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

BRIEF OF TRUE TORAH JEWS INC. AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Although directed to do so by statute, the Secretary of State refused to record "Israel" as the birthplace on a passport issued to a Jerusalem-born American citizen. The question presented is whether this refusal, without more, satisfies the injury-in-fact requirement for standing under Article III of the Constitution as interpreted by this Court.

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INTEREST OF AMICUS CURIAE [1]

True Torah Jews Inc. ("TTJ") is a nonprofit organization of Orthodox Jews, directed by rabbis, who reject the essentially secular political ideology known as "Zionism." TTJ's interest as amicus curiae is rooted in a deep commitment to the teachings of traditional Judaism—and it sees Zionism as running contrary to those teachings by pursuing a political (and military) solution to the problem of Jewish exile. TTJ's immediate interest is to make one fact clearly understood: that the Zionists do not speak for traditional Orthodox Jews, or for "the Jews" generally, either in this country or in the Holy Land (or elsewhere). This fact is obscured by the briefs submitted by petitioner's Zionist and Zionist-oriented amici. It is most important to grasp this fact when it comes to the "expansionist" Zionists—those dedicated to a vision of a "Greater Israel," with borders beyond the Green Line of the 1949 armistice. (Some *non*-expansionist Zionists, as suggested below, have a different vision.)

The Projects of the Expansionist Zionists, and Their Consequences

The expansionist Zionists seek to realize their vision by every available means. One of their

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[1] This amicus curiae brief is filed with the consent of all parties; consent letters are on file with the Clerk. No counsel for any party authored this brief in whole or in part, and no party, or counsel for any party, made a monetary contribution intended to fund the preparation or submission of this brief.

political-legal projects involves the statute on which petitioner Zivotofsky stakes his entire claim. That statute provides that a Jerusalem-born U.S. citizen may, on request, have "Israel" shown as the birthplace on his passport. Section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003 (the "Act"), § 214(d), Pub. L. 107-228, 116 Stat. 1350 (2002) ("Section 214(d)"). Section 214(d), for the expansionists, is a step toward one goal: U.S. recognition of Jerusalem as the capital of the State of Israel ("Israel"). Yet every U.S. President since 1948 has refused to grant such recognition, the Middle East being what it is, on the grounds that it would be damaging *to the United States* in its foreign relations.

Undeterred by the consistent argument based on damage to *U.S.* interests, the expansionist Zionists lobbied Congress to enact Section 214(d); they now ask this Court to enforce it. The statute serves no apparent U.S. interest, and no cognizable interest (as TTJ will argue) of any U.S. citizen. But it does advance one of the expansionists' cherished aims—coinciding, as it does, with an explicit and unvarying desideratum of the *Israeli* political leadership over the decades.

In the scheme of things, the significance of Section 214(d) is only incremental.[2] But every

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[2] This enables petitioner's amici to argue that the statute is almost trivial, *see* Brief of Anti-Defamation League ("ADL"), American Israel Public Affairs Committee ("AIPAC"), et al. at 5 (Section 214(d) "simply authorizes a limited ministerial act"), or *so* trivial that it seemingly has no substance, *see* Brief of Louis D. Brandeis Center for Human Rights Under Law ("LDB"), et

incremental advance moves the ball toward the goal. And all of the expansionist Zionists' projects, taken together with their consequences, can be hung on "the Jews" or "the Jewish people": that is just what TTJ deprecates. If this is true of the Jerusalem project, it is true *a fortiori* of their grander and even more consequential activities—including their core long-term project: the steady (and now rapid) growth of Jewish settlement in the Occupied Territories of the West Bank.

The Need to Put the Interest of TTJ in Context

"Is it good for the Jews?" is the punchline of an old joke. But it is no joke that, in the eyes of many who don't share their vision of a "Greater Israel," the expansionist Zionists' political actions and rhetoric (here and in Israel) have already saddled "the Jews" with moral responsibility for the tragic, and arguably inevitable, consequences of their settlement project and related policing and military operations. This is not the occasion to consider those consequences—for the occupying power's own people (the Israelis), for the indigenous Palestinian Arabs, or for the prospects for regional peace and international security. Yet these weighty issues are implicated in the vulnerable position in which world Jewry increasingly finds itself—and this includes the traditional Orthodox Jews of the TTJ rabbis' own communities.

