No. 10-699

In the Supreme Court of the United States

MENACHEM BINYAMIN ZIVOTOFSKY, BY HIS PARENTS AND GUARDIANS ARI Z. AND NAOMI SIEGMAN ZIVOTOFSKY,

Petitioner,

v.

HILLARY RODHAM CLINTON, SECRETARY OF STATE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF *AMICUS CURIAE* OF AMERICANS FOR PEACE NOW IN SUPPORT OF RESPONDENT

AMERICANS FOR PEACE NOW
2100 M STREET, N.W.
SUITE 619
WASHINGTON, D.C. 20037
(202) 408-9898

MARGARET KRAWIEC
Counsel of Record
PATRICK H. HAGGERTY
DANIELE M. SCHIFFMAN
SCOTT SILVERBOARD
1440 NEW YORK AVE, N.W.
WASHINGTON, D.C. 20005
(202) 371-7000
MARGARET.KRAWIEC@PROBONOLAW.COM

Attorneys for Amicus Curiae

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Americans for Peace Now ("APN") respectfully submits this brief as *amicus curiae* in support of respondent Hillary Rodham Clinton, Secretary of State.[1]

STATEMENT OF INTEREST

APN is a prominent, respected American Jewish, Zionist organization committed to the achievement of peace and security for Israel. Established in 1981, APN works to achieve a comprehensive political resolution to the Arab-Israeli conflict – representing American Jews who support Israel and who know that only peace will ensure Israel's security, prosperity and continued viability as a democracy and as a Jewish state. For more than half a century, the United States has played a key role in promoting a negotiated settlement in the Arab-Israeli and the Israeli-Palestinian conflicts, including on the core issue of Jerusalem. With respect to Jerusalem, both Israeli and Palestinian leaders previously have agreed that this contentious issue will be resolved only through permanent status negotiations. Any deviation from the United States' longstanding

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* states that 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 *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Pursuant to the letters filed with the Clerk, *amicus curiae* has permission of all parties to file this brief.

policy of refusing to recognize sovereignty over any part of Jerusalem outside of the context of a negotiated peace agreement could fatally compromise the United States' role as an "honest broker" in such negotiations. Likewise, any action that undermines the ability of Israel and the Palestinians to ultimately reach an agreement that enables the establishment of two capitals in Jerusalem jeopardizes the vital interests of Israel. A two-state solution is the only thing that can guarantee Israel's survival as a democracy and a Jewish state; if the door is closed on such a solution in Jerusalem, then the door also is closed on a two-state resolution to the Israeli-Palestinian conflict.

APN respectfully submits this brief to assist the Court in deciding the first of the two issues to be heard on this petition – whether the "political question doctrine" deprives a federal court of jurisdiction to enforce a federal statute that explicitly directs the Secretary of State how to record the birthplace of an American citizen on a consular report of birth abroad and on a passport. While we agree with the Respondent and the concurring Circuit Judge below that Section 214(d) is unconstitutional, we confine our submission to the applicability of the "political question doctrine."

APN is deeply concerned by the foreign policy issues posed by this case. Despite arguments to the contrary, this case is not merely about how a certain subset of Americans have their birthplace recorded in U.S. government-issued documents, nor is it about

a simple administrative question regarding what branch of government has authority over matters related to the issuance of passports. Rather, this case represents a direct challenge to more than six decades of U.S. foreign policy regarding one of the most sensitive foreign policy questions facing the United States – recognition of sovereignty over Jerusalem. This issue of recognition of sovereignty over Jerusalem is the quintessential example of why such sensitive foreign policy decisions must be left in the hands of the executive branch.

INTRODUCTION AND SUMMARY OF ARGUMENT

APN agrees with the arguments of the Respondent that the executive branch's decision regarding how to officially record the place of birth of a U.S. citizen born in Jerusalem is constitutionally committed to the President's sole discretion. Specifically, as emphasized by the Respondent, the Constitution grants the President the exclusive power to recognize foreign sovereigns and to determine the extent of their territorial sovereignty. Accordingly, Petitioner's claim that he is entitled to have "Israel" recorded as his place of birth in his passport and consular report of birth abroad is without merit.

This brief focuses primarily on the contention advanced in Petitioner's brief that "the courts below were asked to enforce a straightforward congressional statute, not to decide a 'political question,'" and that its complaint "seeks only the

enforcement of the very straightforward command of Section 214(d)," the kind of question routinely resolved by courts and devoid of any political question. Brief for Petitioner ("Pet. Br.") 25-26. To the contrary, this case presents a direct challenge to the United States' longstanding foreign policy regarding sovereignty over Jerusalem.

The United States has played a critical role in promoting negotiations to resolve the Arab-Israeli conflict for more than half a century and, in an effort to maintain its status as an "honest broker" and to achieve lasting peace in the Middle East, has refused to recognize any state as having sovereignty over any part of Jerusalem until the issue is resolved in negotiations. The executive branch also has rebuffed Congress' sustained legislative efforts to change U.S. foreign policy to recognize Jerusalem as the capital of Israel on the basis that such legislation is an impermissible intrusion on presidential foreign policy powers. Implementing 214(d) of the Foreign Relations Authorization Act would be deemed as a meaningful shift in U.S. foreign policy and potentially strip the United States of credibility in brokering Israeli-Palestinian permanent status negotiations going forward.

Petitioner asks this Court to disregard the President's constitutionally committed recognition power. It is well settled by this Court that issues that raise claims whose resolutions are committed to the executive branch by the Constitution itself should not be resolved by the judicial department. Further, longstanding precedent of this Court

establishes that the Constitution vests the President with plenary and exclusive authority to recognize foreign states and governments, including determining the status of disputed territory and other policies incident to recognition. This case squarely presents a nonjusticiable political question not fit for judicial resolution.

