critically compromise the ability of the United States to work with Israelis, Palestinians, and others to further the peace process."[56]

Since President Harry Truman recognized the nation of Israel in 1948, the Executive branch has consistently exercised its duty to attempt to preserve peace by maintaining Jerusalem's status as neutral.[57] The Executive's actions demonstrate intent to leave

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[55] GOEBEL, *supra* note 18 ("[T]he acknowledgement of the independence of a new Power is an exercise of Executive authority; consequently, for Congress to direct the Executive how he shall exercise this power, is an act of usurpation").

[56] Brief for the Respondent in Opposition of Writ of Certiorari at 3, *Zivotofsky v. Kerry* (No. 05-1631) (2014) (*quoting* Letter from George P. Shultz, Sec'y of State, to Hon. Charles H. Percy (Feb. 13, 1984).

[57] *Id.* at 2, *citing* 6 U.S. Dept of State, *Foreign Relations of the United States 1949: The Near East, South Asia, and Africa* 739–741 (1977).

the question of sovereignty over Jerusalem and its permanent status as an issue to be decided by peace negotiations.[58] In 1983 the Reagan administration opposed a bill that would move the U.S. Embassy to Israel on the contention that such action would violate the Executive's recognition power.[59] In 1992, President George H.W. Bush administration's policy was to oppose actions that were "prejudicial or precedential" to negotiations and "encourage all sides to avoid unilateral acts that would exacerbate tensions or make negotiations more difficult or preempt their final outcome."[60] In an address to the UN 46th assembly President Bush stated, "We must strive to ensure the peaceful, negotiated settlement of border disputes. We also must promote the cause of international harmony by addressing old feuds."[61]

In 1995, Congress sought to undermine the 1993 Oslo Peace Accords by re-introducing legislation that would condition embassy funding on moving the U.S. Embassy in Israel form Tel Aviv to Jerusalem.[62]

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[58] *Id.*

[59] S. 2031, 98th Cong., 1st Sess. (1984); *American Embassy in Israel: Hearing on S. 2031 before the Senate Comm. on Foreign Rel.,* 98th Cong., 2d. Sess. (1984).

[60] U.S. Letter of Assurance to the Palestinians, Oct.18 1991; *see* WILLIAM QUANDT, PEACE PROCESS: AMERICAN DIPLOMACY AND THE ARAB-ISRAELI CONFLICT SINCE 1967 (3d ed. 2005).

[61] George Bush, *Address to the 46th Session of the United Nations General Assembly in New York City*. Sept. 23, 1991. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*, http://www.presidency.ucsb.edu/ws/?pid=20012.

[62] Jerusalem Embassy Act of 1995 §7, 109 Stat. 398 (1995); Connie Buck, *Friends of Israel: The lobbying group AIPAC has consistently fought the Obama Administration on policy. Is it now losing influence?* THE NEW YORKER, Sept. 2014, http://www.new

President Clinton amended the bill to include a waiver provision that enables the president to suspend the funding restriction.[63] Clinton invoked the waiver in order to not sabotage the peace efforts and his recognition power.[64] Even Israeli Prime Minister ("PM") Yatzik Rabin, opposed the US legislation because the recognition of Jerusalem as Israel's capitol would endanger the Oslo Peace Process.[65] Further, every U.S. President since Clinton has invoked the national-security waiver.[66] Section 214(d) acts to undercut the Executive's efforts at mediating a comprehensive peace agreement between Israel and Palestine, and a policy to remain a neutral party.[67]

Section 214(d) also infringes on the Executive's role in respect to the international community as the sole organ of the nation in external relations. Historically, customary international law has also played an important role in shaping and/or influencing U.S. foreign policy.[68] United Nations resolutions are evidence of consistent state practice regarding the status of Jerusalem.[69] Most United Nations members

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yorker.com/magazine/2014/09/01/friends-israel (Former AIPAC analyst Keith Weissman admitted, "[t]he idea was to cripple Oslo.")

[63] Buck*, id.*

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *See* Jean Galbraith, *International Law and Separation of Powers*, 99 VA. L. REV. 987, 990 (2013). The power to accord recognition as a matter of customary international law to foreign nations is also an important interpretive principle. *Id.* at 990–91.

