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 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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INTRODUCTION

The Solicitor General's Brief in Opposition fails to cite even a single instance in which this Court has declined to review a federal court of appeals decision that invalidated a federal statute as unconstitutional. Respect for a deliberate Congressional determination enacted into positive law demands that the final word on the legitimacy of Congress' action not be a lower-court decision repudiating Congress' constitutional authority. If an intermediate appellate court condemns Congress' legislative directive as beyond Congress' constitutional authority, review by this Court is warranted because of "the obvious importance of the case." Shapiro, Geller, Bishop, Hartnett & Himmelfarb, *Supreme Court Practice* § 4.12, p. 264 (10th ed. 2013). The final judicial word should, in such circumstances, come from this Court and not from three judges who describe themselves as "an inferior court." Pet. App. 30a; see also Pet. App. 54a (Tatel, J., concurring) ("the perspective of this 'inferior' court").

Indeed, Solicitor General Verrilli urged this Court in his Petition for a Writ of Certiorari in *United States Department of Health and Human Services v. Commonwealth of Massachusetts*, No. 12-15, to review a court of appeals decision invalidating the Defense of Marriage Act even though the Executive Branch agreed with the lower court that the law was unconstitutional. The Solicitor General's reason – fully applicable to the present case – was, "This Court's Review Is Warranted Because the Court of

Appeals Invalidated an Act of Congress." *Id.* at pp. 15-16.

The government asserts in its Opposition that this case differs from "typical cases" in which this Court has reviewed lower-court nullifications of federal laws on constitutional grounds. The government's Opposition briefly proffers two possible reasons why the consistent precedent that the Supreme Court will review any constitutional invalidation of an Act of Congress should not be followed in this case. The government asserts that in this case (a) the effect of the court of appeals' decision is "to maintain the status quo" and (b) the decision affects "only the very small number of people" who could invoke the right granted by the invalidated federal law. Br. in Opp., pp. 12, 24-25. If the Solicitor General's assertions that this case is atypical were correct, other cases in which this Court has agreed to review rulings of federal courts of appeals invalidating federal statutes on constitutional grounds should not involve (a) lower-court rulings that maintained a status quo and (b) federal laws that affected "smaller numbers of people" than does Section 214(d). In fact, as we demonstrate below (pp. 4-10, *infra*), both asserted grounds of distinction are refuted by a review of this Court's precedents.

The Brief in Opposition also misstates the historical record in arguing that the President has always claimed and exercised "sole authority" to recognize foreign governments. A fair and complete reading of American history regarding the authority to recognize foreign governments establishes,

contrary to the conclusion of the court below and the Solicitor General's assertions, that it has always been a power shared by Congress and the Executive. Presidents from the earliest days of the Republic into the Twentieth Century have acknowledged Congress' role – and occasional leadership – in this arena.

The importance of the Question Presented is demonstrated by this Court's *sua sponte* decision, when this case first came before it, to direct the parties to brief and argue the constitutional issue. In its remand to the court of appeals, this Court used language that implied that this Court would re-visit that question after the lower court issued its decision. There is explicit and square disagreement between the Executive and the Congress over a recognition issue – a legal question that this Court has never heretofore directly addressed.

The Court should not be swayed by the government's effort – repeatedly made at each stage of this litigation – to intimidate the judiciary by emphasizing the "sensitivity" of Jerusalem's status. This case will not determine United States policy regarding Jerusalem, which can be definitively declared by the Executive regardless of how birth in Jerusalem is treated in United States passports. The effect of a ruling sustaining the constitutionality of Section 214(d) has been greatly exaggerated by the State Department ever since the law was enacted. It does not justify a refusal to review a lower-court decision that presents a substantial separation-of-powers issue affects foreign policy judgments on which Congress and the President disagree, and

repudiates a considered Congressional policy that was duly enacted into law.

ARGUMENT

I.

