No. 10-699

In the Supreme Court of the United States

M.B.Z., BY HIS PARENTS AND GUARDIANS
ARI Z. ZIVOTOFSKY, PETITIONER

v.

HILLARY RODHAM CLINTON, SECRETARY OF STATE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in affirming the dismissal of petitioner's suit seeking to compel the Secretary of State to record "Israel" as his place of birth in his United States passport and Consular Report of Birth Abroad, instead of "Jerusalem," when the panel unanimously agreed that the decision how to record the place of birth for a citizen born in Jerusalem in official United States government documents is committed exclusively to the Executive Branch by the Constitution.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-43a) is reported at 571 F.3d 1227. A prior opinion of the court of appeals (Pet. App. 77a-90a) is reported at 444 F.3d 614. The opinion of the district court (Pet. App. 55a-77a) is reported at 511 F. Supp. 2d 97. A prior opinion of the district court is unreported but is available at 2004 WL 5835212.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 2009. A petition for rehearing was denied on June 29, 2010 (Pet. App. 44a-55a). On August 31, 2010, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including No-

vember 26, 2010, and the petition was filed on November 24, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The status of Jerusalem is one of the most sensitive and long-standing disputes in the Arab-Israeli conflict. For the last 60 years, since the Truman Administration, the United States' consistent policy has been to recognize no state as having sovereignty over Jerusalem, leaving that issue to be decided by negotiation between the parties to the Arab-Israeli dispute. The recognized representatives of Israel and the Palestinian people have agreed since 1993 that Jerusalem is one of the core issues that needs to be addressed bilaterally in permanent status negotiations. C.A. App. 56-57; Gov't C.A. Br. 6-11 & n.1.

Within this "highly sensitive" and "politically volatile" context, "U.S. Presidents have consistently endeavored to maintain a strict policy of not prejudging the Jerusalem status issue and thus not engaging in official actions that would recognize, or might be perceived as constituting recognition of, Jerusalem as either the capital city of Israel, or as a city located within the sovereign territory of Israel." C.A. App. 59. This policy is rooted in the State Department's assessment that

> [a]ny unilateral action by the United States that would signal, symbolically or concretely, that it recognizes that Jerusalem is a city that is located within the sovereign territory of Israel would critically compromise the ability of the United States to work with Israelis, Palestinians and others in the region to further the peace process, to bring an end to violence in

> Israel and the Occupied Territories, and to achieve progress on the Roadmap [toward peace].

Id. at 58-59.

The United States policy concerning Jerusalem is reflected in the State Department's policies and procedures for preparing passports and reports of birth abroad of United States citizens born in Jerusalem. As a general rule, the country recognized by the United States as having sovereignty over the place of birth of a passport applicant is recorded in the passport. See Pet. App. 92a-93a (7 *Foreign Affairs Manual (FAM)* 1383.5-4 (1987)). Because the United States does not currently recognize any country as having sovereignty over Jerusalem, under United States policy and State Department implementing regulations, only "Jerusalem" is recorded as the place of birth in the passports of United States citizens born in that city. C.A. App. 387 (*FAM* 1383, Exh. 1383.1).[1]

2. In September 2002, the President signed into law the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350. Section 214 of that Act, entitled "United States Policy with Respect to Jerusalem as the Capital of Israel," contains various provisions relating to Jerusalem.[2] As relevant here,

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[1] In 2008, the State Department revised the *FAM* provisions governing the place-of-birth designation of United States citizens born in Israel, Jerusalem, and Israeli-Occupied Areas. See *FAM* 1360, App. D, Birth in Israel, Jerusalem, and Israeli-Occupied Areas, http://www.state.gov/documents/organization/94675.pdf. The revision of these provisions effected no change in policy and was intended only to reorganize and clarify existing policy.

[2] Congress has enacted provisions similar to Section 214 in subsequent legislation. See Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, Tit. IV, § 404, 118 Stat. 86; Consolidated Appropriations

Subsection (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 [of State] shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel." *Id.* § 214(d), 116 Stat. 1366.

At the time of enactment, President Bush stated that if Section 214 is construed to impose 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." *Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003*, Pub. Papers 1697, 1698 (2002). Even with the President's statement, making clear that "U.S. policy regarding Jerusalem has not changed," *ibid.*, the statute provoked strong reaction and condemnation in the Middle East and confusion about United States policy toward Jerusalem. See, *e.g.*, C.A. App. 396-399.