ARGUMENT

I. This Case Represents a Direct Challenge to More than Six Decades of U.S. Foreign Policy on the Recognition of Sovereignty Over Jerusalem

A. *American Diplomacy and the Arab-Israeli Peace Process*

For more than half a century, the United States has played a key role in promoting and mediating a negotiated settlement to the Arab-Israeli conflict – and the United States will undoubtedly continue to play such a role in the future. Israeli-Palestinian peace has been recognized by successive U.S. Presidents, from both political parties, as a vital U.S. national interest and a prominent foreign policy goal. The United States has deep historical, social, cultural, diplomatic, and strategic-military ties to Israel. The United States has long provided large amounts of aid to Israel and since the outset of the peace process also has provided significant assistance to the Palestinians. *See* Jeremy M. Sharp, *U.S. Foreign Aid to Israel* (Sept. 16, 2010),

http://www.fas.org/sgp/crs/mideast/RL33222.pdf; Jim Zanotti, *U.S. Foreign Aid to the Palestinians* (May 31, 2011), http://www.fas.org/sgp/crs/mideast/RS22967.pdf.

Over the past four decades, the United States has been intimately involved in the peace process. As historian William B. Quandt stated in the introduction of his book, *Peace Process: American Diplomacy and the Arab-Israeli Conflict Since 1967*:

> Sometime in the mid-1970s the term *peace process* began to be widely used to describe the American-led efforts to bring about a negotiated peace between Israel and its Arab neighbors. The phrase stuck, and ever since it has been synonymous with the gradual, step-by-step approach to resolving one of the world's most difficult conflicts. In the years since 1967 the emphasis in Washington has shifted from the spelling out of the ingredients of 'peace' to the 'process' of getting there. . . . The United States has provided both a sense of direction and a mechanism.

William B. Quandt, *Peace Process: American Diplomacy and the Arab-Israeli Conflict Since 1967* 1 (Brookings Inst. and Univ. of Cal. Press, 3d ed. 2005).

The United States continues to play an indispensable role in the peace process. As Ambassador Daniel C. Kurtzer and Dr. Scott B. Lasensky stated in their book, *Negotiating Arab-*

Israeli Peace: American Leadership in the Middle East:

> As the principal outside actor, it is the task of the United States to facilitate, mediate, and to some degree arbitrate and oversee the negotiations, to cut through the asymmetries and help the parties address each other's needs. . . .
>
> To be sure, the parties themselves bear primary responsibility for resolving the conflict, but the United States has long held an outsized role. When the parties have created their own momentum in the negotiations . . . they have always leaned on Washington to help them bridge differences, walk the last mile, provide off-the-table incentives to reach agreement, and to be an involved stakeholder in implementing accords. . . . Unlike other outside actors, Washington is already deeply enmeshed — politically, strategically, and economically — across the entire set of Arab-Israeli relationships.

Daniel C. Kurtzer & Scott B. Lasensky, *Negotiating Arab-Israeli Peace: American Leadership in the Middle East* 9-11 (United States Inst. of Peace Press 2008).

Prior to 1967, Israel and Jordan each controlled parts of Jerusalem. In June 1967, as a result of the Six-Day War, Israel acquired control of the former Jordanian-controlled parts of the city. On November 22, 1967, the United Nations Security Council

adopted Resolution 242, and on October 22, 1973, the Security Council adopted Resolution 338. *See* S.C. Res. 242, U.N. Doc. S/RES/242 (Nov. 22, 1967); S.C. Res. 338, U.N. Doc. S/RES/338 (Oct. 22, 1973). Together, these resolutions established a framework for negotiations to reach a just and durable peace in the Middle East and remain as a foundation for efforts to negotiate a settlement to the Israeli-Palestinian conflict.

On September 13, 1993, the Declaration of Principles on Interim Self-Government Arrangements (the "Declaration") was signed between Israel and the Palestine Liberation Organization ("P.L.O.") and witnessed by the United States and the Russian Federation. *See* Declaration, Isr.-P.L.O., Sept. 13, 1993, http://avalon.law.yale.edu/20th_century/isrplo.asp. The Declaration created two time frames: a transitional period, and "Permanent Status Negotiations." The "issue" of Jerusalem was determined to be a part of the Permanent Status Negotiations. *See id.* at Art. V. The Interim Agreement (the "Agreement") on the West Bank and Gaza Strip was signed by Israel and the P.L.O. on September 28, 1995. *See* Agreement, Isr.-P.L.O., Sept. 28, 1995, http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/THE+ISRAELI-PALESTINIAN+INTERIM+AGREEMENT.htm. The Agreement confirmed that, "[i]n accordance with the [Declaration of Principles] . . . issues that will be negotiated in the permanent status negotiations [include] Jerusalem." *Id.* at Arts. XVII and XXXI.

The United States, with the support of the international community, has remained committed to promoting a negotiated, permanent resolution of all the core issues, including the status of Jerusalem, to achieve the goal of two democratic states, Israel and Palestine, living side-by-side in peace and security. To that end, in 2003, the Bush Administration, in cooperation with Russia, the European Union, and the United Nations (collectively, "the Quartet"), developed "A Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict" that was presented to Israel and the Palestinians on April 30, 2003. *See* The Roadmap (Apr. 30, 2003), http://www.un.org/media/main/roadmap122002.pdf. Phase III of the Roadmap provides for Israeli-Palestinian negotiations aiming at a permanent status agreement on borders, Jerusalem, refugees and settlements. *See id* at 6.

In addition, in November 2007, the United States convened an international conference in Annapolis, Maryland to promote negotiations between the parties. During that conference, Israeli and Palestinian leaders concluded a Joint Understanding committing, among other things, to "immediately launch good-faith bilateral negotiations in order to conclude a peace treaty, resolving all outstanding issues, including all core issues, without exception, as specified in previous agreements." President George W. Bush, *Address to the Annapolis Conference* (Nov. 27, 2007), http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2007/Address%20by%

20President%20George%20Bush%20to%20the%20Annapolis%20Conference%2027-Nov-2007.