The Zionists' views on these matters are frequently presented to the American public, and generally understood in a positive light, even if their

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al. at 3 (by enacting statute, Congress "acknowledg[ed] that Jerusalem may be a 'place' in Israel").

implications are not fully appreciated: they are part of the background of our national political discourse. The views of TTJ and the traditional Orthodox are seldom even acknowledged, and always marginalized. So to put TTJ's interest in context, it is necessary to set out briefly its views on three subjects: on the status of Jerusalem (internationalize it), on the role Jews *as such* should play in making U.S. foreign policy (none), and on whether the State of Israel is in fact the state of "the Jewish people" (no, it isn't).

While needing more space to explain its *interest*, TTJ can make its *legal argument* in quite short order (see below). TTJ will propose a way to dismiss the case on narrow procedural grounds. The argument is as non-political as can be.

Status of Jerusalem: a Widely-Shared Position on the Political Question

The TTJ rabbis take the long view (in keeping with ancient tradition), but they recognize that at present their uncompromising judgment on Zionism puts them in a distinct minority of observant Jews nationally; by TTJ's estimate, some two hundred thousand Jews in the United States fully share the TTJ position on religious grounds. On at least one important issue, however, the situation is different: on the status of Jerusalem, TTJ's overall position is actually held by many who are not traditional Orthodox Jews.

TTJ maintains that Jerusalem, the "holy city" for Jews and many gentiles, should not serve as the *exclusive* capital of the State of Israel. Rather, in any

comprehensive peace agreement, Jerusalem should be treated in relevant respects as an *international city*, a free zone for all its residents.[3] For TTJ, this position is grounded in traditional Jewish teachings. Others hold the same general position on different grounds; there are also differences on crucial details and in fundamental outlook. But the approach commands broad agreement from a great range of practicing (and non-practicing) Jews of various stripes, including *non-expansionist* Zionists, who consider Israel's policies unsustainable and self-destructive.[4]

The existence of such diverse Jewish opposition to expansionist Zionism, including *Zionist* opposition, is not hinted at in the briefs of petitioner's amici.

U.S. Foreign Policy Should Be Made in the Interest of the United States

Unlike some of petitioner's amici, TTJ is not in the general business of influencing U.S. foreign policy, by lobbying or otherwise. Specifically, in

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[3] This position on Jerusalem was presented to the United Nations General Assembly's Ad Hoc Committee on the Palestinian Question in November 1947 by the Chief Rabbi of the Ashkenazic Jewish Community in Jerusalem. He wrote (as the Committee put it) "voicing apprehension at the proposal to include Jerusalem in a Jewish State, and urging that Jerusalem become an international zone under the United Nations, with all its residents citizens of this free zone." U.N. Dag Hammarskjőld Library, A/AC.14/44 (25 Nov. 1947), *available at* http://www.truetorahjews.org/images/telegrams-received-by-UN-Nov-1947.pdf.

[4] *See*, *e.g.*, Gershom Gorenberg, *The Unmaking of Israel* (2012) (orthodox-Jewish Israeli Zionist).

contrast with petitioner's Zionist amici, TTJ does *not* seek to shape U.S. policy to serve the interests (real or as perceived) of the State of Israel, or of any other foreign state.[5] So, for example, TTJ rejects the suggestion that something called "the agenda of the Jewish people" should encompass pushing for a particular U.S. policy on Israel. *See* Brief of Int'l Ass'n of Jewish Lawyers and Jurists at 1.

To the contrary, TTJ embraces the proposition—a truism, except where Israel is involved—that U.S. foreign policy should be made and conducted on the basis of *the legitimate interests of the United States*, and in conformity with applicable moral and prudential norms. In this light, TTJ opposes as a general matter *any lobbying by Jews as Jews* in the foreign-policy field—and it specifically opposes any such lobbying to advance the interests (again, real or perceived) of the State of Israel. (This general policy is not a straitjacket: for example, TTJ supports humanitarian efforts like the October 1943 march of Orthodox rabbis to the White House, petitioning for action against the destruction of European Jewry.)

TTJ grounds its opposition to lobbying for Israel by Jews *as Jews* mainly on an understanding of the teachings of traditional Judaism. The TTJ rabbis put the key point in one sentence, with a single citation to authority: Throughout the centuries, loyalty to the

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[5] TTJ does not question the good faith of any of petitioner's amici. It is possible, for instance, to believe sincerely that the interests of a foreign state are (or happen to be) entirely consistent in all relevant respects with the interests of one's own, at least in certain circumstances.

country in which one lives has been a pillar of Jewish values. This is expressed in the words of the prophet Jeremiah: "Seek the welfare of the city to which I have exiled you." Jer. 29:7. Mindful of this teaching, Orthodox Jews pray for the welfare of the President and "all constituted officers" of the Government—every Sabbath morning, after the reading from the Prophets is concluded.