3. Petitioner is a United States citizen born on October 17, 2002 in Jerusalem. Pet. App. 5a. In December 2002, petitioner's mother filed an application for a Consular Report of Birth Abroad and a United States passport for petitioner, listing his place of birth as "Jerusalem, Israel." *Id.* at 6a. United States diplomatic officials informed petitioner's mother that State Department policy required them to record "Jerusalem" as peti-

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Act, 2005, Pub. L. No. 108-447, Tit. IV, § 406, 118 Stat. 2903; Science, State, Justice, Commerce, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-108, § 405, 119 Stat. 2326; Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, Div. J, § 107, 121 Stat. 2287.

tioner's place of birth, which is how petitioner's place of birth appears in the documents he received. *Ibid.*

On his behalf, petitioner's parents filed this suit against the Secretary of State (Secretary) seeking an order compelling the State Department to identify petitioner's place of birth as "Jerusalem, Israel" in the official documents. Pet. App. 6a. The district court initially dismissed the complaint after concluding that petitioner lacked standing, and that the complaint raised a nonjusticiable political question. See Nos. 03-1921, 03-2048, 2004 WL 5835212 (D.D.C. Sept. 7, 2004). The court of appeals reversed and remanded, concluding that petitioner had standing and that a more complete record was needed on the foreign policy implications of recording "Israel" as petitioner's place of birth.[3] Pet. App. 77a-90a.

On remand, the State Department explained, among other things, that in the present circumstances if "Israel" were to be recorded as the place of birth of a person born in Jerusalem, such "unilateral action" by the United States on one of the most sensitive issues in the negotiations between Israelis and Palestinians "would critically compromise" the United States' ability to help further the Middle East peace process. C.A. App. 58-59. The district court again dismissed on political question grounds. Pet. App. 55a-77a.

4. The court of appeals affirmed. Pet. App. 1a-43a.

a. The panel majority held that petitioner's claim is foreclosed because it raises a nonjusticiable political question. Pet. App. 15a-16a. The court's analysis fo-

[3] Petitioner had originally sought an order requiring the Secretary to record "Jerusalem, Israel" as his place of birth. During the course of the litigation, petitioner modified that request to seek the recordation of "Israel" as his place of birth. See Pet. App. 80a n.1.

cused entirely on the first factor under *Baker* v. *Carr*: whether resolution of petitioner's claim would "raise issues whose resolution has been committed to the political branches by the text of the Constitution." *Id.* at 8a (citing *Baker* v. *Carr*, 369 U.S. 186, 217 (1962)). "Following the framework laid out in *Nixon* v. *United States*," 506 U.S. 224 (1993), the court of appeals began "by 'interpret[ing] the [constitutional] text in question and determin[ing] whether and to what extent the issue is textually committed' to a political branch." Pet. App. 8a (quoting 506 U.S. at 228); see *Baker*, 369 U.S. at 217. The "issue" before the court, as the majority saw it, was "whether the State Department can lawfully refuse to record [petitioner's] place of birth as 'Israel' in the face of a statute that directs it to do so." Pet. App. 9a.

The court determined that the President's textual authority to "'receive Ambassadors and other public Ministers,' U.S. Const. [A]rt. II, § 3, includes the power to recognize foreign governments," and to decide "what government is sovereign over a particular place." Pet. App. 9a-11a (citing cases). Based on this authority, the court held that "the President has exclusive and unreviewable constitutional power to keep the United States out of the debate over the status of Jerusalem." *Id*. at 11a. The State Department's decision to record "Jerusalem" as the place of birth in passports of United States citizens born in that city, the court of appeals explained, "implements this longstanding policy." *Ibid.* Because petitioner's request that the court order the State Department to record his place of birth as "Israel" "trenches upon the President's constitutionally committed recognition power," the court held that the claim presents a nonjusticiable political question. *Id*. at 12a.

In so concluding, the court of appeals addressed petitioner's contention that he had asked the court "to do nothing more than interpret a federal statute—a task within [the court's] power and competence." Pet. App. 12a. The court explained that petitioner's "claim either at the jurisdictional stage under the political question doctrine or on the merits * * * implicates the recognition power." *Ibid.* The court then framed the question as "whether [petitioner] loses on jurisdictional grounds, or on the merits because Congress lacks the power to give him an enforceable right to have 'Israel' noted as his birthplace on his government documents." *Id.* at 13a. Noting that it was "aware of no court that has held" the political question doctrine inapplicable "simply because the claim asserted involves a statutory right," the court of appeals "decline[d] to be the first court" to do so. *Id.* at 13a-14a.

b. Judge Edwards concurred in the judgment, concluding that petitioner "has no viable cause of action," Pet. App. 43a. See *id.* at 16a-43a. He agreed with the majority that, under the Constitution, "[t]he Executive has exclusive and unreviewable authority to recognize foreign sovereigns." *Id.* at 32a. He further found it "obvious[]" that the Jerusalem passport policy "aims to further the United States' policy regarding the recognition of Israel." *Id.* at 35a. And, like the majority, Judge Edwards concluded that as "these are matters within the exclusive power of the Executive * * * , neither Congress nor the Judiciary has the authority to second-guess the Executive's policies governing the terms of recognition." *Id.* at 42a-43a.

