

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 F. 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 ZIONIST ORGANIZATION OF AMERICA
AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER**

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICUS CURIAE	1
SUMMARY OF THE ARGUMENT	3
ARGUMENT	4
I. Section 214(d) Cannot Be Said To Impermissibly Infringe On The President’s Foreign Policy Powers Under The Constitution When Departments And Agencies In The Executive Branch Routinely Refer To Jerusalem As Part Of Israel Without Any Evident Impact On Those Powers	4
A. The Department of Justice’s References to “Jerusalem, Israel”	5
B. The Department of Defense’s References to “Jerusalem, Israel”	8
C. The Department of Health and Human Services’ References to “Jerusalem, Israel”	13
D. The Department of Homeland Security’s References to “Jerusalem, Israel”	14
E. The Department of Housing and Urban Development’s References to “Jerusalem, Israel”	15

	PAGE
F. The Department of the Treasury’s References to “Jerusalem, Israel”	16
G. The Department of Commerce’s References to “Jerusalem, Israel”	18
H. The Department of Transportation’s References to “Jerusalem, Israel”	19
I. The Department of State’s References to “Jerusalem, Israel”	20
J. The Executive Office of the President’s References to “Jerusalem, Israel”	24
II. Birthplace Listings On The Passports Of Americans Born Abroad Do Not Always Reflect A Country’s U.S.-Recognized Sovereignty Over An Area, And May Even Ignore Such Sovereignty To Accommodate Personal Preferences	27
CONCLUSION	30

TABLE OF AUTHORITIES

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INTEREST OF THE *AMICUS CURIAE*

Amicus curiae is the Zionist Organization of America (ZOA), the oldest and one of the largest pro-Israel organizations in the United States, whose leaders have included U.S. Supreme Court Justice Louis D. Brandeis, Rabbi Stephen Wise and Rabbi Dr. Abba Hillel Silver.¹ Since its founding in 1897, the ZOA has advocated for the safety and security of Israel as the homeland of the Jewish people, with Jerusalem as Israel’s eternal and undivided capital. With chapters throughout the United States and an office in Israel, the ZOA has a deep and abiding interest in ensuring that the statute at issue in this case—Section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, § 214(d), 116 Stat. 1366 (2002)—is upheld and enforced.

Section 214(d) affords American citizens born in Jerusalem the right to have “Israel” listed as their birthplace on their passports, certifications of nationality, and registrations of birth. Some ZOA members have a personal stake in the constitutionality and enforceability of Section 214(d). They were born in Jerusalem or are the parents or legal guardians of children born in Jerusalem, and they want to identify themselves or their children as

¹ Counsel of record for the parties received timely notice of the ZOA’s intent to file this brief and they consented to the filing. Their letters of consent have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund its preparation or submission. No person or entity other than the ZOA made a monetary contribution to the preparation and submission of this brief.

American citizens born in Israel. All ZOA members appreciate the significance of Jerusalem to Israel and the Jewish people – it is Judaism’s holiest city. When the State of Israel was established in 1948, Jerusalem once again became the capital of a sovereign Jewish nation, more than 3000 years after King David made Jerusalem the capital of his kingdom.

Protecting the right afforded under Section 214(d) is of such importance to the ZOA that in 2003, at or about the time the Petitioner, Menachem Binyamin Zivotofsky, filed his action, the ZOA filed a similar action on behalf of another American citizen born in Jerusalem, whose request to have “Israel” listed as his birthplace on his passport and registration of birth had also been denied by the State Department. *Odenheimer v. United States Department of State*, No. 03-CV-02048-GK (D.D.C. filed Oct. 3, 2003). After the district court consolidated the *Zivotofsky* and *Odenheimer* cases, the defendants moved to dismiss them. The plaintiffs in both cases opposed the motions and filed cross-motions for summary judgment. By the time the district court issued its decision, granting the motions to dismiss and denying the motions for summary judgment as moot (*Zivotofsky ex rel. Zivotofsky v. Secretary of State*, 2004 WL 5835212 (D.D.C. Sept. 7, 2004)), the ZOA had withdrawn from the case, for reasons unrelated to its merits. The *Odenheimer* case was terminated on September 16, 2004.

Nevertheless, the ZOA’s interest in ensuring that Section 214(d) is upheld and enforced as clearly written has never wavered. On August 5, 2011, the ZOA submitted an *amicus curiae* brief to this

Court in support of the Petitioner. On July 27, 2012, the ZOA submitted an *amicus* brief to the U.S. Court of Appeals for the District of Columbia after the case was remanded there.

SUMMARY OF THE ARGUMENT

Enforcing Section 214(d) so that American citizens born in Jerusalem can choose to have “Israel” listed as their birthplace on their passports cannot be said to impermissibly infringe on a Presidential power to recognize foreign sovereigns. Such passports would not link Jerusalem to Israel; no city would be recorded on the passports and they could thus belong to Americans born in Jerusalem or Tel Aviv or any other city indisputably within sovereign Israel. These passports would be no more an articulation of U.S. foreign policy regarding the status of Jerusalem than the pronouncements of the Executive branch of the U.S. government itself. In documents and delivered remarks, departments, agencies and members of the Executive branch have repeatedly referred to Jerusalem as part of Israel, without impinging on a Presidential recognition power. Enforcing 214(d) would simply require the State Department to accommodate the personal preferences of Jerusalem-born Americans who want to identify with Israel, in the same way that the State Department already defers to the personal identity preferences of Americans who do *not* want to identify with Israel.