Even if taken only as a prudential warning, Jeremiah's counsel should ring especially true for Jews in the United States, which gives them the freedom to maintain and follow their religious principles. Accordingly, TTJ believes that, as U.S. citizens, Jews should not attempt to influence U.S. foreign policy to conform to any *outside* agenda they may have. Those who reject this counsel, and engage in lobbying for Israel, for instance, certainly do not speak for "Orthodox Jews," or Jews in general. Moreover, TTJ believes their efforts are counterproductive, for Jews here and also for Jews living in the Holy Land.[6]

The State of Israel, the Jewish People, and Some Dangerous Misconceptions

Lobbying for Israel, by Jews as Jews, is of immediate *practical* concern. In TTJ's view, Jews are endangered by the widespread misconception that (nearly) all Jews support the State of Israel, *whatever it may choose to do.* More specifically, TTJ sees Jewry worldwide as endangered by the

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[6] Of course, like other citizens, the TTJ rabbis have opinions of their own, and they have the constitutional right to express them—as by submitting an amicus brief in this Court.

misconception that "the Jews" in general favor Israel's territorial expansion, its rejection of territorial compromises, and all of its military operations.

These misconceptions do not come out of nowhere. The expansionist Zionists frequently declare, as does the Government of Israel, that the State of Israel is the state *of* "the Jewish people": the implicit (and false) corollary is that *whatever* is "good for Israel" (in its ruling coalition's eyes) *must* also be good for "the Jewish people." *See*, *e.g.*, Brief of American Jewish Committee at 1 ("Its mission is to enhance the well-being of Israel and the Jewish people worldwide").

Similarly, the expansionists might wrap the State of Israel and the Jewish people, Jerusalem and "Judaism," into one package, in a single sentence that would take paragraphs to unpack. *See* Brief of Zionist Organization of America at 2 ("All ZOA members appreciate the significance of Jerusalem to Israel and the Jewish people—it is Judaism's holiest city."). The effect is heightened by cleaving to rigid formulas on Jerusalem, insisting that the city must remain the exclusive capital of Israel, "united and undivided," *even if* a workable peace plan should be available, putting control of Jerusalem on an international-city or shared-sovereignty basis. *See id.* at 1 ("Jerusalem as Israel's eternal and undivided capital").

Candor in stating its interest brings TTJ to open one especially delicate subject. The expansionist Zionists sound the alarm at the rise of anti-Jewish sentiment abroad. Is it acceptable in this country's

current public discourse, which they have done so much to shape, to suggest that this problem might be *somehow* connected with the policies and actions of the State of Israel? Or even that something ugly here at home may be spawned by their own efforts to undermine and neutralize (or reverse) U.S. policy when *opposed by Israel* (as on expansion of the West Bank settlements)? Can one doubt that such conduct *might* trigger resentment, and dark imaginings of "control" by "the Jews"? History has its lessons. Yet the expansionists have boasted (sometimes openly) of their political influence, especially in Congress (whether or not their claims are well-founded).[7]

Should Any of This Matter to the Court?

By fleshing out its interest in this unorthodox way, TTJ hopes only to cancel out to some degree the background noise generated in this proceeding by a chorus of petitioner's Zionist and Zionist-oriented amici—on matters everyone ostensibly agrees are unrelated to the strictly *legal* issues. In their harmoniously ordered statements of interest, they ignore the existence of discordant facts and convictions. The inevitable upshot, whatever their intentions, is the distortion of a complex reality.

None of this should matter to the Court, assuming it can fairly decide the case in a vacuum,

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[7] See, *e.g.*, J. Goldberg, *Real Insiders*, THE NEW YORKER, July 4, 2005 (reporting a dinner conversation "several years" earlier with AIPAC's director of foreign-policy issues: "'You see this napkin?,' he said. 'In twenty-four hours, we could have the signatures of seventy senators on this napkin.'") *Available at* http://www.newyorker.com/magazine/2005/07/04/real-insiders.

hermetically sealed from contamination by history and politics.