[69] Customary international law is evidenced by general and consistent state practice on account of a sense of legal obligation.

accept the UN proposal that Jerusalem should have international status under international law.[70] United Nations Security Council Resolution 476, adopted June 1980, stated that "all legislative and administrative actions taken by Israel, the occupying Power, which purport to alter the character and status of the Holy City of Jerusalem, have no legal validity and constitute a fragrant violation of the Fourth Geneva Convention."[71] Further, U.N. Security Council Resolution 478, adopted in 1980, rejected an Israeli statute that identified Jerusalem as the "complete and unified" capital of Israel.[72] Since U.S. Passports issued under Section 214(d) would purport to alter the character and status of the Holy City of Jerusalem by listing it as in Israel, Section 214(d) could be considered a violation of the Fourth Geneva Convention[73], which is binding International law under both convention and custom.[74]

Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1031.

[70] IRA SHARKANSKY, GOVERNING JERUSALEM: AGAIN ON THE WORLD'S AGENDA, 23, WAYNE STATE UNIV. PRESS (1996).

[71] S/RES/476 (1980) of 30 June 1980 (The resolution was signed by 14 Security Council Members, including England, France, China, and the Soviet Union).

[72] S/RES/478 (1980) of 20 August 1980. (The Resolution states that the Security Council was "deeply concerned," "censures in the strongest terms" and "affirms also that this action constitutes a serious obstruction to achieving a comprehensive, just and lasting peace in the Middle East.")

[73] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 46, Aug. 12, 1949, 6 U.S.T. 3516. ("Restrictive measures taken regarding protected persons shall be cancelled as soon as possible after the close of hostilities").

[74] Els Debuf, *Customary IHL—helping to improve the protection of victims of armed conflict,* INTERNATIONAL COMMITTEE OF

II. SECTION 214(D) OF THE FOREIGN RELATIONS AUTHORIZATION ACT IS UNCONSTITUTIONAL BECAUSE CONGRESS IS CONSTITUTIONALLY PROHIBITED FROM DELEGATING ITS LEGISLATIVE AND/OR REGULATORY POWERS TO PRIVATE CITIZENS.

Whether Congress holds concurrent powers with the executive branch on foreign affairs has long been debated and discussed in federal case law. Even if it is determined that Congress is not infringing on the executives exclusive power to recognize foreign sovereigns by enactment of Section 214(d), Section 214(d) is unconstitutional under the non-delegation doctrine.[75] Congress cannot delegate its legislative power to private entities.[76] "A delegation of legislative power to [private groups] is utterly inconsistent with

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THE RED CROSS, July 7, 2014. *available at* https://www.icrc.org/eng/resources/documents/interview/2014/07-29-customary-international-humanitarian-law-cihl.htm.

[75] *See United States v. Shreveport Grain & Elevator Co.,* 287 U.S. 77, 85 (1932) (holding that the "legislative power of Congress cannot be delegated); *see Field v. Clark*, 143 U.S. 649, 692 (1892) (same); *see also Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 41 (1825). Congress cannot delegate powers that are strictly and exclusively legislative. *Id.*; *see also Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935). Delegation to agencies requires Congress to provide an intelligible principle to which the agency must conform. *J. W. Hampton, Jr. & Co. v. United States,* 276 U.S. 394, 406 (1928).

[76] *See Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928); *see Carter v. Carter Coal Co.* 298 U.S. 238 (1936); *see Assoc. of American Railroads v. U.S. Dep't of Trans.*, 721 F. 3d 666, 677 (DC Cir. 2013), *writ of certiorari* granted, 134 S. Ct.2865 (2014)*; see also* Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17, 143–53 (2000).

the constitutional prerogatives and duties of Congress."[77] Logically drawn from this threshold is the position that if Congress cannot delegate its own powers to private entities. Then Congress cannot delegate powers it shares and/or holds concurrently with another government branch to private entities and/or citizens.