More recently, President Obama stated during a speech:

> [W]hile the core issues of the conflict must be negotiated, the basis of those negotiations is clear: a viable Palestine, and a secure Israel. The United States believes that negotiations should result in two states, with permanent Palestinian borders with Israel, Jordan, and Egypt, and permanent Israeli borders with Palestine. The borders of Israel and Palestine should be based on the 1967 lines with mutually agreed swaps, so that secure and recognized borders are established for both states.

President Barack Obama, *Remarks As Prepared for Delivery "A Moment of Opportunity"* (May 19, 2011), http://www.whitehouse.gov/the-press-office/2011/05/19/remarks-president-barack-obama-prepared-delivery-moment-opportunity.

B. ***The United States' Consistent Policy Has Been to Recognize No State as Having Sovereignty Over Jerusalem***

The city of Jerusalem – home to the three major monotheistic faiths – Judaism, Christianity, and Islam – lies at the heart of the Israeli-Palestinian conflict. The status of Jerusalem is one of the most longstanding and sensitive disputes in this conflict. The centrality of the question of Jerusalem in any

settlement of this conflict as a whole cannot be denied.

The United States consistently has refused to recognize the sovereignty of any party—Israeli, Jordanian, Palestinian—in any part of Jerusalem. This policy dates back to before the birth of Israel in 1948 and has been followed by every U.S. administration since, regardless of the political party occupying the White House.

Pre-1948. Prior to 1948, the United States supported the internationalization of Jerusalem under the leadership of the United Nations. *See* Yossi Feintuch, *U.S. Policy on Jerusalem* 7 (Greenwood Press 1987). The November 29, 1947 United Nations Partition Plan, supported by the Truman administration, envisaged for Jerusalem the establishment of a "*corpus separatum* under a special international regime." G.A. Res. 181(II), Pt. III, U.N. Doc. A/181 (Nov. 29, 1947). The United States supported Jerusalem's internationalization as a means of safeguarding the religious rights of the three major monotheistic faiths. However, the Partition Plan was never implemented because hostilities broke out.

1948-1967. After Israel took control of West Jerusalem in 1948 and proclaimed independence, the United States' position on the sovereignty of Jerusalem did not change. The United States continued to recognize that no party had sovereignty over any part of Jerusalem. During this period, the United States continued to support internationalization of Jerusalem with a strong

United Nations role. For example, in August 1948, the State Department declared, "[w]e continue to believe that Jerusalem should not be placed under the sole authority of either side and that some degree of UN responsibility is still essential. . . ." Press Release, Dep't of State, Summary of Telegrams (Aug. 13, 1948). And in October 1948, President Truman stated, "We continue to support, within the framework of the United Nations, the internationalization of Jerusalem and the protection of the holy places in Palestine." Press Release, President Harry S. Truman, *Statement by the President on Israel* (Oct. 24, 1948). A few years later, in 1952, an Aide-Memoir concerning the proposed move of the Israeli Foreign Ministry from Tel Aviv to Jerusalem stated, "[t]he Government of the United States has adhered and continues to adhere to the policy that there should be a special international regime for Jerusalem which will not only provide protection for the holy places but which will be acceptable to Israel and Jordan as well as the world community. . . ." Press Release, Dep't of State, No. 576 (July 22, 1952).

Post-1967 – Present. Following the 1967 War, in which Israel took control of the West Bank, including East Jerusalem, the United States' position on sovereignty over Jerusalem again did not change. The United States' position since 1967 has been to recognize no party's sovereignty over any part of Jerusalem. During this period, the United States categorically rejected unilateral actions by Israel altering the status of Jerusalem. For example, responding to the Knesset's extension of

Israeli law to an expanded East Jerusalem on June 28, 1967, the State Department noted that "the United States has never recognized such unilateral actions by any of the states in the area as governing the international status of Jerusalem." Press Release, Dep't of State, Department Statement (June 28, 1967). United Nations representative Arthur Goldberg explained on July 14, 1967, "I wish to make it clear that the United States does not accept or recognize these measures as altering the status of Jerusalem. . . . We insist that the measures taken cannot be considered as other than interim and provisional, and not as prejudging the final and permanent status of Jerusalem." Arthur Goldberg, United States Permanent Representative to the United Nations, *Address to the United Nations General Assembly*, Fifth Emergency Special Session (July 14, 1967). Further, regarding Israel's occupation of a portion of Jerusalem, President Richard Nixon's United Nations Representative, Charles Yost, noted on July 1, 1969 that "[w]e have consistently refused to recognize those measures as having anything but a provisional character and do not accept them as affecting the ultimate status of Jerusalem." Charles Yost, United States Permanent Representative to the United Nations, *Address to the United Nations Security Council* (July 1, 1969). Subsequently, President Gerald Ford's United Nations envoy, William Scranton, noted on March 23, 1976:

> [A]s far as the United States is concerned such unilateral measures, including expropriation of land or other

> administrative action taken by the Government of Israel, cannot be considered other than interim and provisional and cannot affect the present international status nor prejudge the final and permanent status of Jerusalem. The U.S. position could not be clearer. Since 1967 we have restated here, in other fora, and to the Government of Israel that the future of Jerusalem will be determined only through the instruments and processes of negotiation, agreement, and accommodation. Unilateral attempts to predetermine that future have no standing.

William Scranton, United States Permanent Representative to the United Nations, *Address to the United Nations Security Council* (Mar. 23, 1976). More recently, on November 25, 2009, Special Envoy for Middle East Peace George Mitchell reiterated: "As to Jerusalem, United States policy remains unaffected and unchanged. As has been stated by every previous administration which addressed this issue, the status of Jerusalem and all other permanent status issues must be resolved by the parties through negotiations." Press Release, *Briefing by Special Envoy for Middle East Peace George Mitchell* (Nov. 25, 2009), http://www.state.gov/r/pa/prs/ps/2009/nov/132447.htm.

During this period, the United States began discussing a solution to the conflict, including the status of Jerusalem. Presidents Jimmy Carter,

Ronald Reagan, George H.W. Bush, William Clinton, George W. Bush and Barack Obama all have stated that the final status of Jerusalem must be resolved through negotiation.