ARGUMENT

I. Section 214(d) Cannot Be Said To Impermissibly Infringe On The President's Foreign Policy Powers Under The Constitution When Departments And Agencies In The Executive Branch Routinely Refer To Jerusalem As Part Of Israel Without Any Evident Impact on Those Powers

Section 214(d) provides: “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.” Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, § 214(d), 116 Stat. 1366 (2002). The notion that enforcing Section 214(d)—which was signed into law by the President—would impermissibly infringe on the President’s foreign policy powers under the Constitution is difficult to defend in light of the Executive’s own conduct when it comes to Jerusalem.

For years, departments and agencies in the Executive branch of the United States government—including the U.S. Department of State—have routinely referred to Jerusalem as part of the State of Israel. Even the White House has referred to Jerusalem as part of Israel, as has the President, without any evident impact on the President’s foreign policy powers under the Constitution. It is thus difficult to conceive of how enforcing Section 214(d) to permit Jerusalem-born

Americans to list “Israel” on their passports would have any such impact—particularly since there would be no way to know from such passports whether these Americans were born in Jerusalem or in a city indisputably within sovereign Israel, such as Tel Aviv or Haifa.

In the *amicus* brief filed with this Court in August 2011, the ZOA provided numerous examples of official government documents that refer to “Jerusalem, Israel,” including “Official White House photos” on the White House’s Web site. After news reports revealed these “Jerusalem, Israel” references, many of the photos and documents were altered. Photos and documents that once said “Jerusalem, Israel” were changed to read “Jerusalem” only, with the references to “Israel” eliminated. *See, e.g.,* Adam Kredo, *Solving the White House Photo Mystery Over “Jerusalem, Israel,”* Aug. 16, 2011, <http://www.jta.org/2011/08/16/news-opinion/politics/solving-the-white-house-photo-mystery-over-jerusalem-israel>.

The altered documents are described below, as are the many government documents and the remarks of government officials that continue to refer to Jerusalem as part of the State of Israel.

A. The Department of Justice’s References to “Jerusalem, Israel”

In a United States Attorneys Bulletin published by the Justice Department on December 7, 1973, the Department identified those persons engaged in certain activities on behalf of foreign principals, requiring that they register with the Attorney General under the Foreign Agents Registration Act. Among the registrations identi-

fied: “Hilton Goldman of Newark New Jersey registered as agent of Haligh L’Haganah Y’Ludit L’Yisroel (Meir Kahane), **Jerusalem, Israel.**” http://www.justice.gov/usao/eousa/foia_reading_room/usab2125.pdf at 962 (emphasis added).

In March 1998, the Justice Department’s Office of the Inspector General (OIG) issued a “Special Report” entitled “Bombs in Brooklyn: How the Two Illegal Aliens Arrested for Plotting to Bomb the New York Subway Entered and Remained in the United States.” <http://www.justice.gov/oig/special/9803/>. In its discussion of one of the aliens, the OIG noted that the alien “applied at the U.S. Consular Office in **Jerusalem, Israel**, for a visa to travel through the United States to Ecuador.” *Id.* (emphasis added).

The U.S. Drug Enforcement Administration (DEA) in the Justice Department posts a “most wanted” list of DEA fugitives, including a photo and other identifying information about each fugitive. The DEA identified a Miami fugitive, wanted for an alleged federal drug violation, as having a “POB” [place of birth] of “**Jerusalem, Israel.**” <http://www.justice.gov/dea/fugitives/mia/CB3ED150-141E-4137-BA6D-B931353322C5.shtml> (emphasis added).

The Justice Department’s Federal Bureau of Investigation (FBI) has offices around the world which are called legal attachés or legats and are located in U.S. embassies. <http://www.fbi.gov/contact-us/legat>. The FBI has identified one of its “sub-offices” in the Middle East as being in “**Jerusalem, Israel.**” http://www.fbi.gov/contact-us/legat/middle_east (emphasis added).

The Justice Department's Office of Justice Programs (OJP) helps to "identify the most pressing crime-related challenges confronting the justice system and to provide information, training, coordination, and innovative strategies and approaches for addressing these challenges." <http://ojp.gov/about/about.htm>. There are several components to the OJP, one of which is the Office for Victims of Crime.

In 2009, the Office for Victims of Crime issued a Report to Congress—entitled "International Terrorism Victim Expense Reimbursement Program"—which presented detailed data and statistical information on the program's activities from June 2007 through August 2008. http://www.ovc.gov/itverp/pdfs/ITVERP_2009_ReporttoCongress.pdf. The report lists incidents that have been designated as acts of terrorism by the Assistant Attorney General for National Security, so that victims of international terrorism and their families can be reimbursed for the expenses they have incurred as a direct result of a terrorist act.

In three tables set forth in the report, the Office for Victims of Crime identified two terrorism incidents as having occurred in "**Jerusalem, Israel**," and provided this information to Congress. *See id.* at 8, 9, 23 (emphasis added).²

² In 2010 and 2011, the Office for Victims of Crime designated additional incidents as acts of terrorism; included on the list were terrorism incidents that were designated as far back as July 27, 2007. These designations used to be available at http://www.ojp.usdoj.gov/ovc/intdir/itverp/terrorist_events.html.

