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No. 13-628

In the Supreme Court of the United States

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

v.

JOHN KERRY, SECRETARY OF STATE, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICUS CURIAE* DAVID BOYLE IN SUPPORT OF RESPONDENT

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AMICUS CURIAE STATEMENT OF INTEREST

The present *amicus curiae*, David Boyle (hereinafter, "Amicus"),[1] is respectfully filing this Brief in Support of Respondent in Case 13-628 ("*Zivotofsky*").[2] Amicus was gratified to see that in another case touching on foreign policy, *Bond v. United States* (134 S. Ct. 2077 (2014)), the Court did not overturn 18 U.S.C. § 229 (1998) (re chemical weapons) or the venerable case of *Missouri v. Holland* (252 U.S. 416 (1920)), especially since his amicus brief, *see id.*, for Respondent in *Bond* asked for them to be preserved.[3] Similarly, here, the Executive's foreign-policy stance has for decades respected an international consensus about the status of Jerusalem, and there is no need to fix what is not broken.

Additionally, Amicus is an American taxpayer and, respectfully said, does not want his money spent supporting Zivotofsky's desired message. While parties pay for their own passports, Amicus' tax money pays for the State Department's operations, including any passport-printing facilities. Amicus sees Petitioner's declaration of Israeli ownership of Jerusalem as hurting American

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[1] No party or its counsel wrote or helped write this brief, or gave money to its writing or submission, *see* S. Ct. R. 37. Amicus received permission from the parties to write a brief, permission which will be sent to the Court.

[2] *Menachem Binyamin Zivotofsky, By His Parents and Guardians, Ari Z. and Naomi Siegman Zivotofsky, v. John Kerry, Secretary of State*, 725 F.3d 197 (D.C. Cir. 2013) (*cert. granted*, 82 U.S.L.W. 3609).

[3] Amicus also notes with pleasure the Court's citing in *Bond* of a John Singer Sargent painting, 134 S. Ct. at 2083.

interests and making undesirable results, even terrorist attacks against Americans, more likely.

SUMMARY OF ARGUMENT

Millennia of dispute over the Mideast and Jerusalem counsel a careful and fair approach to ownership of Jerusalem.

If that the power to recognize foreign nations is somehow not exclusively the Executive's, the Executive may still hold the preponderance of recognition power, or the power to "break a tie" if there is disagreement.

Congress should not delegate the recognition power to a private citizen.

The "Receive Ambassadors Clause", U.S. Const. art. II, § 3, cl. 4, supports Respondent's case.

A balance-of-sorts or *modus vivendi* has existed where Congress has its sphere, e.g., foreign commerce, whereas the Executive has largely controlled recognition. It would disrupt that balance to remove, or gut, the Executive's recognition power.

Letting Petitioner have his way may violate the spirit of the Logan Act (1 Stat. 613 (1799), codified at 18 U.S.C. § 953).

Petitioner's argument may not treat Palestinians and Israelis by equal standards.

Amicus shall offer refutations for Petitioner's amicus briefs.

The Nation's interests, but also Israel's long-term interests as well, and the interests of the world, are compellingly served by letting the Executive, not private individuals, administrate passports.

ARGUMENT

I. SOME BACK HISTORY OF THE MIDDLE EAST, AND ITS CONSEQUENCES FOR THIS CASE

There has been turmoil in the Middle East for some time. *See, e.g.*,

> About this time war broke out in the region. . . .
>
> The kings of Sodom, Gomorrah, Admah, Zeboiim, and Bela formed an alliance and mobilized their armies in Siddim Valley (that is, the valley of the Dead Sea). For twelve years they had all been subject to King Kedorlaomer [of Elam], but now in the thirteenth year they rebelled.
>
> One year later, Kedorlaomer and his allies arrived. They conquered the Rephaites in Ashteroth-karnaim, the Zuzites in Ham, the Emites in the plain of Kiriathaim, and the Horites in Mount Seir, as far as El-paran at the edge of the wilderness. Then they swung around to En-mishpat (now called Kadesh) and destroyed the Amalekites, and also the Amorites living in Hazazon-tamar.

Genesis 14:1-7 (New Living Translation). This passage, *see id.*, nicely shows the diverse, violent, and complex pageant and chronological depth of Middle-Eastern history, including the "Zuzites in Ham"—whoever *they* were, God rest their memory—and the always-fascinating Sodom and Gomorrah.

One inadvertent punchline is "(now called Kadesh)", *id.*; the "now", *id.*, was current back then, but, ironically and poignantly, is ancient at this point, compared to our present "now". Given all this complexity and depth of "backstory", perhaps the State Department and its foreign-policy professionals, under the Chief Executive and his Article II powers, may be better placed to make decisions about controversial details of Middle-East-related passports than the politicians of the Legislative Branch are.

More recently than the Zuzites of Ham, there was the Latin Kingdom of Jerusalem (c. 1099-1291) under its first leader Godfrey of Bouillon (he modestly refused to call himself "King", it is said), that famed Frankish knight of the First Crusade.[4] Jerusalem, and the rest of the Abrahamic religions' "Holy Land", was in dispute, as battle raged, and the Crusaders cried *Deus le Vult!* ("God wills it"), and Saracens shouted *Allahu akbar!* ("God is great"). Those days of adventure and chivalry, of Saladin and Richard the Lionheart, are long gone; unfortunately, many of the same disputes and bloodshed are still here.

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[4] Wikipedia, *Kingdom of Jerusalem*, http://en.wikipedia.org/wiki/Kingdom_of_Jerusalem (as of 00:46 GMT, Sept. 21, 2014).

To Godfrey of Bouillon, it may have been "obvious" that the God of Israel in the flesh, Jesus Christ, gave His elect Christian people dominion over that region around Jerusalem where He was crucified. By contrast, many Jewish believers may have felt—and still feel—that per Judaism, Yahweh has specially chosen *them* to dominate the region. And some Muslims may think Allah, in His bounty, has given *them* a preferred place over those lands. Who is right?

Given the thousands of years of contending claims, including both the religious ones *supra* and also ethnic or nationalist claims, perhaps sharing the region in an equitable way among various parties may be the best solution. And that includes equitably sharing Jerusalem, instead of letting Israel unilaterally assimilate it.

