13-628

No. 13-_____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal statute that directs the Secretary of State, on request, to record the birthplace of an American citizen born in Jerusalem as born in "Israel" on a Consular Report of Birth Abroad and on a United States passport is unconstitutional on the ground that the statute "impermissibly infringes on the President's exercise of the recognition power reposing exclusively in him."

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The opinion of the Court of Appeals for the District of Columbia Circuit (Pet. App. A, pp. 1a – 63a, *infra*) is reported at *Zivotofsky v. Secretary of State,* 725 F.3d 197 (D.C. Cir. 2013). Earlier opinions of the Court of Appeals are reported at 571 F.3d 1227 (D.C. Cir. 2009), *rehearing en banc denied*, 610 F.3d 84 (D.C. Cir. 2010), and 444 F.3d 614 (D.C. Cir. 2006). The District Court's two opinions are reported at 511 F. Supp. 2d 97 (D.D.C. 2007), and electronically at 2004 WL 5835212 (D.D.C. Sept. 7, 2004).

JURISDICTION

The Court of Appeals for the District of Columbia Circuit issued its opinion on July 23, 2013. On October 8, 2013, the Chief Justice extended the time for filing a petition for a writ of certiorari to November 20, 2013 (Pet. App. B, p. 64a, *infra*). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE AND REGULATIONS INVOLVED

Section 214(d) of Public Law No. 107-228 provides as follows:

> **SEC. 214. UNITED STATES POLICY WITH RESPECT TO JERUSALEM AS THE CAPITAL OF ISRAEL**
>
> * * *
>
> (d) RECORD OF PLACE OF BIRTH AS ISRAEL FOR PASSPORT PURPOSES. For 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.

The relevant provisions of the Foreign Affairs Manual ("FAM"), 7 FAM 1380-1383, appear at Pet. App. C, pp. 65a-68a, *infra*.

STATEMENT

This is an action brought by parents of petitioner, an American citizen born in Jerusalem, seeking enforcement of a statutory provision enacted in 2002 directing the Secretary of State, on request, to endorse U.S. passports and Consular Reports of Birth Abroad of American citizens born in Jerusalem with "Israel" as the place of birth. The Court of Appeals initially affirmed the District Court's dismissal of the complaint on the ground that the case required the court to determine a "political question." *Zivotofsky ex rel. Zivotofsky v. Secretary of State*, 511 F. Supp. 2d 97 (D.D.C. 2007), *aff'd*, 571 F.3d 1227 (D.C. Cir. 2009). This Court reversed the Court of Appeals' "political question" ruling and remanded the case to the Court of Appeals for a decision on the merits of the constitutional issue. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012). Ruling on the merits, the Court of Appeals held that the statute is unconstitutional because it "impermissibly infringes on the President's exercise of the recognition power."

1. Petitioner and His Documentation

Petitioner was born at Shaare Zedek Hospital in Western Jerusalem on October 17, 2002. Both his parents were born in the United States. Pursuant to 8 U.S.C. § 1401(c), petitioner was a United States citizen at birth.

Petitioner's mother applied for a passport and Consular Report of Birth Abroad ("CRBA") for her newborn son. She requested that the place of birth on both documents be designated as "Jerusalem, Israel."* Her request was denied. Although the routine designation for foreign-born American citizens lists the individual's country of birth and does not specify the city, petitioner's passport and his CRBA list only "Jerusalem" as his place of birth and do not include *any* country of birth.

2. State Department Policy

Rules regarding "Passport Preparation" appear in the State Department's Foreign Affairs Manual ("FAM") at 7 FAM 1380-1383. Pet. App. C, pp. 65a-68a, *infra*. Rules regarding "place of birth transcription" appear at 7 FAM 1383. They specify that "[a]s a general rule, enter the country of the applicant's birth in the passport." Pet. App. C, p. 65a.

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* This request was ultimately corrected with the government's consent to reflect a request that the documents record "Israel" as petitioner's place of birth. See 444 F.3d at 616, n.1.

