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 OF THE LOUIS D. BRANDEIS CENTER FOR HUMAN RIGHTS UNDER LAW AND PROFESSORS OF FOREIGN RELATIONS AND CONSTITUTIONAL LAW AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

PROF. EUGENE KONTOROVICH
NORTHWESTERN UNIVERSITY
SCHOOL OF LAW
375 E. Chicago Avenue
Chicago, Illinois 60611
312.503.0429

ALAN GURA*
GURA & POSSESSKY, PLLC
105 Oronoco Street,
Suite 305
Alexandria, Virginia 22314
703.835.9085
alan@gurapossessky.com
**Counsel of Record*

Counsel for Amici Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Whether acknowledging that Jerusalem is a "place" in Israel implicates or infringes a Presidential power to recognize foreign sovereigns.

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INTERESTS OF *AMICI CURIAE*[1]

The Louis D. Brandeis Center for Human Rights Under Law ("LDB") is a non-profit organization dedicated to advancing the civil and human rights of the Jewish people, and promoting justice for all. LDB is concerned that the discussion of matters pertaining to Israel often invokes double-standards and unduly tortured logic that would uniquely disfavor the Jewish national homeland, and thus negatively impact the status and personal security of Jews the world over.

Amici law professors have devoted significant time to the study, research, and teaching of the law of foreign relations and constitutional law. These academics are:

Erwin Chemerinsky, Dean and Distinguished Professor of Law, and Raymond Pryke Professor of First Amendment Law, University of California, Irvine School of Law

John C. Eastman, Henry Salvatori Professor of Law & Community Service, and former Dean, Chapman University Dale E. Fowler School of Law

[1] The parties have consented to the filing of this brief in letters on file in the Clerk's office. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or counsel made a monetary contribution to the brief's preparation or submission.

Eugene Kontorovich, Professor of Law, Northwestern University School of Law

David B. Kopel, Adjunct Professor of Advanced Constitutional Law, University of Denver Sturm College of Law

Julian G. Ku, Professor of Law & Faculty Director of International Programs, Maurice A. Deane School of Law at Hofstra University

Michael W. Lewis, Ella A. And Ernest H. Fisher Professor of Law, Ohio Northern University Pettit College of Law

Calvin Massey, Emeritus Professor of Law, University of California Hastings College of the Law and Daniel Webster Distinguished Professor of Law, University of New Hampshire School of Law

Jeremy A. Rabkin, Professor of Law, George Mason University School of Law

Martin H. Redish, Louis and Harriet Ancel Professor of Law and Public Policy, Northwestern University School of Law

Abraham D. Sofaer, George P. Shultz Senior Fellow in Foreign Policy and National Security Affairs, Hoover Institute, Stanford Law School

Louise Weinberg, William B. Bates Chair for the Administration of Justice, School of Law, University of Texas at Austin

Amici submit that this case lends itself to a much simpler resolution than would a true dispute between the President and Congress regarding the powers to

recognize the legal status of states and foreign sovereigns. The dispute over Jerusalem's legal status is but one of many territorial disputes posing challenges for American foreign policy. While the political branches may disagree about the extent to which either might exercise the power of *legal* recognition, it cannot seriously be questioned that Congress's authority to acknowledge, process and relate to simple facts regarding foreign territory – disputed or not – is a function necessary and proper to the exercise of its assigned powers. The constitutional avoidance doctrine calls for straightforward application of these established legal norms and accordingly, for reversal.

SUMMARY OF ARGUMENT

This Court does not lightly overturn acts of Congress. Nor does it rush to resolve difficult constitutional questions absent true necessity. These overarching principles counsel a more cautious approach than that undertaken by the court below, beginning with a proper understanding of what, exactly, Congress has done – and not done – in acknowledging that Jerusalem may be a "place" in Israel.

The lower court declined this Court's specific instructions to first consider "the nature of the statute," *Zivotofsky* v. *Clinton*, 132 S. Ct. 1421, 1430 (2012), and instead worked backward from its assumed conclusion that the challenged statute sounds in legal recognition of a type implicating the Executive. The lower court's approach and conclusion were both erroneous.

"Recognition" in the foreign relations context refers to either of two acts: "state recognition," recognition that a given entity has the attributes of statehood and should thus be treated as a sovereign state; or "government" or "formal recognition," recognition of a given state's particular regime. The former may include accepting the validity of a sovereign's territorial claims – but it does *not* include simple "recognition" of a territory's factual circumstances. As Petitioner and other *amici* demonstrate, Congress and the President may each play roles in these two forms of *de jure* recognition, and their precise interaction is plainly a difficult constitutional question. That difficulty suffices to compel a decision on other grounds, if possible.

Fortunately, constitutional avoidance is possible, and thus warranted, upon examining "the nature of the statute." *Id.* at 1430; cf. *Bond* v. *United States*, 134 S. Ct. 2077 (2014). The President clearly cannot override Congress's ability to identify and relate to a state or territory's *de facto* status, the present on-the-ground reality of who governs a particular patch of land, if Congress is to exercise its powers over immigration, nationality, foreign commerce, and war. And plainly, that is all that Congress has done by enacting Section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350 (2002) ("Section 214(d)" or "the Act").