The non-delegation doctrine is rooted in the principle of separation of powers.[78] Congress' powers are limited by the United States Constitution. Article I of the United States Constitution proscribes what Congress can do. "All legislative powers herein granted shall be vested in a Congress of the United States."[79] As such Congress does not have authority to extend its powers beyond its enumerated powers that the Constitution authorizes. An offshoot of the constitutional non-delegation doctrine is Congress' prohibition of delegating regulatory authority to private entities.[80]

Federal case law demonstrates that Congress is constitutionally prohibited from delegating its legislative and/or regulatory authority and powers to

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[77] *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935).

[78] *See id. at* 538 (holding Section 3 of the National Industrial Recovery Act an unconstitutional delegation of legislative power to the executive branch); *see Mistretta v. United States*, 488 U.S. 361, 371 (1989). The non-delegation doctrine initiated principally from cases involving delegation of legislative authority to the executive branch. *See id.*; *see Field,* 143 U.S. at 692; *see also Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 543–44 (1981) (Rehnquist, J., dissenting).

[79] U.S. CONST. art. I, § 1.

[80] *See Roberge*, 278 U.S. 116; *see Carter,* 298 U.S. 238; *see Assoc. of Am. R.R.*, 721 F.3d at 677.

private entities[81] including private citizens. Distinctive from government agencies, both private entities and citizens are not government instrumentalities bound by official duties and take action on behalf of private interests. Congress, through enactment of Section 214(d) of the Foreign Relations Authorization Act, unconstitutionally delegate's its power and/or regulatory authority to private citizens.

A. Federal law is settled that Congress is Constitutionally Prohibited from Delegating Legislative Power and/or Regulatory Authority to Private Entities.

Congress' delegation of regulatory authority to a private entity is unconstitutional. Congress cannot claim powers which are not granted to it by the U.S. Constitution.[82] A limiting construction of the statue or providing an intelligible principle does not survive constitutional muster.[83] Non-delegation of regulatory authority to private entities is necessary to ensure that regulations are not dictated by persons who are not bound by any official duty and may act for arbitrary or selfish reasons.[84]

In *Carter v. Carter Coal Co*., this Court held unconstitutional Section 4.III.(g) of the Bituminious Coal Conservation Act, which provided the majorities of coal producers, specifically the producers of two-thirds

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[81] *See Roberge*, 278 U.S. 116; *see Carter,* 298 U.S. 238; *see Assoc. of Am. R.R.*, 721 F. 3d at 670, 677.

[82] *See Carter v. Carter,* 298 U.S. at 291 *referencing Martin v. Hunter's Lessee*, 1 Wheat. 304, 326 (1816).

[83] *Id.* at 671, *citing Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472–73 (2001).

[84] *Assoc. of Am. R.R.,* 721 F.3d at 675.

of the nation's coal, with the power to dictate legally binding employment regulations for small producers. This Court held Section 4.III (g) was an unconstitutional delegation of regulatory authority and beyond the power of Congress.[85] Specifically, Congress' authorized majorities of producers and miners with the power to fix minimum wages binding in their respective districts and fix hours for the entire industry.[86]

In *Forest Serv. Emples. for Envtl. Ethics v. United States Forest Serv*., the United States Forest Service Agency was found to have delegated significant authority to the National Wild Turkey Federation (NWTF), a private entity.[87] This agency's delegation amounted to an unlawful delegation of the agency's duty to protect the environment.[88] First, the Stewardship Agreement between the U.S. Forest Service Agency and NWTF lacked any enforcement regulation by the U.S. Forest Service over the NWTF.[89] Second, the Stewardship Agreement authorized the NWTF with the power to issue special-use permits, which was in direct violation of the Organic Administration Act as NWTF officers are not federal employees of the agency.[90]

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[85] *Carter*, 298 U.S. at 289–97, 310. The Court also emphasized that Congress has no power to regulate or legislate specifically for the promotion of the general welfare. *Id.*at 289–91, 294, 297.

[86] *Id.* at 310–11.

[87] *Forest Serv. Emples for Envtl. Ethics v. United States Forest Serv.,* 891, 904 (W.D. Ky. 2010).

[88] *Id.*

[89] *Id.* at 904–05.