THIS COURT ROUTINELY REVIEWS LOWER-COURT RULINGS THAT MAINTAIN THE STATUS QUO WHEN INVALIDATING A FEDERAL LAW AS UNCONSTITUTIONAL

There is no principled reason to distinguish, for purposes of this Court's discretionary review of lower-court findings of unconstitutionality, between lower-court rulings that alter the status quo and those that maintain it. No decision of this Court and, to our knowledge, no authority or commentator on the Court's practices and procedures has ever stated or implied that this is a distinction that should make a difference in a case in which the constitutionality of an Act of Congress is challenged.

Indeed, this Court's precedents demonstrate that, in ***nearly all*** instances that this Court has reviewed a ruling of a federal court of appeals that found a federal statute to be unconstitutional, the effect of the reviewed lower-court decision has been to maintain the status quo.

(1) In *United States v. Kebodeaux*, 133 S. Ct. 2496 (2013), the Fifth Circuit invalidated, on constitutional grounds, a federal law ("SORNA") that required federal sex offenders to register in the States where they live, study, and work. *United*

States v. Kebodeaux, 687 F.3d 232 (5th Cir. 2012) (en banc). This Court agreed to hear and decide the government's appeal from that decision even though the effect of the Fifth Circuit's ruling was to maintain the legal status quo under which such registration was not required.

(2) In *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564 (2002), the Third Circuit affirmed a preliminary injunction and ruled that the standard prescribed by federal statute ("COPA") in prohibiting sexually explicit materials on the Internet to protect minors violated the First Amendment. *American Civil Liberties Union v. Reno*, 217 F.3d 162 (3d Cir. 2000). COPA had never been enforced prior to institution of the lawsuit. Hence the preliminary injunction issued by the district court on constitutional grounds and affirmed by the court of appeals maintained the status quo. No party or *amicus curiae* thought that this consideration was relevant in any manner in determining whether this Court should grant the government's petition for a writ of certiorari.

(3) In *United States v. Bajakajian*, 524 U.S. 321 (1998), the Ninth Circuit invalidated, on constitutional grounds, a federal statute that directed the forfeiture of the full amount of cash that an accused carried with him in violation of a statutory $10,000 maximum when he left the United States. *United States v. Bajakajian*, 84 F.3d 334 (9th Cir. 1996). The court of appeals' conclusion that the law was unconstitutional retained the status quo as it had existed prior to enactment of the law. No forfeiture of any amount had been authorized before

the law was enacted in 1985, and it does not appear from the Court's opinion that there had been any federal law-enforcement practice following enactment of the forfeiture provision that was disrupted by the Ninth Circuit's ruling.

(4) In *United States v. International Business Machines Corp.*, 517 U.S. 843 (1996), the Federal Circuit invalidated, under the Constitution's Export Clause, generally applicable, nondiscriminatory federal taxes on goods in export transit. *International Business Machines Corp. v. United States*, 59 F.3d 1234 (Fed Cir. 1995). The basis for the ruling was a 1915 decision of this Court (*Thames & Mersey Marine Ins. Co. v. United States*, 237 U.S. 19 (1915)) that the government sought to have overruled. 517 U.S. at 850. The Federal Circuit decision that applied the 80-year-old *Thames & Mersey* precedent in invaliding the tax was plainly a ruling that maintained the status quo. This Court granted certiorari to determine the constitutional status of the law even though the Federal Circuit decision had maintained the status quo.

(5) In *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993), the Fourth Circuit invalidated on First Amendment grounds a federal law that prohibited broadcasting radio advertisements for lotteries into States where lotteries are illegal. *Edge Broadcasting Co. v. United States*, 956 F.2d 263 (4th Cir. 1992). The Fourth Circuit's holding effectively retained the *status quo ante* under which, pursuant to a 1975 law (509 U.S. at 422-423), such broadcasts were permitted so long as lotteries were legal in the broadcaster's home state. No one apparently

believed that maintenance of the status quo was relevant to whether this Court would or would not review the Fourth Circuit's decision.

Examination of all decisions of this Court that have reviewed judgments of federal courts of appeals that invalidated Acts of Congress would, we believe, establish beyond doubt that maintenance of the status quo is totally irrelevant in deciding whether this Court should grant certiorari.

II.