As the United States indisputably recognizes both the sovereign State of Israel, and its (Jerusalem based) government, the question here is not about

either kind of "recognition," but rather about mere acknowledgment of Jerusalem's location.

Allowing for the fact that Jerusalem is a "place" in Israel is not only a necessary and proper exercise of Congress's enumerated powers. It is a routine act. For example, other statutes treat the West Bank (which includes parts of Jerusalem) as "Israel" for purposes of foreign trade; the constitutionality of such action has never been questioned.

Moreover, the determination of Jerusalem's location for the purpose of exercising Congress's enumerated powers is a legislative fact of the sort to which courts must ordinarily defer, if it is not a matter within judicial notice. Indeed, the Executive Branch officially acknowledges Jerusalem's location in Israel, reciting this fact in ways vastly more prominent than Congress's simple administrative decision. Congress has done no more, and far less, than has the Executive Branch, in recognizing Jerusalem's current status.

ARGUMENT

I. The Court of Appeals Did Not Heed Established Doctrine, Reflected in This Court's Specific Instruction to Consider Narrow Constructions Avoiding Constitutional Difficulty.

"[W]hen a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."

Jones v. *United States*, 529 U.S. 848, 857 (2000) (quotation omitted). Rejecting calls to resolve a serious constitutional dispute between the political branches with respect to the treaty power, this Court recently reiterated that "it is 'a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.'" *Bond*, 134 S. Ct. at 2087 (quoting *Escambia Cnty.* v. *McMillan*, 466 U.S. 48, 51 (1984) (per curiam) and citing *Ashwander* v. *TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)); see also *Nw. Austin Mun. Util. Dist. No. One* v. *Holder*, 557 U.S. 193, 206 (2009). "[T]he fact that one among alternative constructions involves serious constitutional difficulties is reason to reject that interpretation in favor of [another]." Norman J. Singer, 2A Sutherland on Statutory Construction § 45.11, at 87 (7th ed. 2008) (collecting cases).

The constitutional avoidance doctrine has higher salience where plowing into the constitutional difficulty might risk invalidating an act of Congress. "The question is not whether" an alternative statutory interpretation "is the most natural interpretation of the [law], but only whether it is a 'fairly possible' one. As we have explained, 'every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'" *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566, 2594 (2012) (Roberts, C.J.) (citations omitted).

This Court's instructions to the lower court asking it to decide the case did not bar application of

these familiar doctrines. To the contrary, this Court signaled that constitutional difficulty might be avoided by instructing:

> Resolution 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.

Zivotofsky, 132 S. Ct. at 1430 (emphasis added). Yet in turning away Petitioner's constitutional avoidance approach, the lower court read this Court's instructions as:

> the Supreme Court has specifically instructed us to examine "the textual, structural, and historical evidence . . . regarding the nature . . . of the passport and recognition powers."

Pet. App. 13a (quoting *Zivotofsky*, 132 S. Ct. at 1430); see also *id.* 16a (same).

Having skipped over this Court's sensible mandate to first consider "the nature of the statute," the lower court apparently assumed, without truly examining, that the Act sounds in legal recognition. It offered that to decide that the Act does not implicate "the *President's* constitutional recognition power," *id.* 13a (emphasis added) – another assumption – "*is* a constitutional holding," *id.* And, as far as the lower court was concerned, the constitutional avoidance doctrine has no bearing where the choice lies between making two constitutional decisions.

Thus, the lower court capped its first two errors – prejudging that the recognition power is "the President's,"

and failing to heed this Court's instruction to examine "the nature of the statute" – with a third error: fundamentally misconstruing the constitutional avoidance doctrine. The doctrine is not limited to instances where courts must choose between deciding a difficult constitutional issue, and avoiding the Constitution altogether. Indeed, among the constitutional avoidance doctrine's manifestations is the rule that "[t]he Court will not formulate a rule of constitutional law broader than is *required* by the precise facts to which it is to be applied." *Ashwander*, 297 U.S. at 347 (Brandeis, J., concurring) (emphasis added) (quotation and citation omitted).

Thus, in *Bond*, this Court avoided a difficult constitutional question by looking to established constitutional doctrine – "principles of federalism inherent in our constitutional structure." *Bond*, 134 S. Ct. at 2088. "[I]t is appropriate to refer to basic principles of federalism embodied in the Constitution to resolve ambiguity in a federal statute." *Id.* at 2090. Applying those established constitutional principles, this Court cabined the Chemical Weapons Convention Implementation Act, 18 U.S.C. § 229 *et seq.*, within Congress's constitutional limitation.