[90] *Id.*

In *Ass'n of American Railroads v. United States Dep't of Transportation*, the U.S. Court of Appeals held that Section 207 of the Passenger Rail Investment and Improvement Act constituted an unconstitutional delegation of regulatory power to a private entity.[91] Section 207 gave Amtrak the power to jointly exercise regulatory power on equal footing with the Department of Transportation.[92] Amtrak, a member of the Association of American Railroads, also had the power to co-develop regulations on metrics and standards of performance and service quality.[93] If rail carriers failed to satisfy the metrics and standard attributable due to rail carrier's failure to provide preference to Amtrak over freight transportation, the rail carrier would be subject to investigation for infractions.[94] Delegation of regulatory authority to a private entity is unconstitutional.

B. Akin to Non-delegation to Private Entities, Congress is Constitutionally Prohibited from Delegating Legislative Power and/or Regulatory Authority to Private Citizens.

Foremost, the delegation of regulatory authority to private citizens is unconstitutional and problematic as the Constitution neither commits nor authorizes any executive and/or legislative power to private citizens,[95]

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[91] *Assoc. of Am. R.R.,* 721 F.3d at 668, 673–74.

[92] *Id.*

[93] *Id.*

[94] *Id.* at 669–70.

[95] *Id.* at 670 "Fundamental to the public-private distinction in the delegation of regulatory authority is the belief that disinterested government agencies ostensibly look to the public

especially in matters related to foreign affairs. Whether Jerusalem is recognized and/or designated as territory or city of Israel is a highly complex foreign affairs matter not suited for private citizen decision-making. Private citizens have no authority or power over foreign affairs. That power is constitutionally solely authorized to the United States government. However, under Section 214(d), American citizens' born in Jerusalem have the power to request to record their place of birth as Israel on United States government documents—registration of birth, certification of nationality, or passport—implicitly recognizing Jerusalem as Israel's territory.

Second, the delegation of regulatory authority to private citizens is inconsistent with the principle of democratic self-governance.[96] Namely, it puts the power to make rules and regulations into the hands of people whom are not elected by the people nor appointed and/or employed by the government.[97] As such, public accountability is undermined, all the while expanding government power.[98] Delegation to

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good, not private gain. For this reason, delegations to private entities are particularly perilous." *Id.* at 675.

[96] *See* CALVIN R. MASSEY, THE NON-DELEGATION DOCTRINE AND PRIVATE PARTIES, 17 Green Bag 2d 157, 168 (Winter 2014).

[97] *See id.*

[98] *See id.* "It is the hard choices, and not the filling in of the blanks, which must be made by the elected representatives of the people. When fundamental policy decisions underlying important legislation about to be enacted are to be made, the buck stops with Congress and the President insofar as he exercises his constitutional role in the legislative process." *Indus. Union Dep't, AFL-CIO v. API*, 448 U.S. 607, 687 (1980) (Rehnquist, J., Concurring) (expressing the view that the Occupational and Safety and Health Act § 6(b)(5) was an unlawful delegation of legislative authority to the executive).

private entities and/or citizens also creates a system where citizens with the power reap benefits at the expense of less favored citizens.[99]

Third, the delegation of regulatory authority to private citizens vitiates the principle of the public-private distinction in the delegation of regulatory authority.[100] Private entities, unlike public and official bodies are not bound by any official duty, and take action on behalf of their own private interests.[101] This is the same danger present in delegation to private entities.[102] This concern is best demonstrated in *Washington ex rel. Seattle Title Trust Co. v. Roberge*, where a landowner was denied a permit to build on his own land where he failed to obtain consent from his neighbors to build on his own land as required under a land ordinance.[103] This Court held that the land ordinance constituted an improper delegation of authority because neighboring landowners wielded absolute determinative decision-making power over whether a permit was issued or not.[104] This was based on the fact that the building superintendent was bound by the decision of the neighboring landowners, there was no review or appeal, and their refusal to provide consent was final.[105]

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[99] *See id.* at 169–70.

[100] *See id.* at 675–76.

[101] *See Assoc. of Am. R.R.,* 721 F.3d at 675; *see also Planned Parenthood of Wis., Inc. v. Van Hollen*, 2014 U.S. Dist. LEXIS 71377, *19 (W.D. Wis. 2014).