• President Carter: "As to Jerusalem, we strongly believe that Jerusalem should be undivided, with free access to the holy places for all faiths, and that its status should be determined in the negotiations for a comprehensive peace settlement." President Jimmy Carter, *Explanation of the United States Vote for the Security Council Resolution on the Occupied Territories* (Mar. 3, 1980).

• President Reagan: "[W]e remain convinced that Jerusalem must remain undivided, but its final status should be decided through negotiation." President Ronald Reagan, *Address to the Nation* (Sept. 1, 1982).

• President George H.W. Bush: "Let me just say that our policy on Jerusalem remains unchanged. It must never be divided again, and its final status must be resolved through negotiation." President George H.W. Bush, *Remarks at the President's News Conference with Prime Minister Yitzhak Rabin of Israel* (Aug. 11, 1992).

• President Clinton: "[I]n terms of the resolution of Jerusalem, the position of the United States has not changed." President William Clinton, *Remarks at the President's News Conference with Prime Minister Yitzhak Rabin of Israel* (Mar. 16, 1994). "The status of Jerusalem is, under the Oslo accords, something that the parties themselves have to work out at the end." President William Clinton,

Remarks at the President's News Conference with Prime Minister Ehud Barak of Israel (July 19, 1999).

• President George W. Bush: "U.S. Policy regarding Jerusalem has not changed." President George W. Bush, *Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003*, 38 Weekly Compilation of Presidential Documents 1659 (Sept. 30, 2002).

• President Obama: "The time has come to relaunch negotiations—without preconditions—that address the permanent status issues: security for Israelis and Palestinians, borders, refugees and Jerusalem." President Barack Obama, *Address to the United Nations General Assembly* (Sept. 23, 2009).

In sum, the United States has never recognized the sovereignty of any party in any part of Jerusalem. The present and consistent foreign policy of the United States is that the competing claims to Jerusalem represent an open question to be resolved pursuant to permanent status negotiations, as part of a negotiated settlement between the parties.

C. *Congress' Sustained Effort to Change U.S. Policy Regarding the Status of Jerusalem Culminating in the Passage of Section 214 of the Foreign Relations Authorization Act, Fiscal Year 2003*

(i) The 2003 Foreign Relations Authorization Act

Section 214, the statutory provision at issue, is found in the lengthy Foreign Relations Authorization Act, Fiscal Year 2003 (the "Act"). *See* Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. 107-228, 116 Stat. 1350 (2003). Section 214 of the Act is titled "United States Policy with Respect to Jerusalem as the Capital of Israel." The specific subsection at issue is § 214(d), which provides:

> 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 [of State] shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel.

The remainder of this section "urges the President . . . to immediately begin the process of relocating the United States Embassy in Israel to Jerusalem," § 214(a), bars funding for a U.S. consulate in Jerusalem unless the facility is

supervised by the U.S. Ambassador to Israel, § 214(b), [2] and bars funding under the Act for publishing any "official government document which lists countries and their capital cities unless the publication identifies Jerusalem as the capital of Israel," § 214(c).

(ii) President Bush's September 30, 2002 Signing Statement

President Bush signed the Act on September 30, 2002. Because of Section 214 regarding Jerusalem, and certain other troubling provisions, the President issued a Signing Statement setting forth his construction of Section 214. *See* 38 Weekly Compilation of Presidential Documents 1658-60 (Sept. 30, 2002). After recognizing the Act's "[m]any provisions . . . [that] will strengthen our ability to advance American interests around the globe, including nonproliferation of weapons of mass destruction, and to meet our international commitments," the President discussed the "number of provisions that impermissibly interfere with the constitutional functions of the presidency in foreign affairs, including provisions that purport to establish foreign policy that are of significant concern." *Id.* at 1658.

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[2] At present, the U.S. Consulate General in Jerusalem, established in 1928, is an independent U.S. mission whose members are not accredited to a foreign government. They do not report to the U.S. Ambassador to Israel.

Specifically, President Bush stated:

> 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.

Id. at 1659. President Bush concluded his statement with:

> My approval of the Act does not constitute my adoption of the various statements of policy in the Act as U.S. foreign policy. Given the Constitution's commitment to the presidency of the authority to conduct the Nation's foreign affairs, the executive branch shall construe such policy statements as advisory, giving them the due weight that comity between the legislative and executive branches should require, to the extent consistent with U.S. foreign policy.

Id. at 1660.

(iii) Congress' Sustained Effort to Change U.S. Policy on Jerusalem

Section 214(d) is not a mere law regularly passed "in furtherance of [Congress'] exclusive powers" over immigration, naturalization, and foreign commerce, as asserted by members of the House and Senate. *See* Br. for the Members of the United States Senate et al. as Amici Curiae Supporting Pet. at 5-6, App., *Zivotofsky v. Clinton*, No. 10-699 (Aug. 5, 2011). Rather, it is part of a sustained effort by Congress to force a substantive change in established U.S. policy regarding the status of Jerusalem by exploiting provisions[3] designed to incrementally impose a new U.S. policy of de facto recognizing Jerusalem as Israel's capital. Republican and Democratic administrations alike have consistently opposed such overreaching congressional action regarding U.S. policy towards Jerusalem, exemplified by President Bush's signing statement to the legislation at issue. *See* 38 Weekly Compilation of Presidential Documents 1698 (Sept. 30, 2002).

Congressional attempts to enact these provisions began in 1997 with the first introductions of several related items of legislation, including the one found in Section 214(d). *See, e.g.*, H.R. 1298, 105th Cong. (1997) (requiring passports to list "Jerusalem" as "Jerusalem, Israel" for birth place); H.R. 1486, 105th

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[3] The provisions consist of the three found in Section 214(b)-(d) of the legislation at issue. *See* Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228 §§ 214b-d, 116 Stat. 1350, 1365-66 (2002).