Nothing immunizes the recognition power, with all its attendant difficulties, from the constitutional avoidance doctrine. Suppose that the President, concerned that Israel might infer a negative statement regarding Jerusalem's status, refused to implement an act of Congress naming a post office after Saladin, Jerusalem's 1187 Arab conqueror. In a proper challenge to the President's resistance, courts would hopefully

avoid the recognition power dispute by "examin[ing] . . . the nature of the statute," *Zivotofsky*, 132 S. Ct. at 1430, and upon locating it exclusively within the postal power, U.S. Const. art. I, § 8, cl. 7, compel the President's performance of the ministerial act Congress mandated.

Whether the recognition power is solely "the President's," Pet. App. 13a, or shared to some extent with Congress, is plainly a vexing constitutional issue of first impression. The Framers' apparent silence on the issue and the dearth of evidence as to the power's original understanding only exacerbate the difficulty. See Robert J. Reinstein, *Recognition: A Case Study on the Original Understanding of Executive Power*, 45 U. Rich. L. Rev. 801 (2011).

The possibility that the recognition power might, to some extent, involve both political branches, strengthens the need to carefully examine the Act's nature. "Part of a fair reading of statutory text is recognizing that 'Congress legislates against the backdrop' of certain unexpressed presumptions." *Bond*, 134 S. Ct. at 2088 (citation omitted). Just as it may be "appropriate to apply the background assumption that Congress normally preserves the constitutional balance between the National Government and the States," *id.* at 2091 (quotation omitted), so, too should courts consider that Congress acts carefully in respecting the separation of powers.

With respect to the recognition power dispute, *amici* would offer that Petitioner has the better of the argument. Pet. Br. 27-57. But upon examining the

Act's nature, in light of the recognition power's limits and Congress's exclusive powers, it appears that this case does not call upon the Court to enter this particular constitutional thicket. And "if it is not necessary to decide more, it is necessary not to decide more." *PDK Labs. Inc.* v. *United States DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment).

II. The Recognition Power Does Not Inherently Include the Recognition Of National Borders.

In both U.S. constitutional practice and international law, recognition has two aspects. One is the "Recognition or Acceptance of States" ("state recognition"), whereby nations "treat as a state an entity meeting the requirements of [statehood]." Restatement (Third) of the Foreign Relations Law of the U.S. § 202(1) (1987) ("Restatement"). The second, distinct kind of recognition is the "Recognition and Acceptance of Governments" ("formal recognition"), *id.* § 203, whereby states recognize which authority officially represents a sovereign entity. Cf. 7 Foreign Affairs Manual 1300 *et seq*. App'x D (Nov. 2010) ("7 F.A.M.") at 1340(a) (distinguishing "what country now has sovereignty" from "whether that sovereignty is recognized by the United States").[2]

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[2] See also, *e.g.*, 22 U.S.C. § 611(e) ("The term 'government of a foreign country' . . . shall include any faction or body of insurgents within a country assuming to exercise governmental

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The recognition of a State can, but need not, go along with a recognition of its government. However, the recognition of a government necessarily implies the recognition of a state, as when diplomatic relations are established with the government of a newly established country.

Recognition of the existence of a sovereign state and recognition of a particular regime exhaust the meanings of recognition in foreign relations and international law. There is no such thing as "geographic" recognition. Recognition of both nations and governments does not entail a delineation of their borders; nor does it presume an acceptance of their maximum claimed borders. Territorial issues only come into play in state recognition when one state conquers territory of another, or claims to secede from another. See Restatement § 202 at cmt. e & Reporter's Note 5; *id*. § 203, Reporter's Note 3.

Judge Tatel's concurrence below stated that "the power to recognize a sovereign state's territorial boundaries is a necessary corollary to the power to recognize a sovereign in the first place." Pet. App. 56a. By this theory, recognizing a newly independent state "necessarily entails a boundary determination." *Id.* These observations are entirely inconsistent with international law and U.S. practice. Recognizing a new state is an action entirely neutral as to boundaries.[3]

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authority whether such faction or body of insurgents has or has not been recognized by the United States.").

[3] See Restatement § 201, Reporters Note 1 ("The requirement of a defined territory does not deny statehood to entities

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Indeed, many new states are born with significant boundary disputes, *e.g.*, India/Pakistan; South Sudan/ Sudan; Ethiopia/Eritrea. Recognizing their sovereignty is never regarded as taking a position on those disputes, which is an entirely separate matter from recognition.[4] Indeed, the U.N. Security Council routinely admits members with overlapping territorial claims, and in at least one case, entirely overlapping claims. See U.N. Doc. S/RES/702 (Aug. 6, 1991) (admitting as member states the Democratic People's Republic of Korea ("North Korea") and the Republic of Korea ("South Korea"), both of which claim as their territory the entire Korean peninsula).

All of the Court's references to the President's important role in recognition have been made in the context of state recognition – acknowledging an entity's status as a state, or government recognition – formal recognition of a government's legitimacy. Indeed, to the extent that a Presidential recognition power is deduced from the "Ambassadors" Clause, U.S. Const. art. II, § 3, cl. 3, this clearly only includes the two forms of recognition, both of which can be affected by establishing diplomatic relations. However, receiving ambassadors does nothing to establish geographic facts.