[102] *See* MASSEY, *supra* note 89, at 17.

[103] *Roberge*, 278 U.S. at 119.

[104] *See id.* at 121.

[105] *Id.* at 122.

C. Section 214(d) Constitutes a Delegation of Legislative Power and/or Regulatory Authority to Private Citizens.

Private parties may have a limited role in regulation if that role is merely as an aid to a government agency.[106] Specifically, that the government agency retains the discretion to approve, disapprove or modify that regulation.[107] For example, in *Sunshine Anthracite Coal Co. v. Adkins*, delegation of legislative authority to private persons was not found where board members had the power to propose prices on coal to the National Bituminous Coal Commission because the government retained control over the regulation. The board members were subordinate to the Commission, and the Commission determined the prices.[108] The Commission had the final say on all price

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[106] *See Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940); *see also Currin v. Wallace*, 306 US 1 (1939). Agencies delegating authority and/or regulation to private citizens have also been identified as being constitutionally problematic. *See Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F. 2d 1095, 1143 (D.C. Cir. 1984) *citing Sierra Club v. Sigler,* 695 F. 2d 957, 963 n.3 (5th Cir. 1983); *see also Am. Textile*, 452 U.S. at 543–44 (Rehnquist, J., dissenting). States have also found that private delegations are unconstitutional under their respective state constitutions. *See e.g.*, *Texas Boll Weevil Eradication Found. v. Lewellen,* 952 S.W.2d 454, 469, 471 (Tex. 1997) (holding that the Official Cotton Growers' Boll Weevil Eradication Foundation Act delegated authoritative power to private interested parties); *see e.g.*, *Stewart v. Utah Public Serv. Comm'n,* 885 P.2d 759, 775–76 (Utah 1994) (striking down statute allowing public utility to veto rate regulation plan of the Public Service Commission).

[107] *See Sunshine,* 310 U.S. at 399.

[108] *Id.* at 388.

proposals, with the power to approve, disapprove, or modify the board members proposals.[109]

However, in this Case, private citizens do not serve in purely advisory or ministerial function. Private citizens are regulating the content of their passport, a power generally preserved for the Executive.[110] The United States Department of State ("DOS") does not retain discretion to review, disapprove or modify the regulation.[111] Namely, the Department of State's disapproval is what initiated this Case.[112] Analysis of Section 214(d) demonstrates that the private citizen is given the power, making the decision of whether Jerusalem is considered part of Israel's territory and the agency. " . . . [T]he Secretary shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel."[113] The DOS Secretary only reacts in response to a foreign affairs related matter decision made by the private citizen,

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[109] *Id.* at 388, 399.

[110] *See* Passports Act, 22 U.S.C. § 211a.

[111] *See id.*; *see Assoc. of Am. R.R.,* 721 F.3d at 671, n. 5; *see also* Froomkin, *supra* note 68, at 143–44, 146–47. "If [the Department of Commerce] has handed this power over to [*Internet Corporation for Assigned Names and Numbers*, a private nonprofit corporation] even on a temporary basis, without keeping the right to review its decisions, then that delegation violates the non-delegation doctrine and raises major due process concerns". *Id.* at 142. Froomkin argues that granting power over the domain name system and ability to make binding rules on internet registrants, and policymaking authority constituted unlawful delegation of regulatory authority to private parties. *Id.* at 27–28.

[112] *See* Brief of the Petitioner on Petition for Writ of Certiorari at 3, *Zivotofsky v. Kerry,* (No. 13-628) (Nov. 20, 2013).

[113] 116 Stat. 1366.

not by any government branch and/or entity. According to the language and the use of the term "shall," the DOS Secretary must oblige by the private citizen's request, the DOS Secretary cannot refuse.