At least until the ZOA filed its *amicus* brief with this Court in August 2011, the Office for Victims of Crime identified 14 incidents on this list as having occurred in

B. The Department of Defense's References to "Jerusalem, Israel"

The Office of the Under Secretary for Personnel and Readiness in the Department of Defense published a table of approved Joint Meritorious Unit Awards. The awards are listed by Department of Defense activity and the inclusive dates. The Department identified one activity as "HQ, U.S. Military Observer Group, U.N. Truce Supervision Organization, **"Jerusalem, Israel"** from June 5, 1982-June 5, 1983. <http://prhome.defense.gov/Portals/52/Documents/RFM/MPP/OEPM/Docs/Approved%20JMUs%20-%20Updated%2031%20Dec%202012.pdf> (emphasis added).

A news article dated April 23, 1998, and issued by the American Forces Press Service, described Defense Secretary William S. Cohen honoring Holocaust victims at Yad Vashem. The Defense Department reported this as news from **"Jerusalem, Israel."** <http://www.defense.gov/news/newsarticle.aspx?id=41567> (emphasis added).

The Defense Department regularly issues news releases announcing the awarding of defense con-

"Jerusalem, Israel." An additional incident was more specifically described as having occurred in **"East Jerusalem, Israel,"** and another was identified as having occurred in **"West Jerusalem, Israel."** But sometime in or after August 2011, these designations were altered. When the ZOA filed its *amicus* brief with the U.S. Court of Appeals in July 2012, the incidents were at that point identified as having occurred in "Jerusalem" only; the references to "Israel" had been eliminated. In preparing this brief, the ZOA could not locate this information at all; typing in the URL above resulted in the message, "Page Not Found."

tracts. One such news release, issued on August 29, 2001, includes a description of an Air Force contract awarded to BAE Systems, in Austin, Texas. The Department of Defense noted in this release that “Rokar International Limited will perform this work in **Jerusalem, Israel** (80%) and other locations.” <http://www.defense.gov/contracts/contract.aspx?contractid-2093> (emphasis added).

Another Defense Department news release issued on July 31, 2009, announced a Navy contract awarded to General Microwave, D/B/A Herley Farmingdale, noting that the “[w]ork will be performed in **Jerusalem, Israel**, and is expected to be completed in July 2014.” <http://www.defense.gov/Contracts/Contract.aspx?ContractID=4084> (emphasis added).

On February 27, 2012, the Defense Department announced a Navy contract where the “[w]ork will be performed in **Jerusalem, Israel** (90 percent), and Syosset, N.Y. (10 percent), and is expected to be completed in February 2017.” <http://www.defense.gov/contracts/contract.aspx?contractid=4734> (emphasis added).

Military service members are paid additional compensation called “hardship duty” when they are “assigned to locations where living conditions are substantially below those conditions in the continental U.S.” <http://militarypay.defense.gov/pay/hdp.html>. Pursuant to Defense Department regulations, hardship duty location pay was authorized for service members in designated areas in **Israel**, specifically including **Jerusalem**. See http://comptroller.defense.gov/Portals/45/documents/fmr/archive/07aarch/07a_17_Dec10.pdf at 17-11, 17-20 (Dec.

2010); http://comptroller.defense.gov/Portals/45/documents/fmr/archive/07aarch/07a_17_200408.pdf at 17-10, 17-18 (Aug. 2004) (emphasis added).

Photos on the Defense Department's Web site—many depicting meetings between U.S. and Israeli government officials—contain captions that identify the photos as having been taken in “**Jerusalem, Israel.**” These captions include the following descriptions:

- “Defense Secretary Robert M. Gates meets with Israeli Prime Minister Ehud Olmert in **Jerusalem, Israel**, April 19, 2007.” [http://www.defense.gov/PhotoEssays/PhotoEssayImage.aspx?id=2026&name=Gates Visits Israel, Part II](http://www.defense.gov/PhotoEssays/PhotoEssayImage.aspx?id=2026&name=GatesVisitsIsrael,PartII) (emphasis added).
- “Israeli Prime Minister Ehud Olmert speaks with Defense Secretary Robert M. Gates during a bilateral meeting in **Jerusalem, Israel**, April 19, 2007.” [http://www.defense.gov/PhotoEssays/PhotoEssayImage.aspx?id=2027&name=Gates Visits Israel, Part II](http://www.defense.gov/PhotoEssays/PhotoEssayImage.aspx?id=2027&name=GatesVisitsIsrael,PartII) (emphasis added).
- “U.S. Ambassador to Israel Richard Jones, Israeli Minister of Defense Amir Peretz, U.S. Defense Secretary Robert M. Gates, and Director General of Yad Vashem Avner Shalev attend a wreath laying ceremony at the Yad Vashem Holocaust Memorial in **Jerusalem, Israel**, April 19, 2007.” [http://www.defense.gov/PhotoEssays/PhotoEssayImage.aspx?id=2028&name=Gates Visits Israel, Part II](http://www.defense.gov/PhotoEssays/PhotoEssayImage.aspx?id=2028&name=GatesVisitsIsrael,PartII) (emphasis added).

