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

PETITIONER'S REPLY BRIEF

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Throughout this litigation – beginning in the district court, continuing in the court of appeals, and culminating with the opening paragraphs of the Solicitor General's Brief in Opposition – the government's strategy has been to exaggerate the foreign-policy significance of the place-of-birth entry on a passport. There is, in fact, no solid basis for believing that if the State Department's discriminatory passport practice is revised – as Congress did in 2002 with Section 214(d) of the Foreign Relations Authorization Act – there will be drastic foreign-policy consequences to the "highly sensitive" and "politically volatile" issue of

sovereignty over Jerusalem. But the courts below have accepted these overblown representations and mistakenly invoked the "political question" doctrine so as to avoid examining the real-life impact of the relatively modest change that Congress directed, in the interest of fairness, in Section 214(d).

The reasons why, for almost a century, a citizen's place of birth has been designated on his or her passport were established by discovery in this case and acknowledged by the State Department. Passports specify a citizen's date and place of birth as means of identification. The location that a citizen designates as his or her place of birth is not an indicator of official recognition and has no significance in the sphere of foreign relations. Congress was satisfied that the sky will not fall on American foreign relations in the Middle East if the 52,569 American citizens born in Jerusalem carried passports that say "Israel" (as 99,177 American citizens born in cities like Tel Aviv and Haifa now do) rather than "Jerusalem."

I.

THE STATE DEPARTMENT'S PASSPORT POLICY IS NOT TIED TO RECOGNITION OF FOREIGN SOVEREIGNS BUT MERELY ACCOMMODATES INDIVIDUAL PREJUDICES

The district court and the court of appeals viewed the State Department's practice of refusing to permit U.S. citizens born in Jerusalem to designate "Israel" as their place of birth as an exercise of the exclusive

Executive Branch power to recognize foreign sovereigns. That rationale is contradicted, however, by (1) the instruction that if an American citizen born in a city that is within the recognized boundaries of Israel "object[s] to showing Israel . . . as their birthplace in the passport," the city of birth may be substituted, (2) the instruction that any American citizen born before 1948 may choose to designate "Palestine" as his or her place of birth although no such country was ever recognized as sovereign by any American President, and (3) the authorization to list "West Bank" and "Gaza Strip" as a place of birth in a passport although no President has ever recognized such sovereigns.

Opponents of Israel are permitted to avoid the sovereign that the President has recognized, and no one is alarmed over the foreign-policy implications of allowing such exceptions. American citizens born in Jerusalem who support Israel are discriminatorily prohibited from listing "Israel" as their place of birth even if they were born in West Jerusalem – an area that is internationally recognized as part of Israel.

II.

MANY DECISIONS OF THIS COURT AND LOWER FEDERAL COURTS ESTABLISH JUDICIAL AUTHORITY OVER THE ISSUANCE AND CONTENTS OF US PASSPORTS

The fact that passports are issued under the authority of the Secretary of State does not mean that the issuance and contents of a passport are necessarily aspects of foreign policy assigned

exclusively to the President. See *Zemel v. Rusk*, 381 U.S. 1 (1965); *Kent v. Dulles*, 357 U.S. 116 (1958). The Court of Appeals for the District of Columbia Circuit has decided substantive issues regarding passports in *Lynd v. Rusk*, 389 F.2d 940 (D.C. Cir. 1967); *Schachtman v. Dulles*, 225 F.2d 938 (D.C. Cir. 1955).

The issue raised by the complaint in this case – whether the plaintiff may have a passport that identifies his place of birth as "Israel" – is, in fact, far less likely to affect the nation's foreign-policy interest than the issue that the lower courts considered and that this Court decided on the merits in *Haig v. Agee*, 453 U.S. 280 (1981). In the *Agee* case, the respondent's activities were, according to the Executive Branch, harming American foreign policy. Neither the lower courts nor this Court refused, as did the court below in this case, to decide the issues presented on the ground that they were "political questions."

III.

THE PETITION SHOULD BE GRANTED TO RESOLVE THE LOWER COURT'S CONFUSION REGARDING THE "POLITICAL QUESTION" DOCTRINE

The Solicitor General compounds the confusion over the breadth of the "political question doctrine" by defending the patently erroneous rationale of the majority below. Judge Edwards and the three active Circuit Judges (Ginsburg, Rogers, and Kavanaugh) who voted to rehear the case en banc apparently

recognize the mischief that will be caused in the lower courts by the jurisdictional ruling in this case.

There is only one Question Presented in the Petition for a Writ of Certiorari. That question addresses the legal issue on which the lower court based its holding. It is an issue that deserves this Court's attention. An authoritative resolution of the boundaries of the "political question doctrine" will assist the lower courts and particularly the District of Columbia Circuit, which is the site of many lawsuits in which the doctrine is invoked.

CONCLUSION

For the foregoing reasons and those presented in the Petition for a Writ of Certiorari, the writ should be granted.

Respectfully submitted,

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