The Legal Question

None of the political issues and historical events touched on above bears properly on the *legal* question, to be addressed in the Argument below. The Argument urges a disposition on narrow procedural grounds that do not require the Court (i) to enforce Section 214(d), contrary to the consistent line taken by the Presidents, or (ii) to hold the statute unconstitutional as trenching on Presidential power in foreign policy, or, more generally, (iii) to wade into political waters. This disposition is argued on a basis that has (apparently) not been raised or addressed by the parties heretofore.

SUMMARY OF ARGUMENT

The sole basis of petitioner's claim is that, although directed by Section 214(d) to do so, the Secretary of State did not record "Israel" as petitioner's birthplace on his passport (and other government documents). By this statutory violation, petitioner has suffered no cognizable "injury in fact," and therefore he cannot sustain his burden to show he has standing to sue.

First, petitioner's passport is not "his"; it belongs to the Government. He presumably has no cognizable interest in another person's property unless it is causing a nuisance.

Secondly, Section 214(d) confers no "right" on a Jerusalem-born citizen to have "Israel" shown on his passport as his birthplace, let alone a private right of action to secure this non-existent right. The statute merely provides that "Israel" should be recorded on request; the "request" requirement protects Jerusalem-born *non*-requesters who would not want "Israel" on their passports. Further, as appears from the enactment's context, including related subsections of the Act, Congress was not concerned with indulging the sentiments of Jerusalem-born citizens (it had a different agenda)—and in any event injury to such sentiments is not cognizable. Nor is what has been termed "ideological injury."

Third, what remains for petitioner to assert as "injury in fact" is the sheer statutory violation, without more. That violation (TTJ submits) does not satisfy the injury-in-fact requirement derived by this Court from Article III—notwithstanding a familiar reading of cases frequently cited to the contrary. This Court granted certiorari in an unrelated case to consider essentially the same general question, but then dismissed the writ after oral argument as "improvidently granted." Thus petitioner's case affords the Court an opportunity to revisit the issue, should it wish to do so.

ARGUMENT

Because the support of this amicus curiae for respondent is procedurally oblique, a short note on the threshold of the Argument may be useful to dispel any initial confusion.

TTJ supports respondent Kerry, Secretary of State, in urging dismissal of the action. Taking no position on the merits of the Secretary's own arguments, however, TTJ urges that the action be dismissed for failure to establish standing to sue—in particular, because petitioner cannot satisfy the injury-in-fact requirement for standing under Article III of the Constitution as interpreted by this Court. The general issue whether petitioner satisfied this requirement was raised in the district court, and decided in petitioner's favor in the Court of Appeals in the first appeal. *Zivotofsky v. Sec'y of State*, 444 F.3d 614, 618 (D.C.C. 2006). Respondent did not pursue the issue further. But TTJ submits that the issue was wrongly decided. It now makes another (and rather different) injury-in-fact argument to this Court.[8]

I. TO SATISFY THE INJURY-IN-FACT REQUIREMENT, PETITIONER MUST SHOW THAT HE HAS SUFFERED CONCRETE INJURY, TANGIBLE AND PALPABLE, BY INVASION OF A LEGALLY-PROTECTED INTEREST

Article III of the Constitution "confines the judicial power of federal courts to deciding actual 'Cases' or 'Controversies.' § 2. One essential aspect of this requirement is that any person invoking the power of a federal court must demonstrate standing

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[8] "Standing represents a jurisdictional requirement which remains open to review at all stages of the litigation." *Nat'l Org. for Women v. Scheidler*, 510 U.S. 249, 255 (1994). The court at any stage must raise the issue *sua sponte* if it spots it. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230 (1990) (issue of standing raised *sua sponte* on appeal to Supreme Court).

to do so." *Hollingsworth v. Perry*, 570 U.S. __, 133 S.Ct. 2652, 2661 (2013).

This Court has identified "the irreducible constitutional minimum of standing," comprising three elements, of which only one comes into play here: "the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is . . . *concrete* and *particularized*." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992).[9] *Accord Susan B. Anthony List. v. Driehaus*, 134 S.Ct. 2334, 2341-42 (2014); *Hollingsworth*, 570 U.S. __, 133 S.Ct. at 2661.

The requisite concrete and particularized injury must be "*tangible,*" *Hollingsworth*, 133 S.Ct. at 2661, and it must be "distinct and *palpable*," *Gollust v. Mendel*, 501 U.S. 115, 126 (1991) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). Of course it must also be an "injury" to begin with.

