

No. 10-699

IN THE
Supreme Court of the United States

MENACHEM BINYAMIN ZIVOTOFKY, by his parents and guardians,
ARI Z. and NAOMI SIEGMAN ZIVOTOFKY,
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 OF THE ZIONIST ORGANIZATION OF AMERICA
AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER**

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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 U.S., founded in 1897. Under the leadership of such illustrious presidents as U.S. Supreme Court Justice Louis Brandeis and Rabbi Dr. Abba Hillel Silver, the ZOA has been on the front lines of Jewish activism, working to strengthen the bond between the United States and Israel.¹ With a national membership of over 30,000 people, chapters throughout the United States, and an office in Israel, the ZOA has a direct and personal interest in ensuring that the statute at issue in this case—Section 214(d) of the Foreign Relations Authorization Act for 2003, 116 Stat. 1350, Pub. L. No. 107-228 (2002) (the “Statute”)—is upheld and enforced.

The Statute 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 whether the Statute is upheld and enforced. They were born in Jerusalem, or they are the parents or legal guardians of children born in Jerusalem, and would like “Israel” recorded on their passports as

¹ Counsel of record 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. Pursuant to Supreme Court Rule 37.6, the ZOA states that counsel for a party did not author this brief in whole or in part, and that no person or other entity other than the ZOA contributed monetarily to the preparation and submission of this brief.

their country of birth. All ZOA members appreciate the significance of Jerusalem to Israel and the Jewish people, and they regard Jerusalem as Israel's capital. They have an interest in ensuring that the statutory right of Americans born in Jerusalem to have "Israel" listed as their birthplace on their passports—if that is their preference—is respected and enforced.

Upholding and enforcing the Statute is of such importance to the ZOA that in 2003, at or about the time that the Petitioner, Menachem Binyamin Zivotofsky, filed an action in the district court to enforce his rights under the Statute, the ZOA filed a similar action against the U.S. Department of State and the Secretary of State on behalf of an 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. *Odenheimer v. United States Department of State*, No. 03-CV-02048-GK (D.D.C. filed Oct. 3, 2003). The *Zivotofsky* and *Odenheimer* cases were consolidated and the defendants moved to dismiss them. The plaintiffs in both cases opposed the motions and filed cross-motions for summary judgment. By the time that the district court issued a 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 having nothing to do with its merits or substance, and the *Odenheimer* case was terminated on September 16, 2004. Nevertheless, the ZOA has maintained a strong interest in ensuring that the Statute is upheld and enforced as clearly

written, so that Menachem Binyamin Zivotofsky, and all other American citizens born in Jerusalem, the capital of the State of Israel, may have “Israel” designated as their birthplace on their passports and other official documents, if they so request.

SUMMARY OF THE ARGUMENT

Enforcing the Statute so that American citizens born in Jerusalem may have “Israel” listed as their birthplace on their passports cannot be said to impermissibly infringe on any power the President might have to recognize foreign sovereigns. For years, departments and agencies in the Executive branch of the United States government have routinely referred to Jerusalem as part of the State of Israel. This designation has been a regular and accepted practice, without any evident impact on the President’s purported recognition power. Moreover, considerations of foreign state recognition do not always govern the way in which the State Department identifies the birthplace on the passports of American citizens born abroad. The State Department will frequently defer to citizens’ personal preferences as to how their birthplace should be recorded. Indeed, for those citizens born in the U.S.-recognized sovereign State of Israel, the State Department will disregard Israel’s sovereignty and honor citizens’ request *not* to have “Israel” listed as their birthplace. It is thus arbitrary and irrational for the State Department to contend that it cannot honor the preferences of Americans born in Jerusalem who want to identify with Israel by having it listed as their birthplace on their passports.

ARGUMENT

I. The Statute Cannot be Said to Impermissibly Infringe on the President's Power to Recognize Foreign Sovereigns When Departments and Agencies in the Executive Branch Routinely Refer to Jerusalem as Part of Israel

The notion that enforcing the Statute—which would permit American citizens to have “Israel” recorded as their birthplace on their passports and other official documents—would impermissibly infringe on any power that the President might have to recognize foreign sovereigns 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. Yet this conduct has had no evident impact on the President’s purported recognition power. Several examples follow.

