

**2011  
ELECTION**

The polls closed after the CJN went to press Nov. 8. See coverage of 2011 state and local elections at [www.cjn.org](http://www.cjn.org). Keep checking the website for updates and reaction to the election results.

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# CLEVELAND Jewish News

[www.cjn.org](http://www.cjn.org)



LeBron James, sporting a Cleveland Indians baseball cap, spent time with children from Playmakers Youth Theatre cast members after playing basketball at the Mandel JCC Nov. 7.

## LeBron hoops it up at The J

**BOB JACOB**  
Managing Editor

LeBron James was back in town Nov. 7, but he wasn't playing with the Miami Heat against the Cleveland Cavaliers at Quicken Loans Arena. Instead, he was working on his game at the Mandel JCC.

James showed up at the Beachwood facility to play in the Herbert S. Diamond Bas-

ketball League and took the court with some of his friends. Word quickly spread that the "King" was in the house, and children from Playmakers Youth Theatre, who were rehearsing for their upcoming performance of "Grease Jr.," hurried downstairs to the gym.

Gil Rubanenko, chief operating officer, was waiting to pick up his children from Playmakers after attending the

*LeBron / 8*

## Pepper Pike woman dies at OU

**MATT DeFAVERI**  
Staff Reporter

Authorities were waiting this week for a coroner's report to determine the cause of death of an Ohio University student from Pepper Pike.

Ya'ara Mashmoor, a 21-year-

old junior who graduated from Orange High School in 2007, was found unresponsive in her off-campus apartment Nov. 3, according to Athens police.

Athens City Police Chief Tom Pyle said, "There are no updates as far as the investigation," and he said the police



**Mashmoor**

*OU / 20*



Menachem Zivotofsky at the U.S. Supreme Court, which will decide if the Jerusalem-born 9-year-old can list Israel as his birthplace on his U.S. passport.

## High court hears passport case

**MARILYN H. KARFELD**  
Senior Staff Reporter

Menachem Binyamin Zivotofsky was born in 2002 in Shaare Zedek hospital in western Jerusalem. He wants his U.S. passport to say he was born in Israel, an option Congress allowed when it passed a law directing the State Department to record the birthplace of Jerusalem-born Americans as Israel, if so requested.

But despite the request of his parents, Naomi and Ari Zivotofsky, Menachem's passport and consular birth certificate list Jerusalem, not Israel, as his birthplace. So the Zivotofskys, former Clevelanders, filed suit in 2003 to force the State

Department to follow the law.

After more than eight years of back-and-forth federal court rulings, on Nov. 7, Menachem, now 9, and his parents were at the U.S. Supreme Court, listening to oral arguments in their case.

The Zivotofskys are proud their child was born in Israel and want it recognized on his American passport, said Ari Zivotofsky, a senior lecturer