This Court in *Currin v. Wallace*, upheld the Tobacco Inspection Act, which authorized the Secretary of Agriculture the power to designate markets for selling tobacco after inspection and grading, but only after a majority of the affected tobacco growers approved.[114] The issue in contention before the Court, was the requirement that two-third of the tobacco growers had to approve the Secretary of Agriculture rules before they went into effect.[115] There was no finding of an unlawful delegation of regulatory authority in *Currin* because it was not a delegation.[116] The tobacco growers were not making the law or regulation, and Congress' prescribed the conditions of the regulation's application, and imposed a restriction on its own regulation.[117]

Section 214(d) is distinguishable from the Tobacco Inspection Act at issue in *Currin v. Wallace* because Section 214(d) does not impose a restriction on Congress' own regulation and the government does not retain control of the regulations.[118] Rather the private citizen retains controls and restricts the agency, the DOS, regulations and/or policies. A private citizen is acting on behalf of their own personal interests, expressing their own views on matters of

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[114] *Currin*, 306 U.S. at 15–16.

[115] *Id.*

[116] *See id.*

[117] *Id.*

[118] *See id.*

sovereignty and recognition. Section 214(d) effectively gives private citizens veto power over regulations and/or policies developed by the Department of State. The will of a private citizen becomes absolute. Section 214(d) delegates its regulatory authority and/or powers over a government agency to private citizens.

III. SECTION 214(D) VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FIFTH AMENDMENT.

As argued above, East Jerusalem is illegally occupied territory by Israel, and according to international law any person born there is not born in Israel.[119] By Section 214(d) giving the option for individuals who are born in Jerusalem to claim they are born in Israel, but not allowing any one to claim they are born in Palestine violates the Equal Protection Clause. "No person shall be deprived of life, liberty, or property without due process of law."[120] This Court established in *Bolling v. Sharpe*, the Equal Protection Clause applicable to the federal government through the Fifth Amendment prohibits the federal government from invidiously discriminating between individuals or groups.[121] Section 214(d) violates the Equal Protection Clause because it invidiously discriminates between Israeli Americans and Palestinian Americans, depriving Palestinian Americans of liberty.

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[119] S.C. Res. 476 U.N. Res. Doc. S/RES/476 (June 30, 1980); *see* UN Department of Public Information, *The Status of Jerusalem,* DPI/2276 ch. 12 (Mar. 2003) http://www.un.org/Depts/dpi/palestine/ch12.pdf.

[120] *See* U.S. CONST. amend. V.

[121] *Bolling v. Sharpe,* 347 U.S. 497 (1954).

A. Section 214(d) is a Facial Classification.

Section 214(d) constitutes a classification on its face because Congress is drawing a distinction between people based on national origin. Specifically, Congress is drawing a distinction between Palestinian citizens and Israeli American citizens. This is demonstrated first by the title of Section 214. The title "United States Policy with Respect to Jerusalem as the Capital of Israel" specifically identifies one country, Israel. There is no room for or mention of Palestine. Section 214(d) restricts American citizens to only being able to designate Israel as the country of birth. Palestinian American citizens are not free to choose Palestine as their country of birth. Section 214(d) effectively grants a right to choose one's country of birth to a group of citizens that cannot be freely exercised by another group of citizens, Palestinian Americans. Section 214(d) is a classification of a group of people on its face.

In *Bray v. Alexandria Women's Health Clinic*, this Court addressed the appearance of facially neutral laws, where a state law prohibited all pregnant persons from getting an abortion.[122] This Court reasoned that the law was not facially neutral because the target of the law was still a specific group of people that was readily identifiable, as women can only get pregnant.[123] In *Bray*, this court compared the anti-abortion state law to segregation laws that made it illegal for both Caucasian and African Americans to desegregate.[124] This Court noted that while the law made desegregation for all citizens, it was neither

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[122] *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993).

[123] *Id.* at 323.

[124] *Id.*

race-neutral because race was the motivating factor and targeting African Americans.[125] Similarly, while Section 214(d) in theory allows for all Americans born in Jerusalem to seek the benefit of having their place of birth recorded as Israel, this is pretextual. Section 214(d) is not race-neutral, as the race and/or national origin is the motivating factor and targeting Palestinian Americans. Section 214(d) was enacted with discriminatory intent and purpose.[126]

B. Section 214(d) constitutes invidious discrimination and has a discriminatory effect on Palestinian Americans.

"A statute otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race" or national origin.[127] This Court stated in *Washington v. Davis*, that an invidious discriminatory purpose may be inferred where a law neutral on its face, bears more heavily on one race than another.[128] Section 214(d) clearly bears more heavily on Palestinian Americans than any other group. There is a disparate impact on Palestinian Americans because they cannot freely identify their country of birth over the disputed territory of Jerusalem, but Israeli Americans can.