Such sharing of Jerusalem chimes with our American tradition since President Truman of regarding Jerusalem as not being Israel's territory. To allow an eleven-year-old boy, petitioner Zivotofsky, to have more foreign-policy power than the President does in the area of deciding how a U.S. passport describes the ownership of Jerusalem, is not a good idea.

II. THE EXECUTIVE NEED NOT POSSESS EXCLUSIVE RECOGNITION POWER IN ORDER FOR RESPONDENT TO HAVE POWER OVER PETITIONER'S PASSPORT RE JERUSALEM

A. Nonexclusive, yet Preponderant, Presidential Power over Recognition

If the President and the State Department, as part of the Executive, have exclusive recognition power, then that is that, basically, as for this case.[5] (Some may argue that Petitioner's designation of birthplace somehow does not involve the recognition power; but that is a difficult, even desperate, argument to make. If a Russian passport described a Russian citizen who was born in Alaska as being born in "Trans-Bering Sea East Russia"—as if Alaska were still Russian territory instead of American—, that would obviously be a problem, and a recognition problem at that.)

But even if the Executive somehow lacks *exclusive* recognition power, that does not mean that Respondent loses this case. For example, even if Congress is somehow ceded a quantum of recognition power by this Court (and that power might be more appropriate to the Senate, by the way—since the Senate helps make treaties—, than to the House of Representatives), that does not mean that the President does not possess a larger quantum, a "majority share", of that recognition power. Such a larger quantum would befit the President's widely-acknowledged prerogatives in foreign affairs. (State dinners are held at the White House, after all, rather than at the Capitol.)

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[5] This case revolving, naturally, around the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350 (§ 214(d), 116 Stat. 1366), and George W. Bush, *Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003*, 2002 Pub. Papers (Sept. 30, 2002).

B. Who Breaks a Tie, if the President and Congress Disagree on Recognition Issues?

And even if the Executive's "preponderant recognition power" *per se* did not exist (after all, Congress might find it offensive to hear that Congress has "inferior recognition power" that is labeled as such), there still could be such power *de facto*, that is, if the President is recognized to have the power to "break a tie" in case the Executive and the Legislature disagree on recognizing a foreign power or territory.

"Breaking a tie" sounds inelegant, perhaps, but it may be an accurate way to describe the situation. After all, *vis-à-vis* treaties, if the President and the Senate disagree on making a treaty, then the treaty will simply not be made. But passports, unlike treaties, essentially have to be issued, on an ongoing basis, to many people. For birthplace, to leave the space blank, or to put "NOTICE: THE AMERICAN GOVERNMENT CANNOT DECIDE WHAT TO PUT HERE', would be embarrassing. So who breaks the tie if there is a tie?

An aleatory method such as rolling dice would not suffice. So allowing one side to be the tiebreaker makes sense. And since the President and State Department have traditionally decided about birthplaces on passports, it makes sense to allow the Executive to decide in case of a "tie", a disagreement with Congress.

Note that this would not be just a euphemism for giving the Executive exclusive recognition power. If only the President had recognition power, then Congress could never wield any such power. But if

Congress had a quantum of recognition power, then the President could simply accede to what Congress' recognition decisions, if he or she liked, unless in cases of particular importance to the President. And arguably, this is what has happened historically. (I.e., Congress may have tried to recognize various nations, and the President may have acceded to it in various cases.)

The Executive breaking a tie even within the Congress is part of our constitutional tradition, after all. The Vice President breaks ties within the Senate, even on domestic issues, *see* U.S. Const. art. I, § 3, cl. 4. Then, it is not hard to imagine that when foreign policy is involved, and the Executive's own recognition power is involved, that the Executive may have a tie-breaking power, *per se* or *de facto*, in recognition issues where there is disagreement with Congress.

III. INSTEAD OF MAKING A CLEAR STATEMENT OF RECOGNITION OF JERUSALEM AS ISRAELI, CONGRESS MAY HAVE UNLAWFULLY DELEGATED THAT TASK TO PETITIONER

Looking at recognition issues from another angle: an additional problem is that instead of making a clear statement of recognition of Jerusalem as Israel's property, Congress has delegated this to be the choice of Menachem Zivotofsky or similarly-situated individuals. However, if Congress really has the power to recognize Jerusalem as Israeli, that does not mean that it has the right to delegate that to a private citizen.

After all, Petitioner seems to admit that the Executive may have some recognition power, *see* Pet'r Br. *passim*. Even if 214(d) was signed into law, and technically met requirements of "presentment", that was done so on the Executive's understanding that a signing statement would allow the President not to enforce 214(d). So, in terms of intent, "presentment" has not really been satisfied, since Presidents since Truman have never agreed to violate the world's understanding about Jerusalem's status, and since, therefore, the President's recognition power has not been used to validate 214(d).

"Improper delegation" may of course refer to an illegitimate delegation to another branch of government, e.g., if Congress offered to let the Chief Justice perform the tasks that the Speaker of the House usually does. In the instant case, where Congress delegates to Petitioner the so-called "right" to label his birthplace "Israel", a *reductio ad absurdum* example or two, following, may clarify why delegation to a private citizen can be a bad idea.

Say that Congress, instead of declaring war, decides to let citizen Joe Blow do it instead, and delegates the power to him by creating a statutory "right" for this to happen. However, it is not for Blow to decide whether America strikes a blow against an enemy through declaration of war; this is Congress' job, not his.

Or, say that instead of outright repealing the Logan Act, Congress says that each citizen may *decide for himself* whether he is violating the Act or not. This sort of "bill of attainder in reverse", making a citizen a perpetual judge in his own case,

resembles what is happening with 214(d). It is not up to each citizen to make his own foreign policy, especially when he does so by using a state document like a passport.