Cong. § 1710 (1997) (pairing the passport obligation with contingencies on consulate and publications funding). Congress continued to introduce legislation containing these measures annually, on their own and as part of larger appropriations and authorization bills,[4] culminating in their passage in 2002 as Section 214(b)-(d) of the Foreign Relations Authorization Act, Fiscal Year 2003. Often, Congress gave titles to the bills or sections featuring these provisions that made clear its intent was to force a shift in U.S. foreign policy and recognize Jerusalem as the capital of Israel. *See e.g.*, H.R. 2529, 106th Cong. (1999) ("To take certain steps toward recognition by the United States of Jerusalem as the capital of Israel."); H.R. 1643, 107th Cong. (2001) ("To provide for the recognition of Jerusalem as the capital of Israel."); Foreign Relations Authorization Act, Fiscal Year 2003, § 214 ("United States policy with respect to Jerusalem as the capital of Israel.").

Additionally, conference reports and congressional debate on these bills show Congress' plan for the provisions to work *collectively* (sometimes with appropriations for constructing an embassy in Jerusalem) to interfere with long-standing U.S. foreign policy regarding Jerusalem.

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[4] *See, e.g.*, H.R. 2832, 105th Cong. (1997); H.R. 4276, 105th Cong. §§ 406-08 (as passed by Senate, Aug. 31, 1998); S. 886, 106th Cong. § 725 (as passed by Senate, June 22, 1999); H.R. 2529, 106th Cong. (1999); H.R. 4690, 106th Cong. (as reported by Senate, July 21, 2000); H.R. 598, 107th Cong. (2001); S. 2778, 107th Cong. §§ 404-06 (2002).

See H.R. Rep. No. 105-432, at 164 (1998) (Conf. Rep.) ("The House bill . . . contains four provisions which *together* reaffirm and strengthen U.S. policy . . . that Jerusalem should remain the undivided capital of Israel.") (emphasis added); 144 Cong. Rec. H1148-49 (daily ed. Mar. 12, 1998) (statement of Rep. Sherman) (stating the failure to list "Jerusalem, Israel" on passports and place the consulate there under the authority of the Ambassador to Israel are missed opportunities to show the United States recognizes Jerusalem as Israel's capital); 145 Cong. Rec. E2529 (daily ed. Nov. 22, 1999) (speech of Rep. Gilman) (noting the provisions "are extremely important efforts which recognize the reality that Jerusalem is, and will always remain Israel's eternal capital"). Even the conference report for the legislation at issue notes Section 214 "contains four provisions related to the recognition of Jerusalem as Israel's capital," H.R. Rep. No. 107-671, at 123 (2002) (Conf. Rep.). The legislative record leaves little doubt that the intended function of Section 214(d) was for it to work in concert with the other related enactments to force a de facto recognition of Jerusalem as the capital of Israel.

Recognizing this, Democratic and Republican administrations alike have consistently rebuffed these intrusions on the executive branch's constitutionally granted powers over foreign policy. Upon vetoing H.R. 2670, 106th Cong. (1999), which contained some of the same provisions as in Section 214, President Clinton remarked:

> The bill includes a number of provisions regarding the conduct of foreign affairs that raise serious constitutional concerns. Provisions concerning Jerusalem are objectionable on constitutional, foreign policy, and operational grounds. The actions called for by these provisions would prejudice the outcome of the Israeli-Palestinian permanent status negotiations. . . . Applying restrictions to the President's authority to engage in international negotiations and activities raises serious constitutional concerns. . . . My Administration's objections to these and other language provisions have been made clear in previous statements of Administration policy regarding this bill.

H.R. Doc. No. 106-148, at 2 (1999). President Bush's 2002 signing statement was a continuation of this constitutional defense of executive power from congressional encroachment.

Notably, enacting the provisions contained in Section 214 was not Congress' first strategy to force a change in U.S. policy regarding Jerusalem. In the decades beforehand, Congress undertook efforts to mandate the relocation of the U.S. Embassy in Israel from Tel Aviv to Jerusalem as a first step in forcing a de facto policy change. In the early 1980s, the House of Representatives introduced but failed to pass a resolution expressing that the embassy should be moved. H. Res. 199, 97th Cong. (1981). Soon thereafter, both houses of Congress introduced

bills requiring that the embassy be moved to Jerusalem. S. 2031, 98th Cong. (1983); H.R. 4877, 98th Cong. (1984). The Reagan administration opposed the bills and Secretary of State George Shultz noted that they raised serious separation of powers questions. *See* Letter from George P. Shultz, Sec'y of State, to Dante B. Fascell, Chairman, Comm. on Foreign Affairs, U.S. House of Representatives (Feb. 13, 1984). President Reagan himself chastised Congress and threatened to veto the bill. *See* Harry Kelly et al., *That Is a Most Unwise Thing*, Time, Apr. 9, 1984, http://www.time.com/time/magazine/article/0,9171,952383-1,00.html ("Like the several presidents before me, I think that that is a most unwise thing.").

A decade later the effort was renewed when Congress passed the Jerusalem Embassy Act of 1995, Pub. L. No. 104-45, 109 Stat. 398 (1995), conditioning portions of State Department funding on the relocation of the embassy by May 31, 1999. Congress recognized the Clinton administration's concerns, however, that the mandatory language in that act intruded on presidential foreign policy powers, and as such could have a severely detrimental effect on the peace process.[5] To alleviate these concerns and avoid a veto, Congress added a provision allowing the President to suspend the