Section 1383.5-6 of the FAM relates specifically to Jerusalem. It reads as follows:

> **7 FAM 1383.5-6 Jerusalem**
> For applicants born before May 14, 1948 in a place that was within the municipal borders of Jerusalem, enter JERUSALEM as their place of birth. For persons born before May 14, 1948 in a location that was outside Jerusalem's municipal limits and later was annexed by the city, enter either PALESTINE or the name of the location (area/city) as it was known prior to annexation. For persons born after May 14, 1948 in a location that was outside Jerusalem's municipal limits and later was annexed by the city, it is acceptable to enter the name of the location (area/city) as it was known prior to annexation (see subsections 7 FAM 1383.5-4 and 7 FAM 1383.5-5).

A "birthplace transcription guide" appears as "Part II" of 7 FAM 1383 Exhibit 1383.1. With the listing of "JERUSALEM," the "guide" directs: "Do not write Israel or Jordan. See sections 7 FAM 1383.5-5, 7 FAM 1383.5-6."

Following "ISRAEL," the "guide" states: "Does not include Jerusalem or areas under military occupation. See section 7 FAM 1383.5-5."

It is undisputed that the State Department has followed the policy of rejecting applicants' requests to designate "Israel" as the birthplace of United

States citizens born in Jerusalem, even within Jerusalem's pre-1967 "municipal limits."

3. The Challenged Statute

Congress enacted H.R. 1646, the Foreign Relations Authorization Act for 2003, Pub. L. No. 107-228, 116 Stat. 1350 (2002). President George W. Bush signed the law on September 30, 2002. Section 214 of the Act relates to "United States Policy with Respect to Jerusalem as the Capital of Israel." Subsection (d) directs the Secretary of State to identify a United States citizen born in Jerusalem, upon the citizen's request, as born in "Israel" on a passport or a Consular Report of Birth Abroad.

On signing the Act, the President made the following statement regarding all of Section 214, without identifying subsection (d) specifically (38 Weekly Compilation of Presidential Documents 1658 (Sept. 30, 2002)):

> Section 214, concerning Jerusalem, impermissibly interferes with the President's constitutional authority to conduct the Nation's foreign affairs and to supervise the unitary executive branch. Moreover, the purported direction in section 214 would, if construed as mandatory rather than advisory, 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. U.S. policy regarding Jerusalem has not changed.

4. Petitioner's Standing Is Confirmed

Petitioner's parents filed a complaint seeking an injunction, mandamus, and declaratory relief on September 16, 2003. On September 7, 2004, the district court granted the government's motion to dismiss on the grounds that (1) the petitioner lacked constitutional standing because he suffered no "injury in fact" and (2) his complaint presented a nonjusticiable "political question." 2004 WL 5835212 (D.D.C. 2004).

The court of appeals reversed the district court's decision regarding standing and remanded the case for discovery and the development of "a more complete record." 444 F.3d at 620.

5. The Government Acknowledges in Discovery That "Place of Birth" Is Designated Principally for Identification Purposes

The government admitted, in response to a Request for Admissions, that "United States citizens traveling in foreign countries are routinely identified in messages sent to and from the Department of State by (1) name, (2) date of birth, and (3) place of birth." In response to another Request for Admissions, the government acknowledged that "identification is the principal reason" that U.S. passports require "place of birth."

6. The District Court Again Dismisses on "Political Question" Grounds

Following discovery, petitioner filed a motion for summary judgment. The government renewed its motion to dismiss and moved alternatively for summary judgment. The district court again issued an order granting the government's motion to dismiss on the ground that the court lacked subject-matter jurisdiction because the complaint "raises a quintessential political question which is not justiciable by the courts." 511 F. Supp. 2d at 102.

7. The Court of Appeals Affirms the Dismissal on "Political Question" Grounds

A majority of the court of appeals' panel affirmed the district court's dismissal on the ground that the complaint "raises a nonjusticiable political question." 571 F.3d 1227. In a concurring opinion Senior Circuit Judge Edwards asserted that "the political question doctrine has no application in this case." 571 F.3d at 1234-1236. Rehearing *en banc* was denied by a 6-to-3 vote. 610 F.3d 84.

8. This Court Grants Certiorari on the "Political Question" Issue and Directs the Parties To Brief and Argue the Merits of the Constitutional Issue

Petitioner sought this Court's review only on the "political question" issue. See Petition for a Writ of Certiorari, No. 10-699, filed on November 24, 2010. The Solicitor General opposed the petition on March 25, 2011. This Court granted the writ on May 2, 2011, with the following Order (*Zivotofsky v. Clinton*, 131 S. Ct. 2897):

Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit granted. In addition to the question presented by the petition, the parties are directed to brief and argue the following question: "Whether Section 214 of the Foreign Relations Authorization Act, Fiscal Year 2003, impermissibly infringes the President's power to recognize foreign sovereigns."