- “Defense Secretary Robert M. Gates tours the Yad Vashem Children’s Holocaust Memorial in **Jerusalem, Israel**, April 19, 2007.” [http://www.defense.gov/PhotoEssays/PhotoEssayImage.aspx?id=2030&name=Gates Visits Israel, Part II](http://www.defense.gov/PhotoEssays/PhotoEssayImage.aspx?id=2030&name=Gates%20Visits%20Israel,%20Part%20II) (emphasis added).
- A lieutenant colonel in the U.S Marine Corps “checks his aircraft’s instruments as Marine One sits in the background in **Jerusalem, Israel**, Jan. 10, 2008.” <http://www.defense.gov/HomePagePhotos/LeadPhotoImage.aspx?id=4883> (emphasis added).
- “Secretary of Defense Robert M. Gates is greeted by Israeli Defense Minister Ehud Barack as he arrives in **Jerusalem, Israel**, during a trip to the Middle East on July 27, 2009.” <http://www.defense.gov/photos/newsphoto.aspx?newsphotoid=11509> (emphasis added).
- “Secretary of Defense Robert M. Gates and Israeli Prime Minister Benyamin Netanyahu shake hands during a working lunch meeting in **Jerusalem, Israel**, on July 27, 2009.” <http://www.defense.gov/Photos/newsphoto.aspx?newsphotoid=11510> (emphasis added).
- “Secretary of Defense Robert M. Gates and Israeli Defense Minister Ehud Barack hold a joint press conference in **Jerusalem, Israel**, during a trip to the Middle East on July 27, 2009.” <http://www.defense.gov/photos/newsphoto.aspx?newsphotoid=11512> (emphasis added).

- “Chief of Defense Israeli Defense Force Lt. Gen. Gabi Ashkenazi and Chairman of the Joint Chiefs of Staff Adm. Mike Mullen, U.S. Navy, wave to onlookers at the Yad Ve Shem [sic] Holocaust Memorial Museum in **Jerusalem, Israel**, on Feb. 15, 2010. Mullen is on a weeklong tour of the region visiting with key partners and allies.” <http://www.defense.gov/photos/newsphoto.aspx?newsphotoid=12277> (emphasis added).
- “Secretary of Defense Leon E. Panetta . . . and Israeli President Shimon Peres meet in **Jerusalem, Israel**, on Aug. 1, 2012.” <http://www.defense.gov/photos/newsphoto.aspx?newsphotoid=15520> (emphasis added).
- “Israel President Shimon Peres . . . meets with Chairman of the Joint Chiefs of Staff Gen. Martin E. Dempsey in **Jerusalem, Israel**, on Oct. 29, 2012.” <http://www.defense.gov/photos/newsphoto.aspx?newsphotoid=15686> (emphasis added).
- “Secretary of Defense Chuck Hagel . . . meets with Israeli President Shimon Peres in **Jerusalem, Israel**, on April 22, 2013.” <http://www.defense.gov/photos/newsphoto.aspx?newsphotoid=16135> (emphasis added).
- “Deputy Secretary of Defense Ashton B. Carter . . . meets with Israeli National Security Advisor Yaakov Amidror . . . in **Jerusalem, Israel** on July 22, 2013.” <http://www.defense.gov/Photos/newsphoto.aspx?newsphotoid=16353> (emphasis added).

The official web site of the United States Marine Corps displays a photo taken just a few months ago, with the following caption: “U.S. Marines and U.S. Navy Sailors listen to a tour guide describe the ‘Old City’ March 7, 2014, during a morale, welfare and recreation trip to **Jerusalem Israel.**” <http://www.marines.mil/Photos.aspx?igphoto=2000784579> (emphasis added).

C. The Department of Health and Human Services’ References to “**Jerusalem, Israel**”

The Department of Health and Human Services posted the remarks delivered by Donna E. Shalala, Secretary of Health and Human Services, at the “Promoting Women’s Health Across Generations Conference,” on December 2, 1998. The Department identified the conference as having taken place in “**Jerusalem, Israel.**” <http://archive.hhs.gov/news/speeches/981202.html>(emphasis added).

The Centers for Disease Control and Prevention (CDC) is part of the Department of Health and Human Services. On April 14, 2008, CDC issued a press release entitled “CDC Urges Travelers to Israel to Protect Themselves from Measles; Concern Raised over Americans Traveling to Israel for Passover.” The press release noted: “Since September, more than 900 cases of measles have been reported in **Israel**, with about 700 cases in the cities of **Jerusalem** and Beit Shemesh.” <http://www.cdc.gov/media/pressrel/2008/r080414a.htm> (emphasis added).

The National Cancer Institute (NCI) is part of the National Institutes of Health, which is an

agency within the Department of Health and Human Services. An NCI Bulletin dated July 28, 2009, described a review of certain clinical trials conducted by “researchers . . . from the Shaare Zedek Medical Center in **Jerusalem, Israel.**” <http://www.cancer.gov/ncicancerbulletin/archive/2009/072809/page6> (emphasis added).

The National Institute of Biomedical Imaging and Bioengineering, which is part of the National Institutes of Health, identified one of its staff members as having “returned in 2011 to Hadassah Medical Organization in **Jerusalem, Israel.**” <http://www.nibib.nih.gov/about-nibib/staff/orit-jacobson-weiss> (emphasis added).

The National Institute on Drug Abuse (NIDA) is also part of the National Institutes of Health. NIDA identified educational opportunities on its Web site, including “[a] 12-month master’s degree program at Hebrew University of **Jerusalem in Israel** offering scholarships to students from developing countries.” <http://www.drugabuse.gov/international/educational-opportunities> (emphasis added).

D. The Department of Homeland Security’s References to “Jerusalem, Israel”

Created in 2003, U.S. Immigration and Customs Enforcement (ICE) is “the principal investigative arm of the Department of Homeland Security,” with “more than 20,000 employees in offices in all 50 states and 47 foreign countries.” <http://www.ice.gov/about/overview/>. In celebration of its tenth anniversary, ICE issued a news release dated April 3, 2013, in which it described 10 ICE offices from around the globe. ICE identified one such office in “**Jerusalem,**

Israel (HSI office)” and provided this description of Jerusalem: “**The capital city of Israel, Jerusalem is the largest city in Israel.** A holy city to three religions (Judaism, Christianity and Islam), Jerusalem is one of the oldest cities in the world.” <http://www.ice.gov/news/releases/1304/130403washingtondc.htm> (emphasis added).