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that at their creation were involved in substantial controversies about their boundaries – *e.g.*, Israel in 1948; Kuwait in 1963; Estonia, Latvia, and Albania, in 1919") (citation omitted).

[4] See *The World Factbook: Disputes – International*, Central Intelligence Agency, https://www.cia.gov/library/publications/the-world-factbook/fields/2070.html (last visited July 21, 2014).

The Court has noted that the executive branch can "in its correspondence with a foreign nation assume a fact in regard to the sovereignty of any island or country." *Williams* v. *Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415, 420 (1839). That is, the President may take a position as "[t]o what sovereignty any island or country belongs" in the legal sense, "whether the [asserted] jurisdiction is rightful." *Id.* And at least absent disagreement or other input from the Congress, as was the case in *Williams*, that decision is "obligatory on the people and government of the Union." *Id.*

But nothing in that opinion suggests such an "assumption" would be binding on Congress in the exercise of *its* enumerated powers.[5] It certainly does not mean that the President enjoys a broader, unilateral and quite novel "geographic" recognition power to deny or reimagine the facts, just or unjust, of national borders. Indeed, the President's "assumption" of the Argentine claim's invalidity contrasted with the facts of the islands' administration and control. The case concerned an insurance claim for the seizure of ships that had defied the Falklands' then-existing Argentine authorities.[6]

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[5] Notably, in *Williams*, the Court deferred to the President's policy on *which* of two recognized countries has jurisdiction over a territory, given a dispute between the two. That is a far cry from binding Congress with a determination that a particular place, while apparently located in a given country, is in fact not, absent any dispute between two recognized sovereigns.

[6] An American captain thereafter arrived to "disarm the island, loot the settlements[,] arrest some of the inhabitants [and]

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As discussed *infra*, a Presidential "geographic" power would defeat Congress's exclusive authority in critical areas.

III. Congress Must Make Assumptions About Geographical Locations in Exercising Its Exclusive Powers Over Immigration, Nationality, Foreign Commerce, and War, and It Does So Without Regard to, or Impact Upon, Recognition.

The Constitution assigns to Congress, not the President, the powers "[t]o regulate Commerce with foreign Nations," U.S. Const. art. I, § 8, cl. 3; "[t]o establish an uniform law of Naturalization," *id.* § 8, cl. 4; "[t]o declare War," *id*, § 8, cl. 11; and to regulate "[im]migration," *id.* § 9.[7]

> "[A] government, entrusted with such powers must also be entrusted with ample means for their execution." Accordingly, the Necessary and Proper Clause makes clear that the Constitution's grants of specific federal legislative authority are accompanied by broad power to enact laws that are "convenient, or useful"

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declare[ ] the island government at an end." Harold F. Peterson, Argentina and the United States 1810-1960 at 106 (1964) (emphasis added).

[7] In barring Congress from limiting the "migration" of slaves prior to 1808, Article I, Section 9 is understood to reference a power to regulate immigration generally. *Smith* v. *Turner*, 48 U.S. (7 How.) 283, 454 (1849) (McKinley, J., concurring); *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 216-17 (1824) (Marshall, C.J.).

> or "conducive" to the authority's "beneficial exercise."

United States v. *Comstock*, 560 U.S. 126, 133-34 (2010) (quoting *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 408, 413, 418 (1819)) (other citation omitted).

In the course of exercising these powers, Congress must be able to acknowledge the reality of administration and control over foreign territory regardless of disputes concerning the legitimacy of such control. Nor could Congress effectively exercise these powers were they subject to presidential nullification for referencing territory that the President wishes to exclude from the scope of the legislative action.

Accordingly, Congress has long addressed its powers to disputed territories or unrecognized states. For example, Congress has occasionally set immigration quotas by country, see, *e.g.*, Emergency Quota Act, Pub. L. No. 67-5, § 2, 42 Stat. 5, 6 (1921); Refugee Relief Act of 1953, Pub. L. No. 83-203, § 4, 67 Stat. 400, 401 (1953), but explained that "[t]he provision of an immigration quota for a quota area shall not constitute recognition by the United States of the political transfer of territory from one country to another, or recognition of a government not recognized by the United States." Immigration and Nationality Act, Pub. L. No. 82-414, § 204(d), 66 Stat. 163, 178 (1952). Were Congress to authorize a separate immigration quota for Abkhazia and South Ossetia, the President would be compelled to admit immigrants from these disputed states notwithstanding his refusal to recognize these breakaway states and their governments.

Congress likewise accounts for unrecognized states and their unrecognized officials in the context of federal criminal law. In criminalizing misconduct relating to other countries, such as the counterfeiting of bills, notes, and bonds, 18 U.S.C. § 478; smuggling, *id.* § 546; and espionage, *id*. §§ 792-798; a "foreign government" includes "any government, faction, or body of insurgents within a country with which the United States is at peace, *irrespective of recognition by the United States*," *id.* § 11 (emphasis added). Likewise, assault, *id.* § 112; extortion, *id.* § 878; property destruction, *id*. § 970; murder, *id.* § 1116; and kidnapping, *id.* § 1201; are federal crimes when directed at foreign officials, even when the validity of the victim-official's government is itself not recognized, *id.* § 1116(b)(2); see also preceding sections (incorporating same).