Amicus even recalls seeing "buzz" somewhere on the Internet (where, he does not recall), to the effect that with 214(d), Congress is basically "pussyfooting" around the issue of recognizing Jerusalem as part of Israel. Amicus thinks there is a large grain of truth in that. 214(d) has a whiff of "Let George do it" (or in this case, "Let Menachem do it"), putting responsibility for the dangerous maneuver of declaring Jerusalem to be Israeli, onto individual citizens who feel like declaring that status on their passports. Those citizens' declarations could constitute a "thin end of the wedge", "toe in the door", or "facts on the ground" that might eventually make it more easy for Congress to eventually recognize Jerusalem as Israel's, while throwing their hands in the air and saying, "Well, we're just following what all these individual citizens have decided on their passports, there's nothing we can do about it now, it's not *our* fault."

But that would be unethical or irresponsible. If Congress wants to recognize Jerusalem as part of Israel, it should do that outright. Then there might not be any "passport problem" *per se*: people would just put "Israel" on their passport if born in Jerusalem. Or if Congress wants to follow the Executive's lead and not recognize Jerusalem as being Israel's, they can do that too. What is likely unacceptable is for Congress to waffle about it and delegate this crucial foreign-policy decision to the

whim of particular Americans, instead of having the determination to make the decision themselves.

"Abdication of responsibility is not part of the constitutional design." *Clinton v. City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring).

(Naturally, Amicus is not saying that if Congress did make a clear statement in a law that they passed, saying that Jerusalem is part of Israel—whether mentioning passports or not—, that that would be valid; after all, the President might not approve.)

All that being said: if the Court does not want to decide about the site of the recognition power itself, i.e., decide about whether the President has it, or Congress, or both: the Court can simply decide that the *ultra vires* delegation of the Jerusalem-recognition choice to Petitioner, is itself illegal, and that that alone is needed to decide the case in favor of Respondent.

IV. THE CONSTITUTION MAY GIVE THE PRESIDENT THE POWER, NOT MERELY THE DUTY, TO RECEIVE AMBASSADORS, OR NOT, WITH ALL THAT IMPLIES

But if the Court desires to inquire further into issues besides non-delegation ones: Petitioner's brief tells us, *id.* at 27, "The President is merely assigned the ceremonial duty of receiving foreign ambassadors." However, re the "Receive Ambassadors Clause", i.e., "he shall receive Ambassadors and other public Ministers", U.S. Const. art. II, § 3, cl. 4, the Constitution does not openly call this a duty (much less a "ceremonial"

one), and lists it among the dignities of other presidential *powers* such as adjourning Congress, *see id.* cl. 3, or the duty-which-is-also-a-power, "He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient[.]" *Id.* at cls. 1-2 ("State of the Union" and "Recommendation" clauses).

Note the "shall" in the two clauses just mentioned, which does not preclude the duty from also being a power (i.e., the President can say what he likes); this means that the "shall" in the "Receive Ambassadors Clause" may, similarly, not denote or connote a mere duty, but may allow for real power and choice.

This all makes it rather unsupportable to automatically call receiving ambassadors a mere "duty". If it were only a mere errand, then the President would be reduced to an errand boy (or girl), a sort of fancy clown in white tie who has to smile and wave and entertain foreign ambassadors, whether at a state dinner or otherwise, while the Congress does all the really important work of choosing of what foreign nations will even be recognized. This seems unbalanced.

Without that textual hook, the "Receive Ambassadors Clause", Petitioner would have a stronger argument. However, that textual hook has existed since the 18th Century, and Petitioner's argument suffers greatly thereby.

Theory aside, there are also real-life equities to consider. For example: practically speaking, if the President makes a stupid or offensive recognition decision, then he and the State Department and

Foreign Service will have to pay for it shortly—a sort of "instant karma", as John Lennon put it—, since they, not Congress, will tend to be the ones personally dealing with foreign leaders. By contrast, if Congress makes a flawed or destructive decision, they leave the President and diplomats "holding the bag" when those latter persons have to deal directly with an angry world. This does not seem fair.

(Picture a state dinner with Arab leaders, if, earlier in the day, following an Israeli annexation of the West Bank, the Congress recognizes the West Bank as Israel's property, ignoring the President's wishes. If the President could not announce at that dinner that he is declining to honor Congress' advisory resolution, then he might be in for a very unpleasant dinner—and the Nation in for some very rough times.)

V. ALLOWING CONGRESS TO TRUMP THE PRESIDENT ON RECOGNITION ISSUES CREATES UNJUST IMBALANCE BETWEEN THE TWO BRANCHES, AND THE POTENTIAL TO HARM THE NATION

This case, by the way, is about more than just passports. The Congress has so many foreign policy powers, whether over declaring war (Art. I, § 8, cl. 11), or foreign trade (Art. I, § 8, cl. 3), etc., that to give Congress full recognition power as well would cause imbalance in our government, redolent of the remark, "The legislative department is everywhere extending the sphere of its activity, and drawing all

power into its impetuous vortex." *The Federalist No. 48* (James Madison).[6]

There may be some "*de facto* recognition power" in things like war declarations, trade, and other matters that Congress handles. However, the *per se*, formal recognition power should belong to the Head of State, or at least the power to decide formal recognition in case Congress disagrees.

All of America's People elect the President to be Head of State—perhaps implying in itself that he or she should be the one to recognize foreign States—, whereas no one has elected people born in Jerusalem to be the deciders of recognizing a foreign power.

The President is "the sole organ of the federal government in the field of international relations", *United States v. Curtiss-Wright Export Corp. et al.* ("*Curtiss-Wright*"), 299 U.S. 304, 320 (1936) (Sutherland, J.). Not a mere "sole instrument", but the "sole organ". His the voice and the final choice over formal recognition, lest he be considered the mere puppet or ventriloquist's dummy of Congress. As the person responsible for meeting foreign heads of state, he should be the one to deal with the delicatesse and politesse of making formal recognition, as is implied in a passport birthplace. Congress micromanaging passports to the point where they can interfere with birthplace issues when they infringe on the Chief Executive's recognition power, is intrusive and usurpatory.

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[6] *Available a*t About.com, US Government, http://usgovinfo.about.com/library/fed/blfed48.htm.