Most fundamentally, the requisite injury must involve "an *invasion of a legally protected interest*." *Lujan*, 504 U.S. at 560. This notion is so fundamental that its proper application is generally treated as self-evident, not as calling for discussion. See, *e.g.*, *Adarand Constructors v. Pena*, 515 U.S. 200, 212 (1995) ("Adarand's claim that the Government's use of subcontractor compensation clauses denies it equal protection of the laws of course alleges an invasion of a legally protected interest.").

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[9] Throughout, emphasis (*italics*) is added, and internal citations and internal quotation marks are generally omitted.

The party invoking federal jurisdiction bears the burden of establishing that he has suffered an "injury in fact." *Lujan*, 504 U.S. at 560. Petitioner is that party and bears that burden.

II. PETITIONER CANNOT SHOW HE HAS SUFFERED THE REQUISITE INJURY

Not complying with Section 214(d)'s directive, to record "Israel" as petitioner's birthplace on his passport (and certain other official documents), the Secretary wrote "Jerusalem" instead. That is the sole basis of petitioner's claim for injunctive and declaratory relief: he (by his guardian) filed this action to have "Jerusalem" replaced by "Israel." He alleges no other injury, such as economic or physical harm, or even the psychological harm that could conceivably flow from the wounding of his feelings as a Jerusalem-born U.S. citizen who, one imagines, might like to have an official U.S. document stating that he was born in Israel.

The Court of Appeals ruled that this statutory violation sufficed to establish petitioner's standing: "Although it is natural to think of an injury in terms of some economic, physical, or psychological damage, a concrete and particular injury for standing purposes can also consist of the violation of an individual right conferred on a person by statute." *Zivotofsky*, 444 F.3d at 618. Yet in this case—unlike, say, environmental-law cases, or cases under the Freedom of Information Act ("FOIA"), cited by the Court of Appeals—there is no express statutory right to sue. And the absence of injury other than the statutory violation itself is, as it were, palpable.

In other words, petitioner has not suffered a cognizable "injury in fact": no concrete injury, tangible and palpable—and also no "invasion of a legally protected interest."

Some reasons why petitioner's "injury" is not cognizable—why he lacks standing—are set out, informally and concisely, in a recent blog post by a well-known legal scholar. *See* E. Kontorovich, *Why the Jerusalem passport case should be dismissed for lack of standing*, WASHINGTON POST (The Volokh Conspiracy), Apr. 25, 2014, *available at* http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/04/25/why-the-jerusalem-passport-case-should-be-dismissed-for-lack-of-standing/ (last visited Sept. 22, 2014). Without apology, TTJ adopts Professor Kontorovich's argument substantially as stated,[10] and (unable to improve on his engaging prose) quotes him *in extenso.* He is not responsible for this use of his writing; and his views might even have changed since publication.[11]

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[10] Despite the blog post's unqualified title (possibly an editor's handiwork), Professor Kontorovich states that he "think[s] there is a reasonable argument" against Article III jurisdiction. Then he specifies it, with further qualification: "I think the argument for standing is thin–though I say this tentatively, as standing doctrine is notoriously inconsistent in its application and vague in its requirements."

[11] Note quite 90 days after presenting his argument against petitioner's standing, Professor Kontorovich surfaced in this proceeding on petitioner's side: the amicus curiae brief for one of petitioner's various platoons of amici lists him (1) among the "Amici law professors," and (2) as counsel (with a non-amicus practitioner as "counsel of record"). *See* Brief of LDB, et al. at 1-2, 31 (and cover).

A. Petitioner's Passport Is Not "His"

"To start with, the passport is not 'his.' Rather, as it says on page five of my passport, it is 'U.S GOVERNMENT PROPERTY . . . It must be surrendered upon demand made by an authorized representative of the United States.'"[12] *See* 22 C.F.R. § 51.7(a). "One generally does not have any legally cognizable interest in other people's property that is not causing a nuisance, even if one is allowed to carry it around."

The fact that petitioner has no property interest in his passport does not mean he has no rights with respect to it, of course. *See Haig v. Agee*, 453 U.S. 280, 307 (1981) (cancellation of passport implicates specific liberty interest, the right to travel internationally). But petitioner has not been disturbed in the use of his passport: he wants a federal court to order the Secretary to revise the passport to conform with the statutory directive. Especially since the passport is not even "his," it is hard to portray him as resisting "an invasion of a legally protected interest."