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

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://www.ojp.usdoj.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.ojp.usdoj.gov/ovc/intdir/itverp/pdf/ITVERP_2009_Report-toCongress.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).

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. http://www.ojp.usdoj.gov/ovc/intdir/itverp/terrorist_events.html. The Office for Victims of Crime identified 14 incidents as having occurred in “**Jerusalem, Israel**” (emphasis added). One incident was even more specifically described as having occurred in “**East Jerusalem, Israel**.” *Id.* (emphasis added). The Office for Victims of Crime identified another incident as having occurred in “**West Jerusalem, Israel**.” *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 one fugitive, wanted for an alleged federal drug violation, as having a “POB” (place of birth) of “**Jerusalem, Israel.**” <http://www.justice.gov/dea/fugitives/miami/jaber.htm> (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.* at 6 (emphasis added).

B. The Department of Defense’s References to “Jerusalem, Israel”

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/mpp/OEPM/docs/Approved%20JMUAAs.pdf> (emphasis added).

The Defense Department issues releases describing the contracts that have been awarded. One such release, dated 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 Inter-

national Limited will perform this work in **Jerusalem, Israel** (80%) and other locations.” <http://www.defense.gov/contracts/contract.aspx?contractid=2093> (emphasis added).

A more recent Defense Department release describing contracts that have been awarded again designated Jerusalem as part of Israel. Issued on July 31, 2009, the release details 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).

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>. Chapter 17 of the Department of Defense’s Financial Management Regulation provides for the payment of two types of hardship duty: one is for duty in “Designated Areas” and the second is for duty in “Certain Places.” The Defense Department has noted that pursuant to the Regulation, hardship duty location pay has been authorized for service members in designated areas in **Israel**, specifically including **Jerusalem**. See http://comptroller.defense.gov/fmr/07a/07a_17.pdf at 17-11 (Dec. 2010); http://comptroller.defense.gov/fmr/07a/07aarch/07a_17_200408.pdf at 17-10 (Aug. 2004); <http://comptroller.defense.gov/fmr/07a/07aic35-01.pdf> at 17-8 (Oct. 2001) (emphasis added).

Photos are posted on the Defense Department's Web site, including photos of U.S. government officials with Israeli officials. One photo depicts Secretary of Defense Robert M. Gates and Israeli Defense Minister Ehud Barak holding a joint press conference on July 27, 2009. <http://www.defense.gov/photos/newsphoto.aspx?newsphotoid=11512>. A second photo depicts Chief of Israeli Defense Forces Lt. Gen. Gabi Ashkenazi and Chairman of the Joint Chiefs of Staff Adm. Mike Mullen at Yad Vashem on February 15, 2010. <http://www.defense.gov/photos/newsphoto.aspx?newsphotoid=12277>. The Defense Department has identified both photos as having been taken in "**Jerusalem, Israel.**" <http://www.defense.gov/photos/newsphoto.aspx?newsphotoid=11512>; <http://www.defense.gov/photos/newsphoto.aspx?newsphotoid=12277> (emphasis added).

C. The Department of Health and Human Services' References to "Jerusalem, Israel"

The U.S. Food and Drug Administration (FDA), an organization within the Department of Health and Human Services, issued a Clinical Investigator Inspection List for investigational new drug studies. The list includes each investigator's name, address and inspection information. The FDA designated four investigators on the list as being located at medical facilities in "**Jerusalem, Israel.**" <http://www.accessdata.fda.gov/scripts/cder/CLIL/index.cfm?fuseaction=Browse.Browse&NameFirstLetter=All&StartRow=4001&SortField=City&SortRequest=0> (emphasis added).

D. The Department of Homeland Security's References to "Jerusalem, Israel"

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." The report describes a legislatively mandated Visa Security Program that assists the State Department's effort to screen and vet visa applicants. The report notes that U.S. Immigration and Customs Enforcement established visa security units in 2010 in "Tel Aviv and **Jerusalem, Israel . . .**" http://www.dhs.gov/xoig/assets/mgmtrpts/OIGr_11-68_Apr11.pdf at 44 n.31 (emphasis added).