Judge Edwards, however, disagreed with the majority's framing of the issue on appeal. He identified the issue as "[w]hether [Section] 214(d) * * * , which af-

fords [petitioner] a statutory right to have 'Israel' listed as the place of birth on his passport, is a constitutionally valid enactment." Pet. App. 18a. Judge Edwards therefore would not have affirmed the district court's dismissal on political question grounds. *Id.* at 19a. Instead, he would have found the statute unconstitutional because it "impermissibly intrudes on the President's exclusive power to recognize foreign sovereigns." *Id.* at 43a.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. The court of appeals unanimously concluded that the Executive Branch's decision to record Jerusalem as the place of birth of a United States citizen born in that location is constitutionally committed to the President's sole discretion. See Pet. App. 9a-11a; *id.* at 32a-38a (Edwards, J., concurring). That determination is clearly correct.

The Constitution grants solely to the President the power to "receive Ambassadors and other Public Ministers." U.S. Const. Art. II, § 3.[4] This Court has long recognized that the logical implication of this authority is that the Constitution commits to the President the authority to recognize the foreign sovereign that sends the ambassador or public minister the President chooses to receive. See, *e.g.*, *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 410 (1964); *United States* v.

[4] In contrast, other foreign affairs powers are shared between the political Branches (*e.g.*, U.S. Const. Art. II, § 2, Cl. 2 (power to make treaties and appoint ambassadors)), or assigned to Congress (*e.g.*, U.S. Const. Art. I, § 8, Cl. 3 (regulation of foreign commerce)).

Pink, 315 U.S. 203, 229 (1942); *Williams* v. *Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415, 420 (1839). Because the President has authority to recognize a foreign state, he has the power to decide, for purposes of United States law, "which nation has sovereignty over disputed territory." *Baker* v. *Carr*, 369 U.S. 186, 212 (1962); *Williams*, 38 U.S. (13 Pet.) at 420.

As the court of appeals held, the State Department's passport policy regarding Jerusalem is clearly encompassed within the President's recognition power. A passport "is a 'political document' that is 'addressed to foreign powers,' 'by which the bearer is recognized, in foreign countries, as an American citizen.'" Pet. App. 37a (Edwards, J., concurring) (quoting *Urtetiqui* v. *D'Arcy*, 34 U.S. (9 Pet.) 692, 699 (1835)); see *id.* at 11a-12a. "A 'political document' indicating that a person born in Jerusalem is from the sovereign nation of Israel misstates the United States' position on the recognition of Israel." *Id.* at 37a (Edwards, J., concurring); see *id.* at 11a. The designation in a passport of a foreign state as a person's place of birth is thus a public statement that the United States recognizes the foreign state's sovereignty over the place where the United States citizen was born. Accordingly, the decision how to record the place of birth of a citizen born in Jerusalem is exclusively committed to the Executive Branch. *Id.* at 11a; *id.* at 43a (Edwards, J., concurring).

2. Based on that determination, the majority deemed the case nonjusticiable because it would require the adjudication of an issue textually committed to the Executive Branch by the Constitution. Pet. App. 12a. Relying on that same determination, the concurring opinion would have resolved the case on its merits and concluded that petitioner "has no viable cause of action

under [Section] 214(d)," because that provision is unconstitutional. *Id.* at 43a (Edwards, J., concurring). Petitioner does not seriously dispute the correctness of that critical holding—*i.e.*, that the decision how to record the birthplace of a citizen born in Jerusalem is exclusively within the President's power—and there is no conflict among the courts of appeals on that issue. Instead, petitioner asks this Court to resolve the disagreement between the majority and the concurring opinion over the question, as the majority put it, "whether [petitioner] loses on jurisdictional grounds, or on the merits." *Id.* at 13a. The majority's political question ruling is correct, and a purely internal disagreement among members of a court of appeals' panel regarding the appropriate basis for disposition does not warrant this Court's review. Cf. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

a. The political question doctrine is "primarily a function of the separation of powers," *Baker*, 369 U.S. at 210, and "is designed to restrain the Judiciary from inappropriate interference in the business of the other branches of Government," *United States* v. *Munoz-Flores*, 495 U.S. 385, 394 (1990). It thus "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n* v. *American Cetacean Soc'y*, 478 U.S. 221, 230 (1986) (*Japan Whaling*). In *Baker*, this Court identified six characteristics "[p]rominent on the surface of any case held to involve a political question," including, as particularly relevant here, "a textually demonstrable constitutional commitment of the issue to a coordinate political department." 369 U.S. at 217.