In April 2011, the Office of Inspector General in the Department of Homeland Security issued a report called “Information Sharing on Foreign Nationals: Overseas Screening (Redacted).” The report describes a legislatively mandated Visa Security Program that assists the State Department’s effort to screen and vet visa applicants. http://www.oig.dhs.gov/assets/Mgmt/OIGr_11-68_Apr11.pdf

At the time the ZOA submitted its *amicus curiae* brief to this Court in August 2011, the report stated that U.S. Immigration and Customs Enforcement had established visa security units in 2010 in “Tel Aviv and **Jerusalem, Israel . . .**”(emphasis added). Sometime after the ZOA filed the brief, the report was altered. It now states that units were added in “. . . Tel Aviv, Israel, Sanaa, Yemen, and Jerusalem. . . .” *Id.* at 44 n.31. The reference to Jerusalem as part of Israel has been eliminated.

E. The Department of Housing and Urban Development’s References to “Jerusalem, Israel”

When Secretary of Housing and Urban Development (HUD) Andrew Cuomo delivered remarks from Jerusalem on June 23, 2000, he stated: “Shalom from **Jerusalem . . .** This is my first

trip to **Israel**. . . .” <http://archives.hud.gov/remarks/cuomo/speeches/jerusalem.cfm> (emphasis added).

On the same date, HUD issued a news release noting that Secretary Cuomo “was sent to **Israel** by President Clinton.” The news release reported that “Cuomo began his day today with a visit to Yad Vashem, **Israel’s** Holocaust museum and memorial in **Jerusalem**. . . . In addition, the Secretary planted four trees at American Independence Park in **Jerusalem**. . . .” <http://archives.hud.gov/news/2000/pr00-146.html> (emphasis added).

F. The Department of the Treasury’s References to “Jerusalem, Israel”

The Treasury Department’s Alcohol and Tobacco Tax and Trade Bureau provides information about authorized wine appellations, both in the United States and in foreign countries. *See* <http://www.ttb.gov/appellation/>. On the list for foreign “Authorized Wine Appellations of Origin” (last updated on November 14, 2007), the Bureau noted that **Jerusalem** is located in **Israel**. <http://www.ttb.gov/appellation/israel.pdf> (emphasis added).

On October 31, 1999, the Treasury Department, through its Press Center, published Treasury Deputy Secretary Stuart E. Eizenstat’s remarks at the Van Leer Institute in Jerusalem. At the beginning of his remarks, Deputy Secretary Eizenstat notes that “[f]or thirty years, the Van Leer Institute has been a center of scholarship, an active and thoughtful participant in Israeli civic life.” He also repeatedly refers to Israel throughout his remarks, thus reflecting the Deputy Secretary’s own understanding that he is in Jerusalem which is in Israel.

At the time the ZOA submitted its *amicus curiae* brief to this Court in August 2011, this press release was entitled “Treasury Secretary Stuart E. Eizenstat Remarks at the Van Leer Forum **Jerusalem, Israel**.” Sometime thereafter, the press release was altered; the reference to “Israel” was eliminated. See www.treasury.gov/press-center/press-releases/Pages/ls190.aspx.

Despite that alteration, three more recent Treasury Department documents specifically refer to Jerusalem as part of Israel. On January 24, 2012, the Treasury Department issued a “Daily Treasury Guidance,” noting that Deputy Secretary Wolin and Deputy Secretary of State Nides would be meeting that morning “in **Jerusalem, Israel** with Stanley Fischer, Governor of the Bank of Israel.” <http://www.treasury.gov/press-center/daily-guidance/Pages/01242012.aspx> (emphasis added).

Likewise, a press release dated May 2, 2012, states: “The U.S. Department of the Treasury announced today that Assistant Secretary for Terrorist Financing Daniel L. Glaser will travel to Riyadh, Saudi Arabia; Kuwait City, Kuwait; Doha, Qatar; Tel Aviv and **Jerusalem, Israel**” <http://www.treasury.gov/press-center/media-advisories/Pages/05022012.aspx> (emphasis added).

In addition, as recently as last month, a Treasury Department Blog called “Treasury Notes” reported on June 19, 2014, about Jacob J. Lew’s “first trip to the Middle East as Treasury Secretary.” The Department’s Blog noted the following: “Yesterday, Secretary Lew finished his trip to the Middle East by visiting **Jerusalem, Israel**, where Secretary Lew participated in and delivered

remarks at the U.S.-Israel Joint Economic Development Group's (JEDG) annual meeting with Israeli Finance Minister Yair Lapid." <http://www.treasury.gov/connect/blog/Pages/Secretary-Lew-Middle-East-.aspx> (emphasis added).

G. The Department of Commerce's References to "Jerusalem, Israel"

The National Telecommunications and Information Administration (NTA) at the U.S. Department of Commerce published the remarks of Lawrence E. Strickling, Assistant Secretary of Commerce for Communications and Information, which were delivered on October 27, 2010, at the 32nd International Conference of Data Protection and Privacy Commissioners. <http://www.ntia.doc.gov/print/speechtestimony/2010/remarks-assistant-secretary-strickling-32nd-international-conference-data-prote>. The NTA identified the location of the conference as "**Jerusalem, Israel.**" *Id.* (emphasis added).