B. Section 214(d) Confers No "Right" and No Right of Action

"Of course, there is a statute involved, but it does not create a 'right,' let alone a cause of action, to have Israel listed on one's passport. Rather, it says that the State Department should *only* list 'Israel' as a birthplace if the passport-holder so requests. That

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[12] Text quotations not otherwise attributed are from the cited blog post.

is, if anything, more about the rights of non-requesters" who would not want "Israel" on *their* passports, "or about the bureaucratic process for making passports. Oddly, the Court of Appeals, in reversing the standing dismissal, analogized the injury to denials of Freedom of Information Act requests. FOIA, however, specifically creates a detailed cause of action, which the passport measure does not." *See Zivotofsky*, 444 F.3d at 618-619 (citing FOIA and cases).

It is important to distinguish between two related points. Section 214(d) does not confer a "right" on a Jerusalem-born U.S. citizen to have "Israel" shown on his passport. And there is no implied private right of action under Section 214(d) to secure this non-existent right by suing in federal court.

"There is no 'injury' to Zivotofsky; he has not been deprived of any legal entitlement. Indeed, Congress's law, given its context, was not about making American citizens [born] in Jerusalem feel good, even if such a sentiment could give rise to an Art. III injury, which I doubt." Research discloses no case in which this Court has held that sentiments or wounded feelings related to a statutory violation amount to cognizable injury. *Cf. Sierra Club v. Morton*, 405 U.S. 727, 734-735 (1972) (holding that plaintiff lacked standing, but acknowledging that "change in the aesthetics and ecology" of a national park "may amount to an 'injury in fact'" and that "particular environmental interests" may be "deserving of legal protection through the judicial process").

The immediate objective "context" of Section 214(d) of the Act includes not only the familiar history of the legislative effort but the three preceding subsections of Section 214: 214(a) through 214(c). All are related to the goal of U.S. treatment or recognition of Jerusalem as "capital" of Israel. And Section 214(d) moves toward that goal too, by treating Jerusalem as part of Israel's territory, just as the State of Israel does.

"Imagine a government form that asked those filling it out to indicate if they were white, black or hispanic. Subsequently, in compiling this information, the government chooses to lump hispanics in with whites. I do not think the mere fact that . . . hispanics were involved in filling out the forms would give them standing to challenge what the government does with the information. *The passport issue is also one about how the government classifies information* provided by individuals."

At bottom, petitioner "is using the contents of his passport *to litigate an ideological injury*": "Such policies [as "the Executive's" policy "of not saying Jerusalem is in Israel"] affect not just the plaintiff, but the entire nation. Indeed, it affects him in ways not differentiable from [those of] the U.S. as [a] whole, whose passport it is." But injuries that are "not differentiable" from those of the nation, or of the public at large, clearly cannot satisfy the injury-in-fact requirement. As the Court held in *Lujan,* "the public interest in the proper administration of the laws . . . cannot be converted into an individual right by a statute that denominates it as such." 504 U.S. at 576-77. *A fortiori* this is true where, as here, no

"individual right" is "denominate[d]" by the statute "as such," or as anything at all. (The merits of the Executive's policy are beside the point, and beyond this Argument's scope.)

Certain of petitioner's amici, in stating their respective "interests," appear to suggest that petitioner suffered an "injury"; but their own words cut against this suggestion: their evident difficulty in articulating a *relevant* interest tends to show that the supposed injury has no concrete content (it's vacuous), or is self-inflicted (it's invented), or really has nothing to do with the statute. A few of the assertions of those amici, with short retorts, will make the point:

American Jewish Committee ("AJC"): "[T]he statute upholds the dignity of United States citizens born in Jerusalem who wish to identify Israel as their nation of birth" (Brief of AJC at 1). These citizens don't need this statute (or its enforcement) to do so: they are free to "identify Israel as their nation of birth" without government assistance.

Association of Proud American Citizens Born in Jerusalem, Israel ("an ad hoc, web-based organization"): They describe themselves as "Jerusalem-born American citizens who wish to self-identify as U.S. citizens born in Israel" (Brief of ADL, et al. at 2). Ditto.

International Association of Jewish Lawyers and Jurists ("IAJL"): The statute "does nothing more than allow U.S. citizens born in Jerusalem to express their own view on the issue by choosing how to describe their place of birth in their passport" (Brief of IAJL at 2). It's not "their" passport—and

"expressing their own view" on a paper that is the property of the U.S. Government is not the proper subject of the statute.