Were the President to find it expedient, for reasons of foreign policy, to look the other way as unrecognized governments have their money counterfeited and their officials killed, he would retain only the ordinary power of prosecutorial discretion. Under federal law, those actions would remain criminal.

Congress can also declare or authorize war on a nation without recognizing its existence as a sovereign. Thus the Gulf of Tonkin resolution explicitly responded to the aggression of the "Communist Regime in Vietnam," Pub. L. No. 88-408, 78 Stat. 384 (1964), though the U.S. did not recognize said regime.

Precedent confirms that Congress must be able to direct its war powers against unrecognized entities. Long ago, this Court held that the Neutrality Act of 1794, Act of June 5, 1794, ch. 50, § 3, 1 Stat. 381, which forbade only the aiding of "any foreign prince or state," did not reach aiding unrecognized belligerents. *Gelston* v. *Hoyt*, 16 U.S. (3 Wheat.) 246, 323-25 (1818). Congress thereafter amended the Act to cover hostile actions on behalf of or against not only states, but "any colony, district, or people." Act of Apr. 20, 1818, ch. 88, § 3, 3 Stat. 447; see *The Lucy H.*, 235 F. 610 (N.D. Fla. 1916). It would hardly make a difference if Congress, instead of enacting a general neutrality law, actually named the "districts or peoples" to whom it would be forbidden to render assistance, yet naming such unrecognized entities would not violate any recognition power.

The Government's theory not only clouds the Neutrality Act; it would bar Congress from declaring war on North Korea because the United States does not recognize it as a state. Moreover, if Congress were to declare war on North Korea, the President's theory of this case could sanction his bombing of South Korea, and even China, Mexico, or Jerusalem (which, if it is not in Israel, may after all be in North Korea), as exclusive "decider" of what territory comprised the enemy nation.

Congress can also direct the expenditure of money in overseas places, regardless of their recognition status. For example, U.S. policy as formulated by both political branches has long held that Western

Sahara, invaded by Morocco in 1975, is not part of sovereign Moroccan territory, despite Morocco's exercising control over the territory. Nonetheless, in the 2014 Omnibus Budget Act, Congress provided that foreign aid to Morocco can also be spent in the Western Saharan territory it controls. Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, § 7041(h), 128 Stat. 5, 526 (2014). Congress did not designate aid to Western Sahara as a separate item of foreign aid, but rather specifically entered it as a specification of where foreign aid to Morocco could be spent. Movement in this direction began in 2012, when the conference report accompanying the spending bill provided that "funds provided . . . for Morocco may be used in regions and territories administered by Morocco." H.R. Rep. No. 112-331, at 1332 (2011) (Conf. Rep.).

Crucially, before the 2014 measure, the Executive restricted Moroccan foreign aid to Morocco proper to avoid recognizing its sovereignty over Western Sahara. Alexis Arieff, Cong. Research Serv., RS21579, Morocco: Current Issues (2013). Nonetheless, Congress's action was entirely uncontroversial because it was made pursuant to a legitimate exercise of its enumerated powers. The spending measure merely constitutes a *de facto* acknowledgment of Moroccan control of the region in which Congress wishes to exercise its spending power. See H.R. Rep. No. 113-185 at 73 (2013) (describing Western Sahara as "territories administered by Morocco").

Congress's regulation of commerce with states or territories is not impacted by the latter's recognition status. As Petitioner recounts, in 1800 and again in 1806, Congress alternately authorized and prohibited trade with authorities on disputed Hispaniola. Pet. Br. 37-40. In the Government's view, the President would be able to exercise broad foreign trade powers, akin to a line item veto. Cf. *Clinton* v. *City of New York*, 524 U.S. 417 (1998).

Imagine if Congress passed a free trade regime with Ruritania, to the consternation of U.S. widget manufacturers distressed by the new competition from Ruritania's powerful widget industry. Under the government's theory, a president could effectively rewrite the free trade law by refusing to "recognize" the widget-producing area as part of Ruritania. At the behest of domestic vintners, the President could refuse to list Bordeaux as a part of France, and instead apply to the region's wines the higher tariff assigned to another nation. The President could target products from any disputed territory, *e.g.*, Falklands wool or Gibraltar fish. The prospect for mischief is endless.

Of particular relevance, Congress has extended trade agreements with Israel to cover the areas that came under Israeli jurisdiction in 1967. While U.S. policy clearly does not treat these as part of Israeli sovereign territory, Congress nonetheless has allowed the extension of the special free trade benefits enjoyed by Israel to the territories under its control. See United States-Israel Free Trade Area Implementation

Act ("FTAIA"), Pub. L. No. 99-47, 99 Stat. 82 (1985), *as amended by* Pub. L. No. 104-234, § 1, 110 Stat. 3058 (1996). Under both the original act and its 1996 amendment,[8] goods from the West Bank and Gaza can be treated as goods of Israel for purposes of the free trade agreement.[9]

This means, inter alia, that goods originating in the West Bank or Gaza can be labeled "Made in Israel," and receive Israel-designated tariff treatment in the United States. *Id.* Articles can be treated "as if they were shipped directly from Israel" for trade law purposes even "if shipped to the United States from the West Bank [or] Gaza."[10] Notably, no separate provision is made for goods originating in Jerusalem – and the "West Bank" includes much of Jerusalem's municipal boundaries.