The International Trade Administration (ITA) in the Commerce Department publicized a "Featured Trade Event" on February 20-24, 2011. At the time the ZOA submitted its *amicus* brief to the Supreme Court in August 2011, the ITA's headline about the event described it as a "Clean Tech and Health Care Technologies Trade Mission to Israel, Jordan, and the West Bank," taking place in "Amman, Jordan; Eilat, **Jerusalem**, and Tel Aviv, **Israel**" (emphasis added). In describing the event, the ITA stated that the trade mission would be stopping in Amman, Jordan, and "**Jerusalem** and Tel Aviv, **Israel** . . ." (emphasis added).

Since the ZOA filed that brief, the document has been altered. Every reference to “Jerusalem” has been deleted. See <http://trade.gov/publications/ita-newsletter/1110/clean-tech-health-care-mission.asp>.

H. The Department of Transportation’s References to “Jerusalem, Israel”

In November 2004, the Department of Transportation issued a Final Report on “Transit Security Design Considerations.” <http://transit-safety.volpe.dot.gov/security/securityinitiatives/designconsiderations/CD/ftasesc.pdf>. The Report “provides transit agencies with a resource for considering and selecting security oriented design approaches to protecting transit systems and minimizing the impacts of terrorist attacks.” *Id.* at 1-4. In discussing past events to learn from, the Department devotes a section of the report to attacks on transit vehicles in “**Jerusalem, Israel.**” *Id.* at 7-26. In addition, Appendix A to the report (entitled “Chronology of Terrorist Attacks Against Public Transit”), makes 17 references to terrorist attacks in “**Jerusalem, Israel**” (including one reference to “**West Jerusalem, Israel**”). *Id.* at A-1–A-3, A-6–A-7, A-13–A-14.

The Transportation Department’s Federal Highway Administration (FHA) lists “evacuations in the news.” For June 8-14, 2009, under the heading “Malevolent Acts,” the FHA listed the following: “West Bank, **Jerusalem, Israel** (illegal outposts).” http://www.ops.fhwa.dot.gov/eto_tim_pse/evac-newsarchive/2009/june/ (emphasis added). For June 15-21, 2009, under the heading “Planning,” the FHA listed: “**Jerusalem, Israel**, the Knesset’s Interior Committee and the Committee for the Rights of the

Child met in a joint session to discuss evacuation procedures of children while outposts are being evacuated.” *Id.* (emphasis added). For August 3-9, 2009, under the heading “Planning,” the FHA listed the following: “Police deal with law suits from 2006 evacuation of the Reches Sela outpost on the West Bank, **Jerusalem, Israel.**” http://www.ops.fhwa.dot.gov/eto_tim_pse/evacnewsarchive/2009/aug/(emphasis added).

I. The Department of State’s References to “Jerusalem, Israel”

The State Department has routinely referred to Jerusalem as part of the State of Israel. The ZOA gave several examples of these “Jerusalem, Israel” references in its *amicus* brief to this Court in August 2011. Since the filing of that brief, some of the references have been altered. Documents that once referred to “Jerusalem, Israel” now say “Jerusalem” only, with the references to “Israel” deleted.

For example, in December 2003, the State Department’s Bureau of Resource Management issued a “FY 2003 Performance and Accountability Report.” The report sets forth “Department of State Locations” around the world, including American Embassies, the Consulates General and the Consulates. At the time the ZOA filed its *amicus* brief with this Court in August 2011, the State Department’s report referred to a Consulate General location in “**Jerusalem, Israel**” (emphasis added). Likewise, in its report for Fiscal Year 2002, the State Department’s Bureau of Resource Management referred to a Consulate General location in “**Jerusalem, Israel**”(emphasis added).

At some point after the ZOA filed the August 2011 brief, these documents were changed. Both reports now identify the location of the Consulates General as being in “Jerusalem”; the references to “Israel” have been eliminated. See <http://www.state.gov/s/d/rm/rls/perfrpt/2003/html/29446.htm> (FY 2003); <http://www.state.gov/s/d/rm/rls/perfrpt/2002/html/19200.htm> (FY 2002).

The same alteration was made to another document—“Country Reports on Terrorism 2009”—issued by the State Department’s Office of the Coordinator for Counterterrorism on August 5, 2010. As the ZOA noted in its *amicus* brief to this Court in August 2011, the report included a section about the U.S.-designated foreign terrorist organization Hamas, noting that Hamas had claimed responsibility for driving a vehicle into a crowd “in **Jerusalem, Israel**” (emphasis added).

Since the ZOA filed that brief, the State Department report has been altered to reflect that Hamas’ terrorist act occurred in “Jerusalem.” The reference to “Israel” has been expunged. <http://www.state.gov/j/ct/rls/crt/2009/140900.htm>.³

Despite all these alterations to undo the State Department’s references to “Jerusalem, Israel,” sev-

³ The State Department also published a table (Table XIX) entitled “Nonimmigrant Visas Issued by Issuing Office (Including Border Crossing Cards) Fiscal Years 1992-2010,” which was similarly altered. At the time the ZOA filed its *amicus* brief with this Court in August 2011, the table identified the location of one of the issuing offices in “**Israel, Jerusalem**,” <http://www.travel.state.gov/pdf/MultiYearTableXIX.pdf> (no longer available) (emphasis

eral still remain and more have been added. For example, the May 1999 issue of *State Magazine*, a State Department publication, identifies that certain J. Kirby Simon Trust Projects (named in memory of an officer in the Foreign Service) included projects in “Tel Aviv and **Jerusalem, Israel.**” <http://www.state.gov/documents/organization/191089.pdf> at 35 (emphasis added).