THIS COURT HAS REVIEWED FEDERAL APPELLATE COURT DECISIONS THAT INVALIDATED FEDERAL LAWS AFFECTING MANY FEWER PEOPLE THAN THE 52,569 PEOPLE AFFECTED BY SECTION 214(d)

In Answers to Interrogatories, the Department of State acknowledged that in 2006 there were 52,569 United States passports outstanding that designated the passport-holder's place of birth as "Jerusalem." J.A. 48. Section 214(d) authorizes each of these American passport-holders born in Jerusalem to choose "Israel" as the place of birth shown in their passports.

If the 52,569 American citizens affected by Section 214(d) comprise too "small" a "number of people" to warrant review of the appellate decision invalidating Section 214(d), why did this Court grant certiorari in *United States v. Bajakajian*, 524 U.S. 321 (1998), which concerned a federal law that affected only individuals who leave the United

States carrying more than $10,000 in currency? Surely the number of international travelers who could be expected to violate a statutory $10,000 limitation on the export of currency is less than 52,569.

Many determinations by this Court to review lower-court rulings have concerned issues that affect far fewer than 52,569 individuals. This Court reviewed "important questions about the balance of powers in our constitutional structure" in *Hamdan v. Rumsfeld*, 548 U.S. 557, 566-567 (2006), which concerned one foreign national incarcerated at Guantanamo. A "narrow" question concerning 652 foreign nationals incarcerated at Guantanamo was heard and decided in *Rasul v. Bush*, 542 U.S. 466, 470-471 (2004). Although the Court observed that "[o]nly three sitting Presidents had been defendants in civil litigation involving their actions prior to taking office" and the respondent had argued that the case was "one-of-a-kind [and] . . . singularly inappropriate for the exercise" of the Court's discretionary jurisdiction, the Court granted certiorari in *Clinton v. Jones*, 520 U.S. 681, 690, 692 (1997).

In Christopher *v. Harbury*, 536 U.S. 403 (2002), the Court granted certiorari due to the "importance of th[e] issue to the Government in its conduct of the Nation's foreign affairs." 536 U.S. at 412. The issue concerned a single individual and the government's liability to her for deceptive statements made to her regarding her deceased husband. In *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252

(1991), the Court determined the constitutionality of an "unusual statutory condition." It held that the statutory provision violated the constitutional principle of separation of powers while observing that violation of separation-of-powers principles "have been uncommon." 501 U.S. at 255.

This line of precedents establishes that denial of certiorari in this case cannot be justified because Section 214(d) affects only 52,596 individuals or because the statute is unusual.

III.

THIS COURT'S 2011 DIRECTIVE THAT THE QUESTION PRESENTED BE BRIEFED, AS WELL AS THE TERMS OF THIS COURT'S 2012 REMAND, ESTABLISH THAT THE ISSUE IS IMPORTANT AND THAT IT IS NOT A "HISTORICAL ABERRATION"

The government belittles the constitutional issue presented in this case by calling it an "aberrational dispute" and a "historical aberration that is unlikely to recur" (Br. In Opp., pp. 12, 25). This Court has, however, already indicated that it does not share this demeaning perspective. It deemed the constitutional issue significant enough to issue a *sua sponte* order directing the parties to brief and argue "[w]hether Section 214 of the Foreign Relations Authorization Act, Fiscal Year 2003, impermissibly infringes the President's power to recognize foreign sovereigns." *Zivotofsky v. Clinton*, 131 S. Ct. 2897 (2011).

This Court included in the majority opinion of March 26, 2012, a lengthy summary of the "detailed legal arguments regarding whether § 214(d) is constitutional in light of powers committed to the Executive, and whether Congress's own powers with respect to passports must be weighed in analyzing this question." 132 S. Ct. at 1428; see 132 S. Ct. at 1428-1430. At the conclusion of this summary, the Court's majority opinion declared that because the constitutional issues were not "simple," the case would be remanded so that this Court would have "the benefit of thorough lower court opinions to guide ***our analysis*** of the merits." 132 S. Ct. at 1430 (emphasis added). The case was remanded "to the lower courts to consider the merits ***in the first instance***." 132 S. Ct. at 1431 (emphasis added). The emphasized words imply that this Court anticipated re-visiting the constitutional issues and deciding them after it received the benefit of the lower court's analysis.