It also bears noting that in passing the law, the Senate Report noted that the measure's objectives include some distinctly foreign policy oriented ones, such as "promoting the peace process in the Middle

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[8] The 1996 Amendment was designed to allow for the continuation, after the creation of the Palestinian Authority, the practice where, for purposes of the FTAIA, "products of the West Bank and the Gaza Strip were marked as products of Israel." See Sen. Rep. No. 104-270, at 2 (1996), Report to Accompany H.R. 3074, May 13, 1996, Par. II.A.

[9] See Harmonized Tariff Schedule of the United States, at 22 General n. 8(b) (2014), available at http://www.usitc.gov/publications/docs/tata/hts/bychapter/1401gn.pdf#page=22 (last visited July 21, 2014).

[10] Proclamation No. 6955, 61 Fed. Reg. 58761 (Nov. 13, 1996).

East" and "ending the Arab economic boycott of Israel." See Sen. Rep. 104-270, at 3 (1996). Of course, the American response to the Arab secondary boycott of Israel might profoundly impact international relations, but the President is expected to enforce, not resist, Congress's policy in this area. See 26 U.S.C. § 999; 50 U.S.C. app. § 2407.

If Congress can designate the West Bank as *de facto* assimilated to Israel in the exercise of its Tariff and Foreign Commerce powers, there is no reason it should not be able to do the same with Jerusalem (a geographically partially overlapping designation) under its Immigration and Nationality powers.

Adopting the Government's view in this case would, far from avoiding unnecessary constitutional questions, cast substantial doubt on the validity of important existing trade agreements, spending measures and other legislation whose constitutionality has previously never been questioned. It would also mean that the President can in effect expand or narrow duly enacted laws about naturalization, war, foreign trade and tariffs, foreign aid, and more, simply by making arbitrary and unreviewable determinations about "where" particular places are. Such vast powers should not be lightly inferred given the lack of any precedent for an exclusive presidential "geographic" authority.

IV. Section 214(d) Reflects Congressional Acknowledgment of Jerusalem's *de facto* Status as a City in Israel. The Act Mirrors the Official Executive Determination on the Subject, Implying No Legal Recognition But Warranting Substantial Deference.

There is no point belaboring here the history of Congress's pervasive regulation of passports, a matter well and thoroughly presented by Petitioner and other *amici*, upon which this Court has previously reflected in some detail. See *Kent* v. *Dulles*, 357 U.S. 116 (1958). A passport is a "travel control document," *Haig* v. *Agee*, 453 U.S. 280, 293 (1981), that, whatever its origins, "today" serves the "crucial function [of] control over exit," *Kent*, 357 U.S. at 129. The issuance and regulation of passports plainly constitutes a necessary and proper exercise of Congress's exclusive powers over immigration, nationality, foreign commerce, and war.

The same holds true for a passport's reference to a "place of birth." "As a general rule, the country that currently has sovereignty over the place of birth is listed as the place of birth." 7 F.A.M. 1330(b) App'x D. This Court has recognized that the term "country" "may describe a foreign State in the international sense," but might also "embrace all the territory subject to a foreign sovereign power." *Burnet* v. *Chi. Portrait Co.*, 285 U.S. 1, 5-6 (1932). "[T]he commonsense meaning of the term [country]" is not coextensive with "sovereign state." *Smith* v. *United States*,

507 U.S. 197, 201 (1993). Accordingly, "the ordinary meaning of the language itself ["country"], we think, includes Antarctica, even though it has no recognized government." *Id.*

"[T]he sense in which ['foreign country'] is used in a statute must be determined by reference to the purpose of the particular legislation." *Burnet*, 285 U.S. at 6 (footnote omitted). This case thus potentially turns on the question: in what sense do passports list the citizen's place of birth? If such listings express statements of legal recognition, the Court would be confronted with questions about the extent to which either branch recognizes foreign countries or their governments. But if such listings are merely administrative, Section 214(d) is nothing more than a routine Congressional reference to a fact about our world, and well within Congress's exclusive power to direct.

The question is not difficult. As the State Department itself acknowledges, "[t]hat [place of birth] entry is included to assist in identifying the individual." 7 F.A.M. 1310(g)(2) App'x D.

> The "place of birth" designation is an integral part of establishing an individual's identity. It distinguishes that individual from other persons with similar names and/or dates of birth, and helps identify claimants attempting to use another person's identity. The information also facilitates retrieval of passport records to assist the Department in determining citizenship or notifying next of kin

> or other person designated by the individual to be notified in case of an emergency.