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[5] *See* 141 Cong. Rec. S15468-69 (daily ed. Oct. 23, 1995). Congress included as exhibits on the record a memorandum from Assistant Attorney General Walter Dellinger and a letter from Secretary of State Warren Christopher opposing the Act on constitutional and policy grounds. *See id.*

funding limitations required in the act for six-month periods. Jerusalem Embassy Act, § 7; *see also* 141 Cong. Rec. S15521 (daily ed. Oct. 24, 1995) (statement of Sen. Feinstein). Despite inclusion of this waiver authority, President Clinton expressed his displeasure at Congress' overreaching by letting the measure become law without his signature. Each President since has used this waiver mechanism to re-assert executive authority over policy regarding Jerusalem's status. *See, e.g.*, Presidential Determination No. 99-29, 64 Fed. Reg. 33739 (June 17, 1999); Presidential Determination No. 2001-19, 66 Fed. Reg. 34355 (June 11, 2001); Presidential Determination No. 2009-19, 74 Fed. Reg. 27903 (June 5, 2009).[6]

Though Congress recognized the same executive concerns during earlier attempts to pass some of the same provisions contained in Section 214, no waiver authority was included. *See* 143 Cong. Rec. H3292 (daily ed. June 4, 1997) (statement of Rep. Hamilton) (warning the requirement to print "Jerusalem, Israel" in government publications is unacceptable to the Clinton administration and could prejudice the United States' position in peace negotiations). Now, with members of Congress taking the further step of joining the Petitioner as *amici* to see this law enforced, Congress' goal to impose its will on the

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[6] The past two Congresses have introduced legislative efforts to eliminate the presidential waiver authority included in the 1995 Act. *See, e.g.*, H.R. 1006, 112th Cong. (2011); H.R. 3412, 111th Cong. (2009).

executive branch's constitutionally granted foreign policy purview is clear. In this light, Section 214(b)-(d), along with more recent attempts to pass nearly identical legislation,[7] only can be seen as attempts to usurp long-standing executive branch policy towards Jerusalem.[8]

D. *Serious Repercussions for U.S. Foreign Policy If Section 214(d) Is Implemented*

The United States has long understood that recognition of the political equities of any party in

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[7] *See* H.R. 167, 108th Cong. (2003); H.R. 588, 109th Cong. (2005); H.R. 895, 110th Cong. (2007).

[8] In an October 27, 2010 Op-ed piece regarding this case, then Congressman Anthony Weiner wrote:

> While this outrage eventually led to Congressional action, it also points to a larger problem – the failure of the State Department to recognize Jerusalem as the undisputed capital of Israel.
>
> This struggle is not just some 'insider' bureaucratic dispute in Washington. Acceptance of Jerusalem as the capital of Israel is crucial. . . .
>
> It is absolutely critical that the law I passed be implemented, that the U.S. embassy be moved to Jerusalem, and that the United States send a clear message to the rest of the world and Israel's neighbors that Jerusalem *is* part of the Jewish state.

Anthony D. Weiner, Op-Ed., *The Failing to Recognize Jerusalem*, The Jewish Press, Oct. 27, 2010, http://www.jewishpress.com/pageroute.do/45774.

Jerusalem is a highly-sensitive foreign policy issue with far-reaching implications for U.S. interests. Any deviation from existing policies and practices is noted by all interested parties in a manner that has a direct, compelling impact on U.S. foreign policy.

United States actions and reactions with respect to Jerusalem, and in particular to changing the status quo in Jerusalem, are watched closely by people in the region and around the world. Every statement uttered about Jerusalem by any U.S. official is parsed by journalists, pundits, and politicians, not to mention interested individuals, to try to determine if the absence or inclusion of a specific word or sentence connotes a meaningful shift in U.S. policy.

In this regard, when the Act at issue in this case was signed into law in 2002, numerous media articles reported on the reaction from Palestinian officials. For example, Saeb Erekat, then a member of the Palestinian Cabinet, stated that President Bush's signing of the bill "undermines all efforts being exerted to revive the peace process and put it back on track;" and the Palestinian Planning and International Cooperation Minister Nabil Shaath described the legislation as "an act against peace, an act of incitement," *U.S. Law on Jerusalem Denounced*, Seattle Times, Oct. 2, 2002, at A12, *available at* 2002 WLNR 1680166.

Other media articles commented on the outrage voiced by Arabs and Muslims and other foreign governments. *See, e.g., Fresh Evidence of U.S. Bias Towards Israel*, Financial Times, Oct. 11, 2002,

available at 2002 WLNR 7617790 ("Following the signing of the congressional legislation . . . the local Arab language dailies discussed the resentment and anger felt by Arabs and Muslims who consider the legislation fresh evidence of the U.S. bias towards Israel. . . . This congressional move has gone so far as to belittle the international legitimacy and the UN resolutions [and] provides that the U.S. administration is a tool in the hands of Zionist policy and Israeli will."); James Bennet, *Angry at U.S., Palestinians Ratify Capital in Jerusalem*, New York Times, Oct. 7, 2002, at A8, *available at* 2002 WLNR 4010268 (reporting that "news of the American legislation has provoked anger well beyond the West Bank and Gaza Strip[;] . . . Malaysia's prime minister, Mahathir Mohamad, said the American measure was 'pouring oil on the fire'" and "[t]housands of Palestinians have demonstrated against the legislation in recent days"); Firdaus Abdullah, *PM: US Move Will Fuel Anger*, New Straits Times, Oct. 7, 2002, at 6, *available at* 2002 WLNR 1217252 (reporting that the signed legislation "caused widespread protest from Muslims around the world"); *Arab States Have Reacted with Fury to the Signing by President Bush of a Law that Urges Recognition of Jerusalem as the "Capital of Israel*," 46 Middle East Economic Digest, Oct. 4, 2002, at 2, *available at* 2002 WLNR 14626460 ("Saudi Arabia issued a statement on 2 October saying that the law was in violation of international law and in contradiction to UN Security Council resolutions," and that the law "was also harshly criticized by Egypt, Jordan, Syria, the Palestinian

Authority and the Arab League"); Jamal Halaby, *Arabs Blast US Legislation Recognizing Jerusalem as Capital*, Jerusalem Post, Oct. 3, 2002, *available at* 2002 WLNR 152188 (quoting various Middle Eastern officials voicing their objection to the legislation and noting that the legislation would "endanger security and peace in the region"); *Arabs Outraged by U.S. Move On Jerusalem: 'U.S.-Israeli conspiracy:' Congress Requires Bush to Recognize City as Israel's Capital*, National Post, Oct. 3, 2002, at A21, *available at* 2002 WLNR 7864977 (reporting various countries as "condemn[ing] the law, saying it will add another unecessary [sic] complication to efforts to bring peace to the region"); *Palestinians Denounce U.S. Recognition of Jerusalem as Israel Capital*, USATODAY.com, Oct. 1, 2002, http://www.usatoday.com/news/world/2002-10-01-palestinians_x.htm (the Organization of Islamic Conference's secretary-general Abdelouahed Belkeziz commented that the signing of the bill "will inflame Muslim feelings everywhere and will not make the United States' mission as a peace mediator in the Middle East easy").