The ZOA has copies of Certificates of Citizenship issued on May 2, 2011, by the Department of Homeland Security, to three siblings whose Israeli birth certificates reflect that they were born in Jerusalem. The Certificates identify each sibling's "country of birth" as "Israel," and record their residential address as being in "**Jerusalem, Israel**" (emphasis added). Pursuant to Supreme Court Rule 32.3, the ZOA has sent a letter to the Clerk of the Court and served it on all parties, describing the Certificates of Citizenship and Israeli birth certificates, and requesting that copies be lodged with the Clerk and considered by the Court.

E. 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,” 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 the remarks that then-Treasury Deputy Secretary Stuart E. Eizenstat made at the Van Leer Institute, and noted that these remarks were delivered in “**Jerusalem, Israel**.” www.treasury.gov/press-center/press-releases/Pages/ls190.aspx (emphasis added). Indeed, the Treasury Department’s Press Release is entitled: “Treasury Deputy Secretary Stuart E. Eizenstat Remarks at the Van Leer Forum **Jerusalem, Israel**.” *Id.* (emphasis added).

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

The International Trade Administration in the Commerce Department publicized a “Featured Trade Event” on February 20-24, 2011. <http://trade.gov/publications/ita-newsletter/1110/clean-tech-health-care-mission.asp>. The International Trade Administration described the event 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**.” *Id.* (emphasis added). The posting also described the trade mission as stopping in Amman, Jordan, and “**Jerusalem** and Tel Aviv, **Israel** . . .” *Id.* (emphasis added).

G. The U.S. Environmental Protection Agency's References to "Jerusalem, Israel"

Researchers in the Environmental Protection Agency (EPA)'s Office of Research and Development attended a meeting of the International Neurotoxicology Association which took place on June 7-12, 2009. The EPA identified the meeting as having taken place "in **Jerusalem, Israel.**" http://www.epa.gov/nheerl/ontheroad/asia/jerusalem_israel.html (emphasis added).

H. The Department of State's References to "Jerusalem, Israel"

In December 2003, the State Department's Bureau of Resource Management issued a FY 2003 Performance and Accountability Report. <http://www.state.gov/s/d/rm/rls/perfrpt/2003/html/29446.htm>. The report sets forth "Department of State Locations" around the world, including American Embassies, the Consulates General and the Consulates. The State Department identified the location of a Consulate General in "**Jerusalem, Israel.**" *Id.* (emphasis added).

In its report for Fiscal Year 2002, the State Department's Bureau of Resource Management also identified one of the Consulates General as being located in "**Jerusalem, Israel.**" <http://www.state.gov/s/d/rm/rls/perfrpt/2002/html/19200.htm> (emphasis added).

On its Web site, the State Department posted 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/rm/2009a/03/11996>

5.htm. In the posting, the State Department indicated that the 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), thus apparently reflecting the Secretary of State’s own understanding that Jerusalem is part of the State of Israel.

On August 5, 2010, the State Department’s Office of the Coordinator for Counterterrorism issued its “Country Reports on Terrorism 2009.” <http://www.state.gov/s/ct/rls/crt/2009/140900.htm>. In describing the activities of Hamas, a U.S.-designated foreign terrorist organization, this government report noted that Hamas “claimed responsibility for driving a vehicle into a crowd in **Jerusalem, Israel** . . .” *Id.* at 13 (emphasis added).

The State Department published a table (Table XIX) entitled “Nonimmigrant Visas Issued by Issuing Office (Including Border Crossing Cards) Fiscal Years 1992-2010.” <http://www.travel.state.gov/pdf/MultiYearTableXIX.pdf>. The State Department identified one of the issuing offices as being located in “**Israel, Jerusalem**.” *Id.* (emphasis added).