Id. at 1310(g) App'x D. Accordingly, "the United States will not issue a U.S. passport with no place of birth listing." *Id.*

The State Department advises anyone who persists in complaining about the passport's inclusion of a "place of birth" that "[o]ver the last few years, deletion of the place of birth entry from the U.S. passport has been discussed extensively among U.S. Government agencies and with the Congress." *Id.* at 1310(g)(4) App'x D. "In 1986, Congress directed the Comptroller General to complete a study on the issue." *Id.* at 1310(g)(4)(a) App'x D. The GAO reviewed "two separate studies," which "concluded that elimination of the place of birth from the U.S. passport would cause considerable inconvenience to the entire traveling population." *Id.* at 1310(g)(4)(b) & (c) App'x D. Law enforcement chimed in, claiming that the "place of birth" entry "is a vital data element used in anti-terrorist, anti-drug, and anti-fraud programs." *Id.* at 1310(g)(4)(d) App'x D. Accordingly,

> The GAO report reinforced previous conclusions that removal of the place of birth would lead to serious problems for the U.S. Government and for the majority of the American traveling public.

Id. at 1310(g)(4)(e) App'x D.

Because the "place of birth" entry sounds wholly in administration, and not in recognition, American

passports bear "places of birth" that would not appear on any list of states or governments recognized by the United States, including Taiwan, *id.* at 1340(d)(6) App'x D, "West Bank," "Gaza Strip," and "Palestine," *id.* at 1360 App'x D, the last three of which have never been recognized as countries by the United States, nor existed as such.

It is strange indeed that the President would use litigation over Petitioner's passport as a forum in which to express views regarding Jerusalem's legal status. An American passport bearing "Israel" as a traveler's "place of birth" tells foreign passport inspectors nothing about a citizen's connection to Jerusalem, other than that the passport holder likely holds the citizenship of a country designating Jerusalem as its capital. As regards American foreign policy, it does not necessarily confirm the fact that the United States affords Israel state recognition – something many Arab nations do not, to the point of barring entry to anyone whose passport evinces past travel to Israel (never mind birth there).

But if the President is concerned about some foreign passport official taking offense at acknowledgment that Jerusalem is presently within Israel, he should hope that official does not, in his time away from examining passports, visit the Central Intelligence Agency's "World Factbook" webpage for Israel.[11]

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[11] *The World Factbook: Israel*, Central Intelligence Agency, https://www.cia.gov/library/publications/the-world-factbook/geos/is.html (last visited July 21, 2014).

Among Israel's "major urban areas – population:" the CIA lists "JERUSALEM (capital) 791,000 (2009)." *Id.* The CIA gives Israel's population as 7,821,850, *id.* – a figure which must include at least some and most likely all Jerusalem residents.[12]

In other words, the CIA presents on its website that Israelis living in the West Jerusalem neighborhood of Petitioner's birth are among Israel's total population, and within Israel's capital. Of course, the CIA *World Factbook* would not be very useful were its "facts" bent to suit disputed legal constructs such as sovereign jurisdiction.

The CIA's "Jerusalem in Israel" position is not accidental. As a matter of geography, it reflects *the official position of the Executive Branch*. Because the proper functioning of government requires the establishment of basic facts about places, there exists within the Executive Branch a Board of Geographic Names ("BGN"). See 43 U.S.C. §§ 364-364f.

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[12] While it is unclear from where the CIA derives its data, Jerusalem's 2011 population stood at 801,000. See *Selected Data on the Occasion of Jerusalem Day*, May 16, 2012, Central Bureau of Statistics (Israel), available at www1.cbs.gov.il/www/hodaot2012n/11_12_126e.pdf (last visited July 21, 2014). That same year, Israel's population totaled 7,836,600. See *Statistical Abstract of Israel 2013*, No. 64, Subject 2, Table 1, Central Bureau of Statistics (Israel), available at http://www.cbs.gov.il/reader/shnaton/templ_shnaton_e.html?num_tab=st02_01&CYear=2013 (last visited July 21, 2014). Per these figures, Jerusalem contains approximately 10% of Israel's population – the same proportion found in the CIA's quite similar population numbers.

In conjunction with the Interior Secretary, the BGN "shall provide for uniformity in geographic nomenclature and orthography throughout the Federal Government." *Id.* § 364. The BGN's membership includes, inter alia, representatives of the State, Defense, and Homeland Security Departments, as well as the Central Intelligence Agency.[13]

The National Geospatial Intelligence Agency's ("NGA") GEOnet Names Server database "is the official repository of foreign place-name decisions approved by the U.S. Board on Geographic Names." *Foreign Names*, U.S. Bd. on Geographic Names, http://geonames.usgs.gov/foreign/index.html (last visited July 21, 2014). The NGA advises that

> [t]he geographic names in [its] database are provided for the guidance of and use by the Federal Government and for the information of the general public. **The names, variants, and associated data may not reflect the views of the United States Government on the sovereignty over geographic features.**

See GEOnet Names Server, National Geospatial Intelligence Agency, http://geonames.nga.mil/namesgaz/ (last visited July 21, 2014).