Moreover, the court of appeals noted in its opinions that it was an "inferior" court and would, on that account, be bound by dicta in opinions of this Court. See Pet. App. 30a, 54a. These otherwise gratuitous expressions of modesty suggest that the panel of the court of appeals entertained doubts regarding this dicta and anticipated that this Court would resolve uncertainties created by controversial dicta in this Court's past opinions.

IV.

THE BRIEF IN OPPOSITION MIS-STATES THE HISTORICAL EVIDENCE

The merits of the constitutional issues are best left to the plenary presentation of briefs and arguments on the merits. We note, however, that the government errs in claiming an "unbroken historical practice" according "sole authority" to the President to recognize foreign governments. See Br. in Opp., p. 14. In our brief in the court of appeals (pp. 30-38), and in our reply brief in that court (pp. 7-17), we demonstrated that Presidents Monroe, Jackson, Buchanan, Taylor, and Lincoln did not exercise "sole authority" over controversial recognition decisions but acknowledged that Congress had authority in this area and sought Congressional authorization or its consent to the President's recognition decisions.

Although the Solicitor General's Brief in Opposition (pp. 17-18 & n. 7) cites and discusses the recent article by Professor Robert J. Reinstein, who has completed an exhaustive study of the history of the recognition power, it fails to acknowledge Professor Reinstein's conclusion which states, in relevant part: "[T]he 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." Robert J. Reinstein, *Is the President's Recognition Power Exclusive?*, 86 Temple L. Rev. 1, 56 (2013).

Nor did Congress "acquiesce," as the government asserts, in an "understanding" that recognition authority is exclusively the President's. See Br. in Opp., pp. 14, 16, 18. Indeed, President Jackson explicitly stated the reverse – *i.e.*, that he "acquiesced" in Congress' 1837 resolution recognizing Texas as an independent government. Message to the Senate (March 3, 1837), in 3 Andrew Jackson: A Compilation of the Messages and Papers of the Presidents, p. 366 (Richardson ed. 2004). During the McKinley Administration the Senate (29 Cong. Rec. 326, 332 (1896)) and then both Houses of Congress (31 Cong. Rec. 3988 (1898)) refused to "acquiesce" to a claim of exclusive Presidential authority and asserted that Congress had the power to recognize Cuba. The view of many Senators was expressed in a proposed resolution declaring that "the Government of the United States hereby recognizes the Republic of Cuba as the true and lawful Government of that island." 31 Cong. Rec. 3993 (1898). That is not the language of "acquiescence."

V.

THE ALLEGED "SENSITIVITY" OF THE STATUS OF JERUSALEM IS NOT A REASON TO DENY REVIEW

In its Brief in Opposition – as in virtually every pleading it has filed over the long history of this case – the government places front and center the "sensitivity" of the status of Jerusalem. This is a patent effort to intimidate the judiciary, which views itself as "not equipped" to evaluate foreign policy

(Pet. App. 47a), into believing that a decision in petitioner's favor will have disastrous consequences in the Middle East.

The State Department has represented in this case that permitting United States citizens born in Jerusalem to be identified as born in Israel will "cause irreversible damage" to the Middle East peace process. Yet the subject seems to be of great indifference to Palestinian representatives. Not a single brief has been filed by a Palestinian interest group throughout the history of this litigation.

This is not the first time this Court has been asked to determine a constitutional issue where the government claims that there will be serious consequences if its position is rejected. See, *e.g.*, *New York Times Co. v. United States*, 403 U.S. 713, 731 (White, J., concurring: "substantial damage to public interests"), 740-741 (Marshall, J., concurring: "grave and immediate danger to the security of the United States") (1971); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582 (1952) (Presidential action "necessary to avert a national catastrophe") (1952). In neither the *Pentagon Papers* case nor the *Steel Seizure* case did the government's doomsday prediction prove accurate. It is equally overblown here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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