The court of appeals correctly held that petitioner's claim is nonjusticiable under the political question doctrine. Following this Court's instruction in *Nixon* v. *United States*, 506 U.S. 224 (1993), the court of appeals "beg[a]n by 'interpret[ing] the [constitutional] text in question and determin[ing] whether and to what extent the issue is textually committed' to a political branch." Pet. App. 8a (quoting 506 U.S. at 228). As discussed above, the majority correctly concluded (and the concurring judge agreed) that the decision how to record in a United States passport the place of birth of a citizen born in Jerusalem is exclusively committed to the Executive Branch. Because petitioner's claim challenges that decision and seeks an order compelling the Secretary to record "Israel" in his passport, the case raises a nonjusticiable political question.

Contrary to petitioner's contention (Pet. 10-12), the fact that his claim is premised on a federal statute does not transform this case into a justiciable controversy. Courts, of course, are fully competent to interpret statutes and to decide questions concerning separation of powers. See, *e.g.*, *Japan Whaling*, 478 U.S. at 230. But under *Nixon*, applying *Baker*, once a court determines that an action presented for judicial resolution prominently involves an issue textually committed by the Constitution to a political Branch of government (*i.e.*, to a Branch other than the Judiciary), that resolves the case—whether or not a statute is also at issue. Petitioner's reliance on *Japan Whaling* (Pet. 10-11) is therefore misplaced. That case did not involve a textual constitutional commitment of authority to a single political Branch. *Japan Whaling* presented only "a purely legal question of statutory interpretation," 478 U.S. at 230; it has no bearing on a case, such as this, in which a party

seeks to invoke a statute to have the courts review a decision assigned exclusively to the President.

Petitioner also suggests (Pet. 11) that the court of appeals was simply asked to interpret a statute "affecting foreign affairs." That is incorrect. Petitioner asked the courts to order the Secretary to "record in official documents that Israel is the birthplace of a U.S. citizen born in Jerusalem." Pet. App. 2a-3a. As the panel agreed, that designation is textually committed to another Branch of government. The court of appeals thus properly dismissed the case on political question grounds. See *Nixon*, 506 U.S. at 238 (dismissing on political question grounds "after exercising [the Court's] delicate responsibility" as "'ultimate interpreter of the Constitution'" to ensure that the challenged action was one committed by the Constitution to the authority of a political Branch) (quoting *Baker*, 369 U.S. at 211).

b. The concurring opinion provides an alternative ground for affirmance. It is the position of the Executive Branch that even if the case were justiciable, petitioner would have "no viable cause of action under [Section] 214(d)," because that provision is unconstitutional. Pet. App. 43a (Edwards, J., concurring). As Judge Edwards explained, "Article II assigns to the President the exclusive power to recognize foreign sovereigns, and Congress has no authority to override or intrude on that power." *Ibid.* Just as the courts cannot override the core foreign-policy determinations embodied in the State Department's policies regarding the status of Jerusalem by adjudicating individual cases challenging such determinations, so too Congress cannot override them by enacting a federal statute. Accordingly, the outcome in this case is "inescapable" (*ibid.* (Edwards, J., concurring)), and the court of appeals correctly affirmed

the dismissal of petitioner's suit. There is no reason for this Court to grant review to resolve a purely intra-panel disagreement with no impact on the ultimate result, particularly where, as here, the case involves an exceedingly sensitive foreign policy concern.