Frankly, formal recognition could be considered a paltry little power, compared to declaring war, or managing trade, etc. But this is one reason why, for sake of balance, the President should retain it. If he does not even have that, he is not much of a "sole organ", or not much of anything. (By the way, protecting this Nation from disastrous foreign policy mistakes that could get Americans killed is a "constitutionally assigned function" of the President, Amicus believes, if we are looking for "constitutionally assigned functions".)

Admittedly, there is still some constitutional confusion about all these issues. However, if the Court can newly recognize its own supremacy *vis-à-vis* other branches in a particular aspect, *see Marbury v. Madison*, 5 U.S. 137 (1803) (establishing judicial review), it should be able to newly recognize another branch's supremacy (the President's in making the final call in formal recognition), as in the recognition issues of long debate, but first impression, that we are examining.

Curtiss-Wright mentions, as partially noted *supra*, "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations — a power which does not require as a basis for its exercise an act of Congress", *id.* at 320 (Sutherland, J.). Thus, the President has "plenary and exclusive power" on his own, *see id.*[7] The famed

[7] Just as in the 1930's this Court shifted to a new frame of mind about economic legislation, *see, e.g.*, *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), they also may have done so *vis-à-vis* foreign policy, which comprises the recognition power.

Jackson concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) says, though, *see id.* at 635 n.2, that *Curtiss-Wright* "involved, not the question of the President's power to act without congressional authority, but the question of his right to act under and in accord with an Act of Congress." But that flatly contradicts what Sutherland says about "plenary and exclusive power" *supra*, and Sutherland wrote the Court's opinion (dicta or not), not a mere concurrence. (Amicus also notes that Jackson says, "Courts can sustain exclusive presidential control in such a case [Congressional disapproval] only by disabling the Congress from acting upon the subject." 343 U.S. at 637-38. But as Amicus has pointed out, the President may need only tie-breaking power, not exclusive power, to have the last word in recognition disputes.)

Debate will continue, but for now, Amicus notes that in *Youngstown*, *supra*, and *Medellín v. Texas*, 128 S. Ct. 1346 (2008), largely the outlier effects of foreign-policy or Commander-in-Chief powers were being considered, i.e., steel plants in *this* country, not abroad, and the execution in this country (not abroad) of a Mexican national. These situations differ greatly from the instant case, because while

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Curtiss-Wright may reflect a judgment by the Court that in the modern world, and the increasingly difficult international atmosphere of the 1930's, with the specter of Nazism, etc., that more reliance should be placed on presidential power in foreign affairs (e.g., the Receive Ambassadors Clause), instead of showing laxness and letting the Congress have powers (e.g., the recognition power) that more properly belong to the President, who can often act more quickly and effectively in foreign affairs than Congress can.

214(d) is a law in this country (and *Medellín*, *supra*, is not fond of the President acting as a domestic legislator, *see id. passim*), 214(d)'s effects are felt abroad, with a passport declaration of "Israel" instead of "Jerusalem" being a calling-card of a most unwelcome kind in many places. The President should be able to make that calling-card one which does not endanger American interests.

VI. ALLOWING PETITIONER TO DECIDE RECOGNITION ISSUES IN HIS OWN PASSPORT MAY VIOLATE THE SPRIT OF THE LOGAN ACT

The Logan Act, *supra* at 2, prevents, *see id.*, private citizens from making U.S. foreign policy. While Petitioner doubtless means well, it strikes Amicus that it would violate at least the spirit of the Logan Act to allow Petitioner, instead of the President, to make a recognition decision about Israel in his passport, one that would harm American interests.

(Incidentally, Amicus notes here that the sensitive expertise of a permanent diplomatic corps, the Foreign Service and State Department—including people who may actually speak fluently some of the languages of the Middle East such as local dialectal forms of Arabic, Hebrew, or Farsi—, may be a factor to consider in this case, instead of just the vagaries of American domestic politics resulting in things like 214(d). A corps of trained specialists may, arguably, know more about a complex issue than does a politician who has to be reelected every two years.)

VII. THE DIFFERING TREATMENT OF PALESTINANS AND ISRAELIS IN PETITIONER'S BRIEF

It also harms American interests to seem inequitable. Petitioner's brief says of Jerusalemites (who will probably be Israeli in the scenario about to be mentioned), "To these Americans, personal dignity and conscientious conviction calls on them to identify themselves as born in 'Israel.'" Br. at 16.

However, of Palestinians who do not want "Israel" on their passports, the brief says, *id.* at 26, "that personal prejudice". How is it any more of a personal prejudice than not wanting "Jerusalem" on your passport, in favor of "Israel"?

Sadly, there may be a double standard here, where Palestinian-Americans are seen as tending to be bigots, while Israeli-Americans get to have "dignity", Br. at 16. This contradiction alone shows a lack of strength in Petitioner's position. (He does not call people who choose Taiwan "prejudiced", but only reserves that for Palestinians, interestingly.)

By the way, this all helps make the point that the State Department allowing people to choose Haifa or Taiwan as their birthplace, instead of Israel or China, is very different from allowing the Jerusalem-born to choose Israel as birthplace. In the first two instances, the passport-holder is allowed to move *downward*, so to speak: instead of choosing a larger unit like "Israel" or "China", she may choose a *smaller* geographical unit (and thus not necessarily implying recognition issues *per se*) like Haifa or Taiwan. However, in the instant case, Petitioner

wants to move *upward*, i.e., to choose a *larger* unit, Israel instead of Jerusalem: a choice which automatically and seriously implicates recognition issues. Thus, Petitioner's case differs hugely from those involving Haifa or Taiwan.

And as Respondent's counsel brilliantly notes, "Petitioner . . . argues that Section 214(d) merely permits individuals to 'identify themselves as born in "Israel."' [But] Section 214(d)'s one-sided operation—it does not permit Palestinian-Americans born in Jerusalem after 1948 to self-identify as being born in 'Palestine'—is inconsistent with offering 'self-identification." Br. at 56 (citations omitted). And it does not end there. For example, Christians of traditionalist bent, if born in Jerusalem, are not allowed to put "Latin Kingdom of Jerusalem 2.0" (or words to that effect) on their passports. Etc. Only partisans of Israel are privileged by Section 214(d).