9. This Court Reverses and Remands for Consideration of the Merits of the Constitutional Issue

This Court reversed the decision of the court of appeals, holding that "[t]he political question doctrine poses no bar to judicial review of this case." 132 S. Ct. at 1430. The Court did not, however, decide the constitutional issue that it had, *sua sponte*, instructed the parties to brief and argue. The Court observed, "To say that Zivotofsky's claim presents issues the Judiciary is competent to resolve is not to say that reaching a decision in this case is simple." 132 S. Ct. at 1430. Noting that "[r]esolution of Zivotofsky's claim demands careful examination of the textual, structural, and historical evidence put forward by the parties regarding the nature of the statute and of the passport and recognition powers," this Court remanded the case so that the constitutional issue could be considered by the court of appeals "in the first instance."

10. The Court of Appeals Decides That the Statute Is Unconstitutional Because It Infringes on the President's "Exclusive" Recognition Power

Reciting a history of the "recognition power" (Pet. App. A, pp. 14a-26a, *infra*) that has been challenged by a leading scholar (see pp. 15-16, *infra*), acknowledging that this Court has never *held* (emphasis original) that the President is exclusively vested with the recognition power (p. 30a, *infra*), and noting that as an "inferior court" it is obliged to follow dicta of this Court (see p. 30a, *infra*, and the concurring opinion of Circuit Judge Tatel (pp. 53a-54a, *infra*)), the court of appeals ruled that the President has "exclusive" recognition authority. The court then affirmed dismissal of petitioner's complaint and refused to enforce the Congressional enactment on the ground that Section 214(d) unconstitutionally infringes on the exercise of the President's exclusive recognition power.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT CONSISTENTLY GRANTS CERTIORARI WHEN A FEDERAL COURT OF APPEALS HAS INVALIDATED A FEDERAL STATUTE ON CONSTITUTIONAL GROUNDS

When a federal court of appeals invalidated as unconstitutional the federal civil remedy for gender-motivated violence this Court granted certiorari in *United States v. Morrison*, 529 U.S. 598, 605 (2000), "[b]ecause the Court of Appeals invalidated a federal

statute on constitutional grounds." That justification for plenary review by this Court has, to our knowledge, been consistently applied. See, *e.g.*, *United States v. Kebodeaux*, 133 S. Ct. 2496, 2501 (2013); *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 425 (1993).

The current edition of Gressman, Geller, Shapiro, Bishop & Hartnett, Supreme Court Practice § 4.12 at p. 264 (9th ed. 2007) states, "Where the decision below holds a federal statute unconstitutional . . . , certiorari is usually granted because of the obvious importance of the case." The Gressman treatise cites no case in which this Court has refused to review a lower-court judgment invalidating an Act of Congress on constitutional grounds.

Indeed, even when the United States has agreed with the lower court's determination that a federal law is unconstitutional (as it recently did with the Defense of Marriage Act), the Solicitor General has acknowledged that respect for Congress' legislative function requires review by this Court of lower-court decisions annulling a duly enacted federal statute. See the United States' Petition for a Writ of Certiorari, *United States Department of Health and Human Services v. Commonwealth of Massachusetts*, No. 12-15, p. 16 ("This Court's Review Is Warranted Because The Court Of Appeals Invalidated An Act of Congress.")

Justice Holmes observed in his separate opinion in *Blodgett v. Holden*, 275 U.S. 142, 148 (1927), that declaring an Act of Congress unconstitutional is "the gravest and most delicate duty" of the courts, and his

characterization was quoted with approval by this Court in *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981). In *United States v. Gainey*, 380 U.S. 63, 64 (1965), this Court expressed its obligation "to review the exercise of the grave power of annulling an Act of Congress." At that time – prior to the repeal of 28 U.S.C. § 1252 in 1988 – this Court had mandatory appellate jurisdiction over lawsuits in which the United States was a party and a three-judge district court found a federal law unconstitutional. See, *e.g.*, *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 316-319 (1985); *McLucas v. Champlain*, 421 U.S. 21, 31-32 (1975).