In accordance with the Statute at issue in this case, the State Department has actually issued passports to American citizens born in Jerusalem, listing their birthplace as “Israel.” The ZOA has a copy of one such passport issued by the State Department in February 2010. (The citizen’s city of birth is reflected on his Israeli and Canadian passports.) On the U.S. passport, the State Department identified this citizen’s birthplace as

“Israel.” Pursuant to Supreme Court Rule 32.3, the ZOA has sent a letter to the Clerk of the Court and served it on all parties, which describes the U.S. passport (as well as the Israeli and Canadian passports), and requests that copies be lodged with the Clerk and considered by the Court.

The ZOA also has a copy of the passport issued by the State Department to another American citizen born in Jerusalem. When the citizen obtained a passport in September 1999, “Jerusalem” was listed as her birthplace. When she renewed her passport in June 2009, the State Department listed her birthplace as “Israel.” Pursuant to Supreme Court Rule 32.3, the ZOA has requested in its letter to the Clerk of the Court that these two passports issued to this American citizen also be lodged with the Clerk and considered by the Court.

In a third case involving another American citizen, the State Department issued a Report of Birth Abroad on March 16, 1972, reflecting that the citizen was born on September 7, 1971, at “Shaarei Zedek Hospital, Jerusalem.” The citizen’s current passport, issued on January 4, 2008, lists his birthplace as “Israel.” Pursuant to Supreme Court Rule 32.3, the ZOA has requested in its letter to the Clerk of the Court that this citizen’s Report of Birth Abroad and passport also be lodged with the Clerk and considered by the Court.

In the above three examples—and the ZOA would respectfully suggest to this Court that there are likely others—the State Department actually enforced the Statute and listed “Israel” as the citizens’ country of birth on their passports. The

State Department would find it difficult to show that these listings have had any discernible impact on any power that the President might have to recognize foreign sovereigns.

I. 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. On the White House Web site, the White House posted eight photos from the trip that Vice President Joe Biden and his wife, Dr. Jill Biden, made to the Middle East last year. <http://www.whitehouse.gov/photos-and-video/photo-gallery/vice-president-and-dr-biden-middle-east>. One photo includes this caption: "Vice President Joe Biden meets with Israeli Prime Minister Benjamin Netanyahu in **Jerusalem, Israel**, March 9, 2010." *Id.* (emphasis added). The caption to another photo reads: "Vice President Joe Biden laughs with Israeli President Shimon Peres in **Jerusalem, Israel**, March 9, 2010." *Id.* (emphasis added). The caption to a third photo states: "Vice President Joe Biden has breakfast with Former British Prime Minister Tony Blair . . . in **Jerusalem, Israel**, March 10, 2010." *Id.* (emphasis added). Each photo is described as an "Official White House Photo." *Id.*

All of the examples described above 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 purported power to recognize foreign

sovereigns. The State Department has frequently done so. Even the White House has referred to Jerusalem as part of Israel. It is thus hard to conceive of exactly how there would be any impermissible impact on the President's power if American citizens born in Jerusalem were permitted to have "Israel" listed as their birthplace on their passports.

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 Passport Applicants' 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 ignoring that a country has 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. See U.S. Department of State Foreign Affairs Manual, 7 FAM 1300 (Passport Services), *available at* <http://www.state.gov/m/a/dir/regs/fam/07fam/c22714.htm>.² According to the Manual, the State Department’s “general rule” is that “the country that currently has sovereignty over the actual place of birth should be listed as the place of birth, regardless of when the birth occurred.” 7 FAM 1330 App. D (b).

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 may have “Palestine” listed as their birthplace instead (7 FAM 1360 App. D(g))—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. Even 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

² A different version of the Foreign Affairs Manual existed at the time that Zivotofsky filed suit, but the policies and practices discussed in this brief have not changed.

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 their legal right under the Statute—the State Department will not honor these preferences and accommodate their request. 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 “Jerusalem, Israel” designations by the various departments and agencies in the Executive—would actually impermissibly interfere with a presidential power to recognize foreign sovereigns. The State Department’s arbitrary and irrational 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 the Court determine that the Statute does not impermissibly infringe on the President's power to recognize foreign sovereigns, and that the Statute, clearly written, duly enacted and signed into law by the President, should be enforced.

Respectfully submitted,

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