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[125] *Id.*

[126] *See Arlington Heights v. Metropolitan Housing Dev. Corp.,* 429 U.S. 252, 264–65 (1977). Importantly, an Equal Protection challenge to a law does not require it rest solely on racial discriminatory purposes, a discriminatory purpose has to only be a motivating factor. *Id.* at 265–66.

[127] *Washington v. Davis*, 426 U.S. 229, 232 (1976); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

[128] *Washington,* 426 U.S. at 232.

Congress as the decision maker in the enactment of this statue selected a particular course of action at least in part because of its adverse effects upon an identifiable group.[129] Congress acted with the knowledge that a large proportion of United States citizens born in Jerusalem, mainly Palestinian Americans would likely not seek to record their place of birth as Israel. Section 214(d) was enacted with the intent to benefit Israeli American citizens at the expense of Palestinian American citizens, and effectively excludes them. Congress intended American citizens, namely Palestinian Americans, to not to be able to identify Jerusalem as part of Palestine, but only as a part of Israel.

Palestinian Americans have been powerless in terms of political influence.[130] Lobbying groups with abundant resources such as the American Israel Political Action Committee (AIPAC) routinely exert and utilize their great influence on Congress.[131] "When key votes are cast, the question on the House floor, troublingly, is . . . 'How is AIPAC going to score

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[129] *Pers. Adm'r of Mass. V. Feeney*, 442 U.S. 256, 279 (1979); *Harris v. McRae*, 448 U.S. 297, 323 (1980).

[130] *See* JOHN J. MEARSHEIMER AND STEPHEN M. WALT, THE ISRAEL LOBBY AND U.S. FOREIGN POLICY, 204–28 (2007).

[131] *Id.*; Connie Buck, *supra* note 60 (Former Justice Minister of Israel, Yossi Beilin, describing AIPAC's political motives: "[t]hey always want to punish the Arabs") *Id.*; *see* David E. Sanger, *Under Pressure, Dubai Company Drops Port Deal*, NY TIMES, Mar. 10, 2006 (Senators including Charles Schumer took action to block the transfer of British controlled ports to an Arab Company, warning that Arab terrorists might "infiltrate" the ports. The House Appropriates Committee voted 62-2 to reject the transfer, because "it allowed the sale of some terminal operations to an Arab state company").

this?'"[132] Palestinians have also been without political influence in regards to the status of Jerusalem[133] and Congress' legislating on issues that relating to the Israeli-Palestinian conflict. For example, on July 30, 2014 the House passed a resolution on titled the "Denouncing the use of civilians as human shields by Hamas and other terrorist organizations in violation of international humanitarian law."[134] The resolution was not neutral and the House failed to denounce or criticize Israel's killing of thousands of Palestinian civilians as violations of international humanitarian law.[135]

Section 214(d) also has a discriminatory effect. According to the 2013 Census, there are approximately 101,985 Palestinian Americans and 130,990 Israeli Americans living in the United States.[136] This

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[132] Connie Buck, *supra* note 60 (Former Congressman Brian Baird on voting to appease AIPAC).

[133] Jerusalem Embassy Act of 1995 §7, 109 Stat. 398 (1995).

[134] H. R. Res. 107, 113th Cong. (2014) (passed the House with 102 cosponsors); *see e.g.*, S. Res. 526, 113th Cong. (2014) (resolution passed unanimously) (condemning the United Nations call for an investigation into Israel for potential human rights violations); *see e.g.*, S. Res. 498, 113th Cong. (2014) (resolution passed unanimously) (fails to call on Israel to cease attacks on Palestine).

[135] *See* U.N. Office for the Coordination of Humanitarian Affairs, Situation Report, Aug. 25, 2014.