VIII. REFUTING THE AMICUS BRIEFS FOR PETITIONER

The amicus briefs of July 2014 supporting Petitioner are skilled and interesting, yet in error. Amicus shall try to refute various points from them.

Pace the opinion of the brief for International Association of Jewish Lawyers and Jurists, allowing "Israel" on a Jerusalem-born's passport would indeed implicate the recognition power, as the Government would seem to be talking out of two sides of its mouth if the Executive "officially declared" Jerusalem's non-Israeli status, while allowing the passport to declare otherwise. If someone says "I like

you" while he is meantime slapping you in the face, perhaps you should doubt his credibility.

The brief of the American Jewish Committee claims, "The [Receive Ambassadors C]lause is not included as a power of the President in Section 2 of Article II, but rather is placed in Section 3[,] which contains a list of executive duties." *Id.* at 4 (quotations and citation omitted). This is not strictly true, though. Section 2 lists some "powers", such as making a treaty with the advice and consent of the Senate, *see id.* at § 2 cl. 2, that are actually more trammeled (by the need to cooperate with Congress) than some of the "duties" in Section 3, e.g., as Amicus previously noted, the President's ability to call Congress into session, or adjourn it, is a power indeed. So the placement of the Receive Ambassadors Clause in Section 3 does not hurt Respondent's case.

The brief for the United States Senate lists, *see id.* at 7, a number of issues (such as how U.S. courts treat judgments of courts in Jerusalem) related to recognition of a sovereign: issues which the brief claims are not fulfilled by merely a passport saying "Israel", thus showing that the name "Israel" does not show official recognition of Israel. However, the claim, "It does not determine the status of any sovereign property", *id.*, is not really true, as the passport is a declaration, in writing on a U.S. state document borne and shown in foreign countries to which the passport travels, that Jerusalem is Israeli property.

Also, the Senate brief claims "that the specter of adverse consequences does not render [foreign-

policy-related] legislative action unconstitutional." *Id.* at 8. If the President has exclusive recognition power, he may not even need bring up the specter of unpleasant consequences; but if his power is non-exclusive, then the possibility of bad consequences may be considered part of the "mix" that the President, or courts, consider re his recognition power.

The brief also says, "The 'place of birth' specification assists in identifying the individual[; t]hus, the Department itself recognizes that the 'place of birth" entry in a passport serves to aid in identifying the passport bearer; it is not an instrument for recognizing foreign sovereignty." *Id.* at 23 (spacing changed, citation omitted). But that is not necessarily true: the identification of the individual, if it identifies the individual as being born in Israel, *de facto* recognizes foreign sovereignty, even if it does not do so *per se*.

The brief of Louis Fisher contends that Justice George Sutherland made some mistakes in *Curtiss-Wright*, even calling Sutherland a liar, *see* Fisher Br. at 23. Fisher also deplores dicta, *see id.* at 5-7. True, some lower courts may be addicted to dicta from this Court; but, *inter alia*, what is "holding" and what is "dicta" in any one case may be debatable. Moreover, there are many sources Respondent presents besides *Curtiss-Wright* to support Respondent's claims, regardless of whether Sutherland was some conniving jurisprudential viper or not.

The brief of Public Citizen says at 4, "[T]he President may make clear in public statements and in applicable State Department manuals that

Congress has created the right of someone born in Jerusalem to [have] Israel listed as his place of birth and that the President's position is that the status of Jerusalem remains an open question[.]" *Id.* at 4. But the world probably neither reads nor cares about "applicable State Department manuals", nor maybe even cares much about "public statements", since the passports speak louder than words.

It is not the President's job to be reduced to complaining and protesting about recognition status. That may be beneath his dignity and job as Head of State. Rather, the Congress can pass as many resolutions as it likes, deploring the President's refusal to recognize Jerusalem as Congress wishes. And Petitioner may do similarly.

That is, Zivotofsky has ample First-Amendment-protected alternatives, such as putting up a billboard, or wearing a T-shirt, proclaiming his personal belief that all Jerusalem is somehow Israeli property despite the opinion of the Executive (and most of the world too). There is also the wide world of social media: the Zivotofskys, even young Menachem if he is interested, can use "YouTube", "Facebook", "Twitter", or other informational vectors to spread their belief that Jerusalem should be exclusive Israeli property. They should not use state property, like a passport, to do so.

As for "[T]o the extent that the power of recognition rests on the need for an immediate determination, or the superior ability of the President to gather the relevant facts to make such a decision, those considerations have no bearing on this case. The facts . . . have been [known] for decades", *id.* at 11, there may always be new facts

coming in. Even if there were none: since in general the President and State Department are able to act more quickly and deftly re foreign affairs, that is enough to justify an Executive power over recognition, without courts nitpicking over any case where supposedly "all the facts are known".

"If, as the Court held in *Chadha*, action by a vote of one House of Congress has no constitutional significance, then inaction by both Houses cannot possibly have any greater effect." Br. at 5-6. If the inaction has persisted for decades (or centuries), it could easily have precedent and effect.

"The idea that Congress has ceded constitutional power by silence is particularly offensive to the principles of *Chadha*. It assumes . . . . that Congress has the right to give away its constitutional power[.]" *Id.* at 26. But this contradicts what the Senate brief says, *id* at 16: "*See NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014) ('[L]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions regulating the relationship between Congress and the President.')" (citation and some quotation marks omitted). If Congress has long let the Executive have sway in recognition issues, especially since *Curtiss-Wright*, that should count for something.

(The brief opines later, "Unlike *Noel Canning*, this case does not involve an interpretation of constitutional text[.]" *Id.* at 29. But does not the Receive Ambassadors Clause count as constitutional text?)

Congress may be precisely "giv[ing] away its constitutional power"—albeit not to the President—, Pub. Citizen Br. at 26, and wrongly, if it *ultra vires* delegates recognition power to private citizens, as Amicus discussed *supra*.