When it repealed this Court's mandatory Section 1252 jurisdiction to review decisions invalidating Acts of Congress on constitutional grounds, Congress did not imply that this Court might avoid reviewing lower federal-court nullifications of duly enacted federal statutes. The House Report said, "Under usual circumstances any lower Federal court decision invalidating an act of Congress presents issues of great public importance warranting Supreme Court review." H. Rep. No. 100-660, 100th Cong., 2d Sess., p. 21 (May 26, 1988). It is clear from the House Report that the mandatory-review provision was eliminated in 1988 only because the "interpretation of the jurisdictional statute" consumed too much of the Court's time (see, *e.g.*, *Heckler v. Edwards*, 465 U.S. 870 (1984)) and the direct-appeal procedure often failed to "produce a record that is useful for review by the Supreme Court." H. Rep. No. 100-660, p. 21.

We demonstrate below that the constitutional issues presented by this case warrant plenary review by this Court. But even if the legal issues presented were narrower and less significant – as they were in the *Morrison*, *Kebodeaux*, and *Edge Broadcasting Co.* cases – the fact alone that a lower court has annulled an Act of Congress would call for review by this Court.

II.

THIS COURT RECOGNIZED THE SIGNIFICANCE OF THE CONSTITUTIONAL ISSUE BY DIRECTING THE PARTIES IN 2011 TO BRIEF AND ARGUE THAT ISSUE IN ADDITION TO THE QUESTION PRESENTED IN THE PETITION

This Court's *sua sponte* order of May 2, 2011, directing the parties to brief and argue the constitutional recognition-power issue in addition to the Question Presented in the Petition for a Writ of Certiorari demonstrates the importance of the constitutional issue and its worthiness for plenary review. If the Court had some doubt in 2011 whether the constitutional issue warranted consideration and decision by this Court, it would not have taken the initiative of adding the constitutional recognition-power issue to the threshold political question issue that petitioner had presented in his request for this Court's review.

Although this Court did not ultimately resolve the constitutional issue that it had chosen to add to the briefing and argument of the case, the Court

indicated in its opinion remanding that issue to the lower court that the resolution of that question by the court of appeals should not be the final word. This Court's majority opinion declared that the constitutional issue was not "simple," and that this Court's "analysis of the merits" would benefit from "thorough lower court opinions." 132 S. Ct. at 1430-1431. It remanded the case to the lower court for its consideration "in the first instance," and implied that after the lower court's ruling, the constitutional issue would be finally considered and decided in the Supreme Court.

The court below has now considered the constitutional issue that this Court identified and remanded to the lower court for its "analysis of the merits." As Circuit Judge Tatel acknowledged in his concurring opinion, the court of appeals was "in relatively uncharted waters with few fixed stars by which to navigate" (p. 52a, *infra*). The important constitutional issue is now ripe for the contemplated consideration and decision by this Court.

III.

WHETHER THE PRESIDENT HAS "EXCLUSIVE" RECOGNITION POWER IS AN ISSUE OF GREAT NATIONAL IMPORTANCE

This Court's review in its 2012 majority opinion of the historical precedents marshaled by both sides regarding the recognition power (132 S. Ct. at 1428-1430) demonstrates that the constitutional question regarding the nature, source, and scope of the power has arisen repeatedly during our nation's history.

Presidents and Congresses have expressed differing views on the subject.

It is undisputed – as the court of appeals noted (p. 30a, *infra*) – that this Court has never directly addressed the issue and announced a square holding regarding it. Circuit Judge Tatel observed in his concurring opinion that "the Supreme Court has had no occasion to resolve the political branches' competing claims to recognition power" (p. 53a, *infra*).

Resolution of that question demands – as this Court observed in 2012 – "careful examination of the textual, structural, and historical evidence put forward by the parties regarding the nature of the statute and of the passport and recognition powers." 132 S. Ct. at 1430. Now that the record in this case is complete, and the parties have marshaled conflicting textual and historical evidence going back to the founding of the Republic regarding the recognition power, along with conflicting dicta in this Court's opinions on the source and scope of that power, the recurring important issue is ripe for final resolution by this Court.

IV.