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[13] 43 U.S.C. § 364a; *Getting the Facts Straight*, U.S. Bd. on Geographic Names, available at http://geonames.usgs.gov/brochures_factsheets/docs/USBGN%20Getting%20the%20Facts%20Straight.pdf (last visited July 21, 2014).

Searching that database reveals a variety of Jerusalems – including one in "Israel," bearing a "conventional" name designation[14] and the Unique Name Identifier 13535646. A city in "Israel" under the Hebrew transliteration, "Yerushalayim," is also BGN-approved, Unique Name Identifier 13535647.

If these names are "provided for the guidance of and use by the Federal Government" – by an executive agency – the Executive can hardly complain when Congress takes such "guidance" and makes "use" of the "names" in the context of locating and uniquely identifying geographic features. That Congress might also have communicated a position on that geographic feature's legal status is irrelevant; Congress, like the President, cannot be required to choose between relating to geographic features, and expressing opinions about them.

Congress is entitled to follow the BGN's conclusion about Jerusalem's status as it regulates identifying information on passports. After all, Israel does exercise exclusive jurisdiction and control over the city, which it formally annexed long ago. Whatever the legal validity of Congress's earlier recognition of

[14] "A commonly used English-language name approved by the U.S. Board on Geographic Names (BGN) for use in addition to, or in lieu of, a BGN-approved local official name or names, e.g., Rome, Alps, Danube River." This definition appears when selecting "Name Type Codes" under "Lookup Tables," at http://geonames.nga.mil/namesgaz/, and selecting "Search Name Type Codes."

Jerusalem as Israel's capital, the truth of at least some of the facts Congress found in the course of so doing is incontestible, *e.g.*, that "[t]he city of Jerusalem is the seat of Israel's President, Parliament, and Supreme Court, and the site of numerous government ministries and social and cultural institutions;" and that "[s]ince 1967, Jerusalem has been a united city administered by Israel." Jerusalem Embassy Act of 1995, Pub. L. No. 104-45, § 2, 109 Stat. 398 (1995).

For this Court to reject Congress's determination in enacting Section 214(d), it would have to accept that "Congress has no reasonable basis for believing that" Jerusalem is within Israel. *Vance* v. *Bradley*, 440 U.S. 93, 111 (1979). Congress is "of course entitled to a great deal of deference" when engaging in fact-finding. *Walters* v. *Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 330 n.12 (1985) (citations omitted). Determining that Jerusalem is, in fact, in Israel, is far from the most controversial factual findings that courts have accepted. See, *e.g.*, *Nix* v. *Hedden*, 149 U.S. 304 (1893) (finding that tomatoes, which are botanically fruit, are vegetables).

Indeed, Jerusalem's location in Israel is the sort of simple fact of which courts properly take judicial notice. See *Gov't of Canal Zone* v. *Burjan*, 596 F.2d 690, 693 (5th Cir. 1979) (courts "may take judicial notice of governmental boundaries") (judicially noticing boundary between Panama and Canal Zone); *Philipps* v. *Talty*, 555 F. Supp. 2d 265, 267 n.2 (D.N.H. 2008) (judicially noticing St. Martin's political division and legal system). Doing so is sometimes necessary to

decide cases, and serves as no commentary on the legitimacy of borders or governments.

Other nations might take offense at American passports for all sorts of reasons. But such offense cannot constrain the administration of laws Congress duly enacted pursuant to its assigned powers. The President could not, for example, refuse to implement Congressional codification of the current passport design, bowing to pressure from regimes offended by what they might consider to be graven images in the depictions of Mount Rushmore, see United States Passport (28 page version, 2014) at 14-15, and the Statue of Liberty, *id.* at 26-27.

Enmity among nations cannot supply the President with the power to intrude upon and nullify Congress's necessary and proper exercise of its powers. Congress has the power to identify "Israel" and its declared capital, Jerusalem, on the map, even if such actions are forbidden elsewhere.

CONCLUSION

There is no "Israel exception" to Congress's powers over immigration, nationality, foreign commerce, and war. Congress cannot exercise these powers without inherently determining basic facts about the physical location of various places around the world, including areas that are the subject of vexing territorial disputes. Whatever role the President enjoys in recognizing foreign sovereigns, and quite apart from the

question of Jerusalem's current or future legal status, the President cannot set aside Congress's considered determination that Jerusalem is, as a matter of fact, presently a "place" in Israel.

Respectfully submitted,

PROF. EUGENE KONTOROVICH
NORTHWESTERN UNIVERSITY
SCHOOL OF LAW
375 E. Chicago Avenue
Chicago, Illinois 60611
312.503.0429

ALAN GURA*
GURA & POSSESSKY, PLLC
105 Oronoco Street,
Suite 305
Alexandria, Virginia 22314
703.835.9085
alan@gurapossessky.com
**Counsel of Record*

Counsel for Amici Curiae

July 22, 2014