Implementing 214(d) of the Act would, without question, be perceived by all sides as a meaningful shift in U.S. policy. Advocates of such a shift would no doubt declare it a foreign policy victory. They would argue that this shift means that for the first time, the United States is recognizing Israeli sovereignty over Jerusalem – as defined by the borders that Israel has drawn, including East Jerusalem.

Opponents of such a shift, in particular among stakeholders whose interests are not safeguarded or addressed under the current Jerusalem status quo, would unquestionably view it as abandonment by the United States of its longstanding, principled position of refusing to recognize any sovereignty over Jerusalem. They would see it as a shift by the United States in favor of a position that openly supports a specific and exclusionary outcome with respect to the city.

Such a shift in U.S. policy would fatally compromise the ability of the United States to act, or even claim to act, as an "honest broker" in future peace negotiations, with the United States de facto taking sides with respect to the outcome of one of the core issues in the conflict – an issue that both Israeli and Palestinian leaders have previously agreed would be resolved through permanent status negotiations. When vetoing H.R. 2670, President Clinton foreshadowed this very concern: "The actions called for by these provisions would prejudice the outcome of the Israeli-Palestinian permanent status negotiations." H.R. Doc. No. 106-148, at 2 (1999). And the State Department explained in this litigation, "U.S. Presidents have consistently endeavored to maintain a strict policy of not prejudging the Jerusalem status issue and thus not engaging in official actions that would recognize, or might be perceived as constituting recognition of, Jerusalem as either the capital city of Israel, or as a city located within the sovereign territory of Israel." J.A. 53. The Department of State has thus determined that

> [a]ny unilateral action by the United States that would signal, symbolically or concretely, that it recognizes that Jerusalem is a city that is located within the sovereign territory of Israel would critically compromise the ability of the United States to work with Israelis, Palestinians and others in the region to further the peace process, to bring an end to violence in Israel and the Occupied Territories, and to achieve progress [toward peace]. . . . [A]ny United States change with respect to Jerusalem . . . [would] cause irreversible damage to the credibility of the United States and its capacity to facilitate a final and permanent resolution of the Arab-Israeli conflict.

Id. at 52-53.

II. The Decision How to Record the Place of Birth for a Citizen Born in Jerusalem in Official U.S. Government Documents Is Committed Exclusively to the Executive Branch Through the President's Constitutionally Committed Recognition Power

APN agrees that the analyses of the legal issues in the majority and concurring opinions of the court below are correct statements of the applicable jurisdictional and constitutional principles that control this case. The question as to whether individual Americans born in Jerusalem have

"Israel" recorded as their place of birth in U.S. government-issued documents is not the kind of question courts routinely resolve. This is not a simple administrative question arguing about which branch of government has authority over matters related to the issuance of passports. This case represents a direct challenge to more than six decades of U.S. foreign policy on one of the most sensitive foreign policy questions facing the United States: recognition of sovereignty over Jerusalem. It also challenges the exercise of considered judgment that the Constitution aspires to preserve, and which the Supreme Court has preserved, in the separation of powers. It is not within the province of the courts to inquire into the policy underlying actions taken by the executive branch in the exercise of its constitutionally afforded powers. This case presents a nonjusticiable political question.

A. *Courts May Not Consider Claims That Raise Issues Whose Resolution Has Been Committed to the Executive Branch by the Text of the Constitution*

Every aspect of U.S. foreign policy relating to recognition of sovereignty over Jerusalem is a matter of foreign policy traditionally assigned to the executive. It is clear that the founding fathers sought to at least partially immunize the determination of foreign policy from the vagaries of passion and populism – forces to which the legislative branch is far more exposed than the executive. They did so by vesting such

determination, subject to some checks and limits, in the hands of the executive.

"Under the Constitution of the United States, the President has exclusive authority to recognize or not to recognize a foreign state or government, and to maintain or not to maintain diplomatic relations with a foreign government." Restatement (Third) of Foreign Relations Law of the United States § 204 (1987). Moreover, "[t]he President's determinations and actions within the scope of this [power], if they accord with the Constitution in other respects, are binding on Congress and the courts." *Id.* § 204 cmt. a. And the President's recognition power includes the determination of foreign sovereignty over territory and boundaries, and the policies incident to recognition. *See id.* § 204 cmt. a, reporters' note 1.

The constitutional provision that the President "shall receive Ambassadors and other Public Ministers" U.S. Const. Art. II, § 3, historically has been considered the source of the President's recognition power.[9] This clause gives the President plenary and exclusive authority to recognize foreign states and governments, and that authority includes

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[9] *See also* U.S. Const. Art. II, § 2, cl. 2, stating that the President has the constitutional "power" to appoint "Ambassadors, other public Ministers and Consuls." The exchange of diplomatic envoys has been considered conclusive evidence of mutual recognition between governments, and has been said to be a source of the executive recognition of power. Restatement (Third) of Foreign Relations Law of the United States § 204 cmt., a, reporters' note 2 (1987).

determining the status of disputed territory and other policies incident to recognition. Specifically, directing the State Department to treat U.S. passport documentation, which is used to communicate with foreign governments, *see Haig v. Agee*, 453 U.S. 280, 292 (1981), in a manner that directly contravenes presidential policy in place since 1948, would require the Court to disregard policy decisions made pursuant to the President's recognition power. This squarely presents a nonjusticiable political question not fit for judicial resolution.