3. Petitioner contends (Pet. 13-14) that the majority's political question ruling conflicts with other courts of appeals' "more discriminating" analysis. Petitioner also argues (Pet. 15-18) that the Court should grant review so that the court of appeals can consider, on remand, the legal significance of the President's signing statement. Neither contention has merit.

a. There is no conflict among the courts of appeals on the question presented. The majority was "aware of no court that has held [that a court] cannot or need not conduct the jurisdictional analysis called for by the political question doctrine simply because the claim asserted involves a statutory right," Pet. App. 13a, and petitioner has not identified any such case.[5]

The cases petitioner does cite (Pet. 13-14) are inapposite. Several do not involve rights asserted under a federal statute. See *Connecticut* v. *American Elec. Power Co.*, 582 F.3d 309 (2d Cir. 2009) (federal common law claims), cert. granted, No. 10-174 (Dec. 6, 2010)[6];

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[5] Petitioner discusses (Pet. 11-12) the en banc D.C. Circuit's decision in *El-Shifa Pharmaceutical Industries Co.* v. *United States*, 607 F.3d 836 (2010). Among other things, the plaintiffs in that case also sought this Court's review of the question whether the political question doctrine is applicable in cases presenting statutory challenges to executive action. On January 18, 2011, this Court denied the petition for a writ of certiorari. See *El-Shifa Pharm. Indus. Co.* v. *United States*, 131 S. Ct. 997 (2011). The same result is warranted here.

[6] There is no reason to hold this case for *American Electric Power Co.* v. *State of Connecticut*, cert. granted, No. 10-174 (Dec. 6, 2010)

Lane v. *Halliburton*, 529 F.3d 548 (5th Cir. 2008) (fraud and tort claims); *Alperin* v. *Vatican Bank*, 410 F.3d 532 (9th Cir. 2005) (finding only common law property claims justiciable), cert. denied *sub nom. Order of Friars Minor* v. *Alperin*, 546 U.S. 1137 (2006). The others involve case-specific rejections of the political question doctrine. See *Totes-Isotoner Corp.* v. *United States*, 594 F.3d 1346, 1352-1353 (Fed. Cir. 2010) (finding political question doctrine inapplicable to Fifth Amendment challenge to the use of gender in tariff classifications); *Romer* v. *Carlucci*, 847 F.2d 445, 461-463 (8th Cir. 1988) (finding political question doctrine inapplicable to National Environmental Policy Act challenge to Air Force Environmental Impact Statement). Moreover, petitioner asserts only a statutory claim to have his place of birth recorded as Israel, which petitioner seeks to minimize as simply a way of assisting in identifying the passport holder—scarcely an issue involving "individual liberties" as petitioner asserts (Pet. 14). By contrast, the "individual liberties" cases petitioner cites (Pet. 14) involved criminal detention, *United States* v. *Decker*, 600 F.2d 733 (9th Cir. 1979), immigration custody, *Khouzam* v. *Attorney General*, 549 F.3d 235 (3d Cir. 2008), and

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(*American Electric Power*). Although the third question presented in that case involves the political question doctrine, it does not involve the first *Baker* factor at issue here. The petitioners in *American Electric Power* instead contend that the assertion of common law claims to limit power-plant emissions of greenhouse gases on the theory that they contribute to a public nuisance and global climate change implicates the second and third *Baker* factors. See Pet. at i, 28, *American Electric Power, supra*. Accordingly, even assuming that this Court were to decide the applicability of the political question doctrine in that case (rather than disposing of the case on another ground, such as prudential standing), there is no reason to expect that decision or its reasoning to affect the outcome of this case.

human rights violations, *Kadic* v. *Karadzic*, 70 F.3d 232 (2d Cir. 1995).

b. Petitioner contends (Pet. 15-18) that this Court should grant review and reverse so that, on remand, the court of appeals could consider the legal significance of the President's signing statement. As an initial matter, even if the Court were to grant review and conclude that the case is justiciable, the reasoning set forth by Judge Edwards would provide a clear alternative ground for affirmance and, thus, there would be no remand. None of the panel judges deemed it necessary to consider the significance of the President's signing statement or any challenge to it. The suggestion that the court of appeals would have to do so on remand is incorrect because—if the case were found justiciable—Section 214(d) would be found unconstitutional without any need to refer to the President's statements.

In any event, petitioner's speculation is hardly a reason to grant review. It has long been settled that the President need not comply with a statutory provision that infringes his constitutional authority. See, *e.g.*, *Myers* v. *United States*, 272 U.S. 52 (1926); *National League of Cities* v. *Usery*, 426 U.S. 833, 841 n.12 (1976), overruled on other grounds by *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); see also *INS* v. *Chadha*, 462 U.S. 919, 942 n.13 (1983) ("[I]t is not uncommon for Presidents to approve legislation containing parts which are objectionable on constitutional grounds."). That question, however, was not addressed below and is not presented here, and the Court should not grant review based on speculation as to what might (or might not) be decided at a later stage of proceedings that might (or might not) ensue depending upon the nature of the Court's disposition if it were to grant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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