Presidential signing statements, by the way, have always given Amicus some pause. However, that does not mean that signing statements on the whole are illegitimate, especially compared to maneuvers like the unconstitutional "line-item veto". The line-item veto was a monstrosity, practically making the President into a Congress-unto-himself. However, a signing statement does not strike down legislation, it merely shows the President's intent about enforcement of it. So, while a signing statement allowing torture would tend to be unconstitutional, a signing statement that *prevents* unconstitutionality, e.g., one that prevents Congress from usurping the President's final say on recognition matters, should not give much pause to thoughtful people. Signing statements may actually help preserve the balance between the Government's branches, then.

The brief of the Zionist Organization of America mainly focuses, *see id. passim*, on the fact that in other venues besides passports, e.g., bureaucratic documents, the Government may have used the term "Jerusalem, Israel". However, a passport is a very special document, one largely for external (foreign) consumption, as opposed to domestic. Also, in internal bureaucratic affairs, agencies might have found it useful to make reasonably clear to employees where "Jerusalem" was, although those agencies should have said "Jerusalem, Middle East"

or something. Maybe “Jerusalem, Israel” was the best they knew how to do. Detailed description can be helpful. (This may be one reason that the group calls itself the Zionist Organization of America, as opposed to, say, the Zionist Organization of West Burma.)

The brief also notes that, *see id.* at, e.g., 5, the Government erased “Israel” from some of its Jerusalem-related publications, following the ZOA mentioning to them the presence of “Israel”. If so, then the ZOA has well served America by alerting the Government to the (now-corrected) errors.

The Brandeis Center brief says, *id.* at 1, “LDB is concerned that the discussion of matters pertaining to Israel often invokes double-standards and unduly tortured logic[.]” This may apply to Petitioner’s calling Palestinians “prejudiced” while praising others’ “dignity”, as noted *supra.*

“Nothing immunizes the recognition power, with all its attendant difficulties, from the constitutional avoidance doctrine.” Br. at 8. If so, this may be a good reason to do as Amicus mentioned and solve the case in favor of Respondent on non-delegation grounds alone.

“However, receiving ambassadors does nothing to establish geographic facts.” Br. at 12. That depends: if the State of Palestine (as it calls itself) regains East Jerusalem as property, a piqued America could always refuse to recognize that State or receive its ambassador.

“Congress can also declare or authorize war on a nation without recognizing its existence as a

sovereign." Br. at 16. Exactly. Thus, Congress is not crippled in its powers by the President retaining the last word on recognition.

Br. at 17:

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

Id. Was that unintentional comedy?

That is, first off, Amicus is not sure how Respondent's theories prevent a declaration of war on a non-sovereign. Second, the Brandeis briefers must have a pretty low opinion of the President if they think he is going to start bombing the other Korea, or the mythical "Jerusalem putatively in North Korea although it is on the other side of Asia by the Mediterranean" that the briefers invoke, in one of the most hallucinatory spectacles Amicus has read in a Supreme Court brief. (A "Brandeis brief" is supposed to be informative on the facts, not resemble hallucination.)

"Hypothetically", yes, the President could "lose his marbles", and if we are at war with Mr. Putin, our President could avoid bombing Moscow, Russia and instead bomb Moscow, Scotland (yes, there is such a place), or even Moscow, Texas. However, if the President has really "gone nuts", then the Constitutional remedy is his prompt removal from office under Amendment XXV of the Constitution, and also under lock, key, and 24-hour psychiatric care. The "parade of horrible relocation of North Korea to Jerusalem" is a little too strained for Amicus (or any rational person) to believe; and thus, *pace* Brandeis' brief, this Court need not worry that just because he has recognition power, the Chief Executive will start bombing the Supreme Court building if he wants to construe North Korea as being at 1 First Street, N.E., Washington, D.C.

"Congress's regulation of commerce with states or territories is not impacted by the latter's recognition status." Br. at 19. Again, this makes the point for Respondent, since the President's power does not hamstring Congress' legitimate powers.

"If Congress can designate the West Bank as *de facto* assimilated to Israel in the exercise of its Tariff and Foreign Commerce powers, there is no reason it should not be able to do the same with Jerusalem (a geographically partially overlapping designation) under its Immigration and Nationality powers." *Id.* at 21. No, not if Congress lacks supreme recognition power.

"But if such listings [of birthplace] are merely administrative, Section 214(d) is nothing more than

a routine Congressional reference to a fact about our world, and well within Congress's exclusive power to direct." *Id.* at 23. But if the rest of Section 214 is meant to nudge toward, or foreshadow, recognizing Jerusalem as Israeli, then, in context (and in context of Israel's 1980 annexation of all Jerusalem), 214(d) is far more than "routine".

"'West Bank,' 'Gaza Strip,' and "Palestine,'. . . . which have never been recognized as countries by the United States, nor existed as such." Br. at 25. The State of Palestine might beg to differ about the last one on that list.

The brief of Texas says, "Nor does it follow that the President holds the still further power to prevent Congress from allowing individual citizens to express their dissent from the executive's views on their passports." *Id.* at 3. But a passport is not a complete free-speech zone. The situation in the instant case is not like forcing someone to put "Live Free or Die" on their license plate; it's about territorial recognition. A Mennonite or other peace-lover does not necessarily have the right to request a U.S. passport where the eagle has peace signs instead of the arrows of war, just because that citizen is offended.

"A ruling for the Secretary will inaugurate a new, substantive-due-process-like doctrine of executive power, where the President is empowered to push aside democratically enacted legislation in the name of supposed 'constitutional' powers that have no textual footing[,] but that the President nevertheless believes should belong exclusively to him." Br. at 3-4.

Amicus notes the mixed metaphor (substantive due process as Presidential power?), and also believes that a well-crafted, not-overbroad ruling by this Court need not inaugurate disaster.

"Even if this Court were to demand that the 'longstanding practice[s]' [re recognition] be defined with specificity, that will not ensure that future Presidents or courts will follow the instruction—especially when a ruling for the Secretary will require this Court to resort to some degree of abstraction." *Id.* at 36. Again, Amicus actually has great faith in this honorable Court, that they can make a narrow ruling which will let the President have the last word on formal recognition (e.g., passports), without letting him gain undeserved power and become a tyrant.

The brief of the Endowment for Middle East Truth (EMET) says, *id.* at 3, "But when Congress disagrees with the President, Congress wins." But if this were universally true, then the Executive would not be a coequal branch with the Legislative.