Union for Reform Judaism, Central Conference of American Rabbis, and Women of Reform Judaism: They have a commitment "to uphold the right of a U.S. citizen to identify the country in which he or she was born," a "right that must extend to American citizens born in Jerusalem" (Brief of ADL, et al. at 4). That "right" remains unimpaired even if the directive of Section 214(d) is not enforced by judicial decree.

Union of Orthodox Jewish Congregations of America: "There are few issues of higher *symbolic value* to the Orthodox Jewish community than the centrality of Jerusalem, toward which the community's many members turn thrice daily to face in prayer") (Brief of ADL, et al. at 4). Noncompliance with the statutory directive can scarcely depreciate the "symbolic value," or undermine the religious practice, which obviously has nothing to do with passports or what's recorded on them.

C. The Sheer Statutory Violation Does Not Constitute "Injury in Fact"

Logically, petitioner's last-ditch proposition is this: the injury-in-fact requirement is satisfied by the sheer statutory violation, *without more.* But even a cursory inspection of the leading cases does not support such a "naked-violation" rule, so petitioner should be held to lack standing on this score too. At best (for petitioner), it is an open question whether the naked-violation rule is the current rule of law: it is certainly a question that the Court recently

declined to decide in another case, and could now take up here.

In holding that petitioner had standing (*Zivotofsky*, 444 F.3d at 617), the Court of Appeals relied primarily on two cases from the 1970s for the supposed naked-violation rule, which it seemed to embrace: (1) *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973) ("Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute."); (2) *Warth v. Seldin*, 422 U.S. 490, 514 (1975) ("Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute."). In both of these cases, however, the pronouncement on standing quoted by the Court of Appeals was unquestionably dictum: in neither case was it necessary to the holding, since the Supreme Court held in both that the plaintiff before it did not have standing. *See Linda R.S.*, 410 U.S. at 617-618; *Warth*, 422 U.S. at 514. Even *this* Court's obiter dicta are not properly taken as controlling precedents—and least of all in this Court.

The Court took a closer look at the supposed naked-violation rule in *Lujan.* Denying standing once again (504 U.S. at 578), the Court left undisturbed the broad dictum in *Linda R.S.*, declaring: "Nothing in [the ruling] contradicts the principle [stated in *Linda R.S.*] that 'the . . . injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing.'" To show that there was no contradiction with this

dictum ("principle"), the Court considered the precedents relied on in *Linda R.S.* and distinguished them (*ibid.*): "Both of the cases used by *Linda R. S.* as an illustration of that principle involved Congress' elevating to the status of legally cognizable injuries *concrete, de facto injuries that were previously inadequate in law* (namely, injury to an individual's personal interest in living in a racially integrated community, *see Trafficante v. Metropolitan Life. Ins. Co.*, 409 U.S. 205, 208-212 (1972), and injury to a company's interest in marketing its product free from competition, *see Hardin v. Kentucky Utilities Co.*, 390 U.S. 1, 6 (1968))." And it is one thing to broaden categories of injury by statute, for standing purposes, another to "'abandon[] the requirement that the party seeking review must himself have suffered an injury.'" 504 U.S. at 578 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972)).

In short, the sheer statutory violation is not sufficient: there is always something more required for "injury in fact," perhaps a wrong "previously inadequate in law." Petitioner clearly suffered no such wrong. He has nothing more than a statutory violation to allege, and so he suffered no injury cognizable in federal court.

At best, from petitioner's viewpoint, it is an arguably open question whether a statutory violation without more suffices in general for "injury in fact." This was essentially the question on which the Court granted certiorari in *First American Financial Corp. v. Edwards*, 131 S.Ct. 3022 (2011). There the specific question was whether a plaintiff has standing to challenge a violation of the Real Estate Settlement

Procedures Act ("RESPA"), absent an allegation that the alleged violation resulted in an overcharge—*i.e.*, with nothing more than the sheer violation of RESPA. After briefing and oral argument, however, the Court dismissed the writ as "improvidently granted." *First American Financial Corp. v. Edwards*, 132 S.Ct. 2536 (2012).

The Court could revisit this issue in the present case, if disposed to do so. TTJ takes no position on this option.

CONCLUSION

For the foregoing reasons, the case should be dismissed for lack of standing. Accordingly, the judgment below should be vacated and the case remanded with instructions to enter an order of dismissal.

Respectfully submitted,

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