B. ***This Court Has Long Recognized That the President Has Sole Authority to Decide Which Nation Has Sovereignty Over Disputed Territory***

As noted above, the Constitution grants solely to the President the power to "receive Ambassadors and other Public Ministers" U.S. Const. Art. II, § 3. The executive branch's decision to record Jerusalem as the place of birth of a U.S. citizen born in that location is constitutionally committed to the President's sole discretion, consistent with the Supreme Court's prior pronouncement that "when the executive branch . . . assume[s] a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department." *Williams v. Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415, 418 (1839). The recognition of foreign states and governments by the President has been a longstanding authority recognized by the Supreme Court since as early as 1839.

Williams was one of the first Supreme Court cases to deal with the political question doctrine in the context of presidential action. In *Williams*, the underwriters of a ship which had been confiscated by the Argentine Government for catching seals off the Falkland Islands, against the orders of the Argentine Government, sought to escape liability by demonstrating that the Argentine Government was the sovereign over the Falkland Islands and thus the ship had been condemned for willful disregard of legitimate authority. *Id.* The Court decided against the underwriters because the President had taken the position that the Falkland Islands were not part of Argentina:

> [C]an there be any doubt, that when the executive branch of the government, which is charged with our foreign relations, shall in its correspondence with a foreign nation assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department? And in this view it is not material to inquire, nor is it in the province of the court to determine, whether the executive be right or wrong. It is enough to know, that in the exercise of his constitutional functions, he has decided the question. Having done this under the responsibilities that belong to him, it is obligatory on the people and the government of the Union.

Williams, 38 U.S. at 420.

Thus, even from early on, prevailing doctrine was such that the President has constitutional authority to formulate the foreign policy position of the United States and determine the terms on which recognition is given to foreign states. This Court has followed this doctrine for decades. In *United States v. Belmont*, this Court held that:

> The recognition, establishment of diplomatic relations, the assignment, and agreements with respect thereto, were all parts of one transaction, resulting in an international compact between the two governments. That the negotiations, acceptance of the assignment and agreements and understandings in respect thereof were within the competence of the President may not be doubted. . . . [I]n respect of what was done here, the Executive had authority to speak as the sole organ of that government.

301 U.S. 324, 330 (1937).

In *Guaranty Trust Co. v. United States*, this Court stated that "[w]hat government is to be regarded here as representative of a foreign sovereign state is a political rather than a judicial question, and is to be determined by the political department of the government." 304 U.S. 126, 137 (1938). And in *United States v. Pink*, this Court held that:

> The authority of the political department is not limited . . . to the determination of the government to be

> recognized. The President is also empowered to determine the policy to govern the question of recognition. Objections to the President's determination of the government 'as well as to the underlying policy' must be addressed to the political department.

315 U.S. 203, 207 (1942) (quoting *Guar. Trust Co. v. United States*, 304 U.S. 126, 137-138 (1938)).

The assumption underlying the refusal of courts to intervene in such cases also can be seen in the case of *Chicago & Southern Airlines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948). This Court refused to review orders of the Civil Aeronautics Board granting or denying applications by citizen carriers to engage in overseas and foreign air transportation, which by the terms of the Civil Aeronautics Act were subject to approval by the President and therefore impliedly beyond those provisions of the act authorizing judicial review of board orders. Discussing the need for judicial abstinence in the conduct of foreign relations, the Court declared:

> The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports neither are nor ought to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. . . . But even if courts could require full

> disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. . . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

333 U.S. at 111 (citations omitted); *see also Nat'l City Bank of N.Y. v. Republic of China*, 348 U.S. 356, 358 (1955) ("The status of the Republic of China in our courts is a matter for determination by the Executive and is outside the competence of this Court."); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964) ("Political recognition is exclusively a function of the Executive.").

Thus the Court follows a policy of great deference to the presidential expertise in the arena of foreign affairs, particularly with respect to the recognition of foreign states and governments, and does not intervene in such issues. As this Court has noted, "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention." *Agee,* 453 U.S. at 292 (recognizing that the issuance of a passport is a matter intimately related to foreign policy and as such committed to the sole discretion of the President); *see also Urtetiqui v. D'Arcy*, 34 U.S. (9 Pet.) 692, 699 (1835) (stating that "[a passport] is a document, which, from its nature and object, is addressed to foreign powers . . . and is to be

considered rather in the character of a political document").

The President's textual authority to "receive Ambassadors and other public ministers," U.S. Const. Art. II, § 3, includes the power to recognize foreign governments and to decide what government is sovereign over a particular territory. Based on this authority, and consistent with both the Constitution and with the view of this Court over the past 100 years, the President has exclusive and unreviewable constitutional power with respect to the question of U.S. foreign policy and the status of Jerusalem. Foreign policy decisions of this kind are to be left in the hands of the President.

This case directly challenges the executive branches ability to maintain longstanding foreign policy as to the recognition of sovereignty over Jerusalem. To require the State Department to record petitioner's place of birth as "Israel" intrudes upon the President's constitutionally committed recognition power. This case presents a nonjusticiable political question. *See Baker v. Carr*, 369 U.S. 186, 217 (1962).

CONCLUSION

For the foregoing reasons, and for the reasons stated by the Respondent, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

AMERICANS FOR PEACE NOW
2100 M STREET, N.W.
SUITE 619
WASHINGTON, D.C. 20037
(202) 408-9898

MARGARET KRAWIEC
Counsel of Record
PATRICK H. HAGGERTY
DANIELE M. SCHIFFMAN
SCOTT SILVERBOARD
1440 NEW YORK AVE, N.W.
WASHINGTON, D.C. 20005
(202) 371-7000
MARGARET.KRAWIEC@
PROBONOLAW.COM

Attorneys for Amicus Curiae

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