The EMET brief, *see id. passim*, is largely about the President's duties to execute the laws, and not to unilaterally run foreign policy. However, signing statements may legitimately allow Presidential non-enforcement of laws (including unconstitutional ones); and there is no Question Presented here as to whether signing statements themselves are *ipso facto* illegal or unconstitutional. And retaining the recognition power does not make the President the King of All Foreign Policy.

The brief for U.S. House of Representatives members says, *id.* at 4, "The recognition power cannot be drawn so broadly as to swallow completely, at the Executive's sole discretion, the exercise of Congress's law-making authority in the fields of immigration, naturalization, foreign commerce, passport control, criminal law, and foreign policy." Quite so, and vice versa, Congress should not encroach on the Executive.

"Indeed, the Executive has *already* taken the position that it should not be bound by restrictions and conditions placed on the Executive by Congress through its 'appropriations authority' that are at odds with recognition policy." *Id.* at 10 (footnote omitted) If this is so, then the House members have a point. The Court, then, could narrowly rule that the President has final say on recognition, but that he may have to fund it out of his own pocket if he can't convince the House. (Some wealthy ambassadors might serve for free, true…)

"In light of the Constitution's text, structure, and purpose, it is clear that the exclusive recognition power should be drawn narrowly by this Court so as not to trench on or engulf Congress's Article I powers." *Id.* at 19. Well said, and helpful to Respondent.

The brief of the Anti-Defamation League et al. says,

> Section 214(d) . . . . is, on its very face, a limited provision[, allowing] record[ing] place of birth as "Israel." Were there any doubt that this

> recording is solely for this limited purpose, the provision begins, "*For purposes of*." . . . . The provision simply authorizes American citizens to identify their place of birth on their own passport[.]

Id. at 6. But regardless of any stated purpose, the *de facto* effect is to produce an American governmental endorsement of Israeli ownership of Jerusalem. Moreover, the passport is the property of the Government, not just of the bearer.

That brief also claims, *see id.* at 11 n.2, that forcing someone to have in their passport just "Jerusalem" instead of "Israel" means the person is doomed to risk being mistaken for a native of some other place called Jerusalem, globe-wide. However, this is no worse than for a Palestinian born in Jerusalem before 1948, who has the choice of either "Jerusalem" or "Palestine", which could be Palestine, Texas (a real place), so that passport-readers could be confused by that too.

The brief claims at, e.g., 19, that an explanatory footnote can be put in the passport, *see id.* However, that footnote may be seen as hypocritical: when the birthplace says "Israel", that may be seen as more determinative than a mere footnote.

At 24-25, *see id.*, the ADL brief notes that Palestinians born before 1948 (and thus before modern Israel even existed) may list Palestine instead of Israel on their passports. This is a limited exception, given to some old generations who are dying out, and who may have been traumatized by

what they may see as the *Nakba*, the catastrophe, of Israeli occupation of Palestinians' homeland. By contrast, 214(d) gives every generation from now on the right to put "Israel" instead of "Jerusalem", which is a far broader grant.

If the Court feels those elderly Palestinians are getting an unfair advantage, the Court could, instead of letting Petitioner put "Israel" on his passport, ban both "Israel" for new passports of Jerusalemites, and "Palestine" for any new applicant born c. 1948 or before who now wants a passport with "Palestine". Or, if it insists, the Court could demand that all the 1948-era passport holders with "Palestine" on their passports turn in their passports for new ones without "Palestine". However, this may seem inhumane.

IX. THE HIGHLY-COMPELLING NATIONAL INTEREST IN NOT RECOGNIZING JERUSALEM AS ISRAEL'S BEFORE INTERNATIONAL AGREEMENT

The late comedienne Joan Rivers (RIP), around the time of the recent "Gaza War" involving Israel and Hamas, said, "The Palestinian vote for Hamas was making them get what they deserved[.] 'You're dead, you deserve to be dead - you started it[:] Don't you dare make me feel sad about that.' She called the ones who were killed as being people with 'very low IQs.'." Revathi Siva Kumar, *Many On Twitter Call Joan Rivers' Death A Karmic Payback*, Int'l Bus. Times—Australia, Sept. 18, 2014, 12:49 p.m.[8]

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[8] http://au.ibtimes.com/articles/566697/20140918/joan-rivers-controversies-media-hiroshima-nagasaki-offensive.htm#.VCj2Rbl0xUF.

Unfortunately, Rivers' rant typifies what many in the world think about America re the Middle East, i.e., that American and Americans unduly favor Israel and hold Arab or Palestinian life and dignity as worthless.

Amicus does not believe that stereotype *supra*. Of course, it is commonly acknowledged that America has a treasured friendship with Israel. (And many Americans wish Israel well and *L'shana tovah* ("Happy New Year") during the present High Holidays including Rosh Hashanah.) However, that does not mean that the two nations must always agree on everything. In fact, if America thinks Israel is hurting not only America's interests but Israel's own long-term interests, then America, a Nation which has been immensely generous and kindly to Israel, may act appropriately.

For example, after Israel annexed East Jerusalem in 1980, provoking world ire, *see* Wikipedia, *East Jerusalem*,[9] "[i]n 1991[,] United States Secretary of State James Baker stated that the United States is 'opposed to the Israeli annexation of East Jerusalem and the extension of Israeli law on it and the extension of Jerusalem's municipal boundaries'." *Id.* (footnote omitted) Under Israel's rule, "On 22 June 2013, the Israeli Public Security Minister closed the El-Hakawati Theater for eight days, to prevent a puppet theater festival with an 18-year tradition." *Id.*

However, Israeli security forces have not only been busy closing puppet shows, they have also been

[9] http://en.wikipedia.org/wiki/East_Jerusalem.

brutally beating an American citizen in Jerusalem. *See* Nir Hassson, *Israeli officer indicted for beating Palestinian-American teen in July*, Haaretz, Sept. 11, 2014, 12:33 p.m.,[10]

> Israel Police filed an indictment on Wednesday against an officer who was filmed beating a Palestinian-American teenager during a violent protest in July.
>
> Tariq Abu Khdeir, who lives in Tampa, Florida, was beaten at an East Jerusalem protest that followed the death of his cousin, 16-year-old Mohammed Abu Khdeir, who was burned to death by Israeli extremists in revenge for the killings of three Israeli teens in the West Bank.
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> . . . .
>
> [The indictment related,] "After full control over the plaintiff was achieved, the accused began to beat him, punching and kicking his head, face, shoulders and torso. All this occurred while the plaintiff was not resisting arrest . . . ."
>
> The accused beat Abu Khdeir until "his [sic] lost his senses," said the indictment[.]