In addition, on July 22, 2002, the Federal Register posted the State Department’s list of gifts made to federal employees from foreign government sources which were reported to the employing agencies in 2001. Among the gifts listed by the State Department was a framed photograph of “then-Governor Bush at the Western Wall in **Jerusalem, Israel.**” <https://www.federalregister.gov/articles/2002/07/22/02-16498/gifts-to-federal-employees-from-foreign-government-sources-reported-to-employing-agencies-in> (emphasis added).

A document entitled “Embassy Security, Construction, and Maintenance,” describes the activities of the Bureau of Overseas Buildings Operations, which “is responsible for providing U.S. Diplomatic and Consular missions overseas with secure, safe and functional facilities to assist them in achieving the foreign policy objectives of the United States.” <http://www.state.gov/documents/organization/181119.pdf> at 467. This document lists 88 new facilities completely constructed since 2001,

added). By the time the Court remanded this case to the Court of Appeals and the ZOA filed an *amicus* brief there, the location had been changed to refer to “Jerusalem” only; “Israel” was removed from the table. Presently, the ZOA cannot find the table on the State Department’s Web site at all.

including a facility in “**Jerusalem, Israel.**” *Id.* at 469 (emphasis added).

The State Department posted on its Web site the remarks that Secretary of State Hillary Rodham Clinton delivered with Israeli Prime Minister Ehud Olmert on March 3, 2009. <http://www.state.gov/secretary/20092013clinton/rm/2009a/03/119965.htm>. The State Department noted that these remarks were delivered in **Jerusalem**. Toward the end of her remarks, Secretary of State Clinton is quoted as stating, “I am very grateful, once again, to be **here in Israel.** . . .” (emphasis added), plainly reflecting the Secretary of State’s own understanding that Jerusalem is part of the State of Israel.

The State Department’s Bureau of Diplomatic Security issued a report entitled “Diplomatic Security, 2012 Year in Review.” <http://www.state.gov/documents/organization/210836.pdf>. The report includes a timeline identifying events affecting U.S. diplomatic personnel at their posts, including two events that occurred in “**Jerusalem, Israel**”: “Sept 14, **Jerusalem, Israel**: Anti-U.S. protests”; and “Nov 20, **Jerusalem, Israel**: Israeli air-raid sirens activate; U.S. Consulate General personnel take shelter as one rocket strikes city.” *Id.* at 29, 43 (emphasis added).

HumanRights.gov is “the official United States Government (USG) website for human rights related information.” <http://www.humanrights.gov/about/>. The Web site is managed by the Office of Policy Planning and Public Diplomacy, in the State Department’s Bureau of Democracy, Human Rights and Labor. *Id.* On November 16, 2012, this official

government Web site displayed a photo depicting the celebration in “**Jerusalem, Israel**” of the 57th U.S. presidential elections, and it referred to the “U.S. Embassy in **Jerusalem, Israel**.” <http://www.humanrights.gov/2012/11/16/observing-the-u-s-election-jerusalem-israel/> (emphasis added).

At the beginning of this year, the State Department posted Secretary of State John Kerry’s remarks delivered in “Jerusalem” on January 5, 2014. Secretary Kerry himself acknowledged that Jerusalem is part of Israel when he stated, “Obviously, it is this effort to try to make peace that has brought [us] **back here again to Israel, to Jerusalem**.” <http://www.state.gov/secretary/remarks/2014/01/219298.htm> (emphasis added).

J. The Executive Office of the President’s References to “Jerusalem, Israel”

Even the Executive Office of the President has referred to Jerusalem as part of the State of Israel. In its August 2011 *amicus* brief to this Court, the ZOA identified a series of photos on the White House Web site depicting the Vice President’s 2010 trip to the Middle East. The captions to these “Official White House Photos” described Vice President Joe Biden and his wife, Dr. Jill Biden, as being in “Jerusalem, Israel.” For example, one photo included this caption: “Vice President Joe Biden laughs with Israeli President Shimon Peres in **Jerusalem, Israel**, March 9, 2010” (emphasis added).⁴

⁴ On August 9, 2011, the *Weekly Standard* posted a screen-shot of this photo with the reference to “Jerusalem, Israel.” See Daniel Halper, *White House Cleanses Israel*

After the ZOA filed its *amicus* brief, the White House altered the captions to these photos. See Adam Kredo, *Solving the White House Photo Mystery Over “Jerusalem, Israel,”* Aug. 16, 2011, <http://www.jta.org/2011/08/16/news-opinion/politics/solving-the-white-house-photo-mystery-over-jerusalem-israel>. Now, they identify Vice President Biden and his wife as being in “Jerusalem” only. The references to “Israel” have been deleted. See <http://www.whitehouse.gov/photos-and-video/photo-gallery/vice-president-and-dr-biden-middle-east>.

The White House has not, however, completely scrubbed its Web site of all references to Jerusalem as part of Israel. In a posting about the Peace Corps, the White House described the activities of one Peace Corps volunteer, including that her “first foreign service assignment will be in **Jerusalem, Israel** beginning August 2011.” <http://www.whitehouse.gov/champions/peace-corps/adrienne-fagler> (emphasis added).