[136] U.S. Census Bureau, *2013 American Community Survey 1-Year Estimates* (estimated the Arab population in the U.S. at 1,866,851 million); Arab American Institute Foundation, *Demographics* (2012), http://b.3cdn.net/aai/44b17815d8b386bf16_v0m6iv4b5.pdf (2012 study conducted on the adjusted population total of Arab-Americans concluded that that there are approximately 3.5 million Arab-Americans. "The American

means that thousands of Palestinian Americans whom were born in Jerusalem who attempt to obtain a passport, or birth certificate cannot identify their country of birth as Palestine. We also have to bear in mind the impact on future Palestinian American citizens who will also be prohibited from identifying their country of birth.

Section 214(d) also has further discriminatory effect on religion and the sensitive status of Jerusalem. The sentiments of the three Abrahamic religions with ties to Jerusalem: Christianity, Islam, and Judaism, greatly add to the sensitivity of the status of Jerusalem.[137] Jerusalem is acknowledged by all three Abrahamic religions as a "holy land."[138] The U.N. Security Council has noted the "need for protection and preservation of the unique spiritual and religious dimension of the Holy Places in the City."[139] Israel is a completely Jewish state, so identifying Jerusalem as being under Israeli sovereignty on a government document is discriminatory to Christian and Muslim Americans, because it benefits one religion over others.

Section 214(d) is an example of the discriminatory and biased legislation that continues to plague our

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Community Survey identifies only a portion of the Arab population through a question on "ancestry" on the census long form. Reasons for the undercount include the placement of and limit of the ancestry question (as distinct from race and ethnicity").

[137] JIMMY CARTER, PALESTINE: PEACE NOTE APARTHEID 19 (2006), *citing* JIMMY CARTER, THE BLOOD OF ABRAHAM: INSIGHTS INTO THE MIDDLE EAST (1985).

[138] *Id.*; *Matthew* 27:33-35; *Mark* 15:22-25; *John* 19:17-24; Ruth Eglash & Swati Shara, *Raw footage: Israeli forces storm holiest mosque in Jerusalem*, THE WASHINGTON POST, July 18, 2014.

[139] S.C. Res. 476 U.N. Res. Doc. S/RES/476 (June 30, 1980).

nation, implemented to favor, benefit, and/or provide preferential treatment, to one race, ethnicity, religion, and/or group of persons over another. ADC strongly asserts that recognizing Jerusalem as the capital, city or territory of Israel on a passport, birth certificate, certificate of nationality, or any other government issued document invidiously discriminates against Palestinian-Americans.

C. Section 214(d) is Subject to Strict Scrutiny.

Section 214(d) is subject to strict scrutiny because the law involves a suspect class, race and/or national origin classification against Palestinian Americans. Case law is settled that strict scrutiny is exercised where the law involves a suspect class.[140] This Court held in *Brown v. Board of Education* and *Bolling v. Sharpe*, that classifications based on race are highly suspect.[141] This Court went even further in *McLaughlin v. Florida* and *Washington v. Davis*, stating that racial classifications are subject to the most rigid, strictest scrutiny.[142]

Congress has no compelling government purpose for enacting Section 214(d). It bears no rational relationship to a legitimate government purpose and Section 214(d) is unexplainable on grounds other than race and/or national origin. There is no truly significant reason to enact a statute that discriminates against and/or disproportionately favors one group of citizens over another. "Liberty under law extends to

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[140] *Bolling*, 347 U.S. at 499; *Brown v. Bd. of Edu.*, 347 U.S. 483 (1954).

[141] *Id.*

[142] *McLaughlin v. Florida,* 379 U.S. 184, 192 (1964); *Washington v. Davis,* 426 U.S. at 242.

the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective."[143] In all respects a group of American citizens, Palestinian Americans, are actually prohibited and/or all excluded from a right and liberty granted by law to American citizens.

CONCLUSION

Amicus respectfully urges the Court to affirm the decision of the Court of Appeals.

Respectfully submitted,

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[143] *Bolling,* 347 U.S. at 499–500. Liberty is not confined to "mere freedom from bodily restraint." *Id.* at 500.