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[10] http://www.haaretz.com/news/national/1.615169.

Id. See also Ori Lewis*, U.S. asks Israel to probe beating of American teen in Jerusalem*, Reuters, July 5, 2014, 7:58 p.m.[11] (State Department calls for investigation).

Americans have a right to protect their own people, such as Tariq Khdeir. Were Jerusalem under international sovereignty right now, say, the United Nations, Khdeir might not have been beaten senseless by Israelis. He is only one person, but his physical suffering under Israeli sovereignty exceeds the importance of any pique or annoyance that Petitioner could feel from not getting to put "Israel" on his passport.

Fortunately, Khdeir did not die, although some Americans have died at Israeli hands, e.g., the sailors killed in the mistaken Israeli attack on the *U.S.S. Liberty* in 1967, and activist Rachel Corrie under an Israeli bulldozer in 2003. Despite those negative incidents (and non-fatal ones such as Jonathan Pollard's spying on America for Israel), a positive relationship with Israel continues: but again, America has to be careful about its own interests.

An insightful recent article, Connie Bruck, *Friends of Israel*, The New Yorker, September 1, 2014 issue,[12] notes of a tendency among politicians show great deference to lobbyists for Israeli causes (especially of a territorial-expansionist nature), "[Former U.S. congressman Brian] Baird said, 'When

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[11] http://www.reuters.com/article/2014/07/05/us-palestinians-israel-investigation-idUSKBN0FA0XZ20140705.

[12] *Available at* http://www.newyorker.com/magazine/2014/09/01/friends-israel.

key votes are cast, the question on the House floor, troublingly, is often not "What is the right thing to do for the United States of America?""" *Id.*

Fortunately, some government officials are still on the watch, *see, e.g.*, Michael Wilner, *US wants Israel to reverse land grab*, The Jerusalem Post, Sept. 2, 2014, 8:17 p.m.,[13]

> The United States has officially called on Israel to reverse its decision to appropriate 988 acres of land near Bethlehem in the West Bank . . . .
>
> "We are deeply concerned[,]" State Department spokeswoman Jen Psaki said. "We have long made clear our opposition to continued settlement activity."

Re Israeli expansion especially, part of the problem with removing the President's recognition power is that it could lead to no end of mischief. For example, if Israel annexes the whole West Bank, or even a large chunk of it (the so-called "Area C"), and Congress recognizes that massive seizure, does the President have a right to veto that recognition, or is he left holding the bag in dealing with the whole world?

See, for proof that such annexation is not just an idle threat like academics' *supra* that the President will bomb Jerusalem because he considers it "North

[13] http://www.jpost.com/Breaking-News/US-wants-Israel-to-reverse-land-grab-374249.

Korea", JPost.com Staff, *Likud MK Danon: Israel should annex West Bank settlements in response to Abbas' drive for statehood*, The Jerusalem Post, Sept. 26, 2014, 7:50 p.m.,[14] "In response to Palestinian Authority President Mahmoud Abbas' threat to unilaterally seek UN Security Council approval for statehood, Likud MK Danny Danon urged the government to annex the Jewish settlements of Judea and Samaria." *Id.*

So, letting Petitioner or similarly-situated people is not fine and dandy after all, since it is a signal that American has no problem with endless Israeli territorial expansion. And such signals may have terrible effects: *see, e.g.*, the *Zivotofsky v. Clinton* (132 S. Ct. 1421 (2012)) merits amicus brief by Americans for Peace Now (Sept. 30, 2011), supporting respondent Hillary Rodham Clinton, at 27-30, noting the rage all over the Muslim and Arab worlds (not just by "a few Palestinians") when President Bush signed 214(d) into effect, e.g., "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'", Peace Now Br., *supra*, at 29. Indeed, it may be not only in America's interest that 214(d) be found invalid; it is likely in Israel's long-term interest as well, if the friendship of the world means something to Israel.

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[14] http://www.jpost.com/Breaking-News/Likud-MK-Danon-Israel-should-annex-West-Bank-settlements-in-response-to-Abbas-drive-for-statehood-376392.

In all, even if the issue of compelling interest is not necessary to discuss, e.g., because the President has exclusive power and does not need a reason to exercise it: there is very compelling interest in letting the Executive prevent Jerusalem-born citizens from putting "Israel" as their birthplace on the passports.

* * *

Psalm 87 notes, while saying Jerusalem is in Israel, *see id.*, "And it will be said of Jerusalem, 'Everyone has become a citizen here.' . . . . When the LORD registers the nations, he will say, 'This one has become a citizen of Jerusalem.'" *Id.* (New Living Translation) It is not a punishment to have "Jerusalem" on your passport.

The Receive Ambassadors Clause; *Curtiss-Wright*; decades (or more) of precedent, including both conservative Republican and liberal Democratic Presidents; the idea of non-delegability of choice over recognition; and the compelling interest of not endorsing Israeli annexation of Jerusalem (or anywhere else), among other reasons, justify keeping "Jerusalem" on the passports of the Jerusalem-born. Petitioner may have been raised to think it is important that he have "Israel" on his passport; but if the Court decides that he has to have "Jerusalem" instead, Amicus suspects that at adult age, the Petitioner may not mind that. After all, there is strong evidence that for legal and political reasons, and following the tradition of Psalm 87, maintaining Jerusalem on the passport will serve the best interests of Menachem Zivotofsky's people—the American people.

CONCLUSION

Amicus respectfully asks the Court to uphold the court of appeals' judgment, on whatever suitable grounds; and humbly thanks the Court for its time and consideration.

September 29, 2014 Respectfully submitted,

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