THE COURT OF APPEALS' HISTORICAL SURVEY IS ERRONEOUS AND CONFLICTS WITH AN AUTHORITATIVE SCHOLARLY ASSESSMENT

While acknowledging that ratification-era evidence fails to establish whether the Framers

intended to grant the President exclusive recognition power (pp. 16a-19a, *infra*), the court of appeals ruled in the government's favor because it "conclude[d] that longstanding post-ratification practice supports the Secretary's position that the President exclusively holds the recognition power." (p. 20a, *infra*). That conclusion is demonstrably erroneous.

The court below cited and relied on the ratification-era historical research of Professor Robert J. Reinstein of Temple University Law School. See Pet. App. A, pp. 3a, 17a n.7, 19a, *infra*. Professor Reinstein has now reviewed in great detail the post-ratification history that is discussed in the majority opinion of the court below and in the parties' briefs on the subject of the recognition power, beginning with the Washington Administration's conduct during the Neutrality Crisis of 1792-1793 through the relevant events during the Monroe, Jackson, Lincoln, and McKinley Administrations. His conclusions conflict with those of the court of appeals.

In an article containing his analysis that will shortly appear in the Temple Law Review and that is available now at http://ssrn.com/abstract=2351966, Professor Reinstein identified two instances not discussed in the lower-court opinion or in the briefs of the parties in which early Congresses exercised the recognition power. Congressional legislation in 1800 and 1806 recognized "the island of Hispaniola" as "a dependency of the French Republic" (2 Stat. 7, 10) and prohibited all trade with persons in Santo Domingo not "under the acknowledged government of France" (2 Stat. 351).

The latter Congressional statute was held by Supreme Court Justice Bushrod Washington, sitting on Circuit in *Clark v. United States*, 5 Fed. Cas. 932, 934 (C.C. Pa. 1811), to constitute nonrecognition of Haitian independence and to be "a clear acknowledgment of the sovereignty of France over the island."

Professor Reinstein's research also establishes that, contrary to the premise of the court below, Congress recognized Haiti and Liberia in 1862 and Cuban independence in 1898. He also discusses the Taiwan Relations Act of 1979 and subsequent legislation (including the Taiwan passport act of 1994) and demonstrates that Congress thereby legislated a policy governing recognition that was contrary to the Executive's.

We quote in full the "Conclusion" to Professor Reinstein's article (Robert Reinstein, "Is the President's Recognition Power Exclusive?"):

> Historical practice confirms that the President has the power to recognize foreign states and governments. But the text, original understanding, post-ratification history, and structure of the Constitution do not support the more expansive claim that this executive power is plenary. Under these circumstances, executive recognition decisions are not exclusive but are subject to laws enacted by Congress. In short, the President's duty remains to faithfully execute the laws.

Other legal scholars have severely criticized the court of appeals' reliance on the famous dictum in *United States v. Curtiss-Wright Export Corp.,* 299 U.S. 304, 320 (1936). See the recent writings of Professor Louis Fisher of William and Mary Law School, who served for four decades in the Library of Congress as senior specialist in separation of powers at the Congressional Research Service and as specialist in constitutional law at the Law Library. Louis Fisher, "D.C. Circuit Court Adopts Old Judicial Error to Inflate Executive Power," *rollcall.com,* September 16, 2013; "Getting it Wrong Again and Again – Judicial Error's Compounding Effect," National Law Journal, November 18, 2013; "Judicial Errors that Magnify Presidential Power" to appear in The Federal Lawyer (forthcoming Jan. 2014). Professor Fisher articulates similar views at pp. xviii, 3-4, 265-68, 296-97, 387, 415 of his 2014 treatise titled "The Law of the Executive Branch, Presidential Power."

This criticism of the basis for the decision below warrants scrutiny of the lower court's ruling by this Court. Professor Reinstein observed in the comprehensive article that will be appearing in the Temple Law Review (emphasis original):

> The *Zivotofsky* decision is the first to hold that the recognition of foreign states and governments – and the determination of the scope of that recognition – is an *exclusive* executive power. This decision has significant implications for the separation of powers that go well beyond the question of recognition. If affirmed,

> this decision will mark only the second time that the Supreme Court will have held that a non-enumerated power of the President supersedes the legislative authority of Congress (the other being the power to remove executive officials) and the first in the field of foreign affairs.

The Court should grant certiorari not only to determine whether an Act of Congress was correctly nullified as unconstitutional and to decide an issue that it asked the parties to brief and argue, but also to resolve uncertainties on important issues affecting the Legislative and Executive branches of our government.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

November 20, 2013

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