More recently, a White House press release dated August 12, 2013, announced President Obama’s intent to appoint several individuals to “key Administration posts,” including S. Fitzgerald Haney, who was described as having been a senior associate at a venture capital firm in “**Jerusalem, Israel.**” <http://www.whitehouse.gov/the-press-office/2013/08/12/president-obama-announces-more-key-administration-posts> (emphasis added).

Even President Obama has referred to Jerusalem as part of Israel. On May 21, 2014, the

from Website, Weekly Standard, Aug. 9, 2011, http://www.weeklystandard.com/blogs/white-house-cleanses-israel-website_588127.html.

President was walking through a park in Washington, DC on his way to the Department of the Interior, greeting members of the public and shaking the hands of people he passed. When one individual told President Obama it was his birthday, the President wished him a “happy birthday” and asked him where he was from. When the individual said he was from “**Israel**,” President Obama asked him, “Tel Aviv or **Jerusalem**?” <http://www.shalomlife.com/news/23617/obama-wishes-an-israeli-man-happy-birthday-video/>. (A video of the President’s walk is posted on the White House Blog, but the portion in which he refers to Jerusalem as part of Israel has been edited out. *See* <http://www.whitehouse.gov/blog/2014/05/22/raw-video-president-obama-takes-surprise-walk>.)

All of the foregoing examples show that for years, departments and agencies in the Executive branch of the government have regularly referred to Jerusalem as part of the State of Israel, without any evident impact on the President’s foreign policy powers. The State Department frequently has referred to Jerusalem as part of Israel. Even the White House has done so. It is thus hard to conceive of exactly how there would be any impermissible impact on the President’s authority under the Constitution if American citizens born in Jerusalem were permitted to have “Israel” listed as their birthplace on their passports—particularly since such passports would not reflect or reveal whether the particular passport holder was born in Jerusalem or in a city unquestionably within sovereign Israel, such as Tel Aviv or Haifa.

II. Birthplace Listings On The Passports Of Americans Born Abroad Do Not Always Reflect A Country's U.S.-Recognized Sovereignty Over An Area, And May Even Ignore Such Sovereignty To Accommodate Personal Preferences

The State Department would have this Court believe that American citizens born in Jerusalem cannot have “Israel” recorded as their birthplace on their passports because the United States has not officially recognized Jerusalem as part of the State of Israel. But what the U.S. government has or has not officially recognized does not always govern. The State Department will sometimes defer to the personal preferences of American citizens—even to the point of disregarding a country’s sovereignty over the area of the citizens’ birth—when recording their birthplace on their passports. Indeed, this has been the State Department’s policy and practice with regard to American citizens born in the U.S.-recognized sovereign State of Israel who do *not* want to be identified with Israel.

The State Department’s policies and practices for issuing passports are set forth in its Foreign Affairs Manual (FAM). *See* U.S. Department of State Foreign Affairs Manual, 7 FAM 1300, *available at* <http://www.state.gov/m/a/dir/regs/fam/07fam/c22714.htm>.⁵ According to the FAM, the State Department’s “general rule” is that an

⁵ A different version of the Foreign Affairs Manual existed at the time that Petitioner filed suit, but the policies and practices discussed in this brief have not changed.

applicant's country of birth should be entered on his/her passport. 7 FAM 1383.1(2002).⁶

Yet the State Department will ignore this rule when it comes to Israel. If passport applicants were born before 1948, in an area that is presently and indisputably recognized by the U.S. government as under Israeli sovereignty (not including Jerusalem and certain other areas), then the State Department will not require them to list "Israel" as their birthplace on their passports if they object to that designation. They can request that "Palestine" be listed as their birthplace instead (7 FAM 1383.5-4)—even though "Palestine" is not and never has been a sovereign nation, and even though there is no question that the United States recognizes the area of the applicants' birthplace as under the present sovereignty of Israel.

The State Department will also ignore Israel's status as a sovereign nation when it comes to passport applicants born in Israel in or after 1948. If these passport applicants were born in an area that the U.S. government recognizes as part of the sovereign state of Israel, they are not required to have "Israel" listed on their passports if they object to it. *Id.* The State Department will honor their preferences and permit them to have their city or town recorded as their birthplace instead. *Id.*

But when American citizens born in Jerusalem *want* to identify with Israel by listing Israel as their birthplace—which is the right afforded to them under Section 214(d)—the State Department will not honor their preferences and accommodate their

⁶ The FAM provisions cited in this brief refer to the 2002 version, which was in effect at all times relevant to this case.

requests. Incongruously—and to the ZOA, offensively—the State Department insists that in *that* situation, foreign sovereignty considerations must govern.

Plainly, it is not that the State Department cannot record “Israel” as the birthplace on the passports of American citizens born in Jerusalem. The State Department has simply chosen not to, without any showing that this particular designation—unlike all the other numerous “Jerusalem, Israel” designations by the various departments and agencies in the Executive—would actually impermissibly interfere with the President’s foreign policy powers under the Constitution. The State Department’s unsubstantiated decision should not be allowed to stand. The right afforded to American citizens born in Jerusalem to have “Israel” recorded as their birthplace on their passports—clearly mandated by Congress and signed into law by the President—should be upheld and enforced.

CONCLUSION

For the foregoing reasons, the ZOA respectfully requests that this Court determine that Section 214(d) does not impermissibly infringe on the President's foreign policy powers under the Constitution, and that Section 214(d), clearly written, duly enacted and signed into law by the President, is constitutional and enforceable.

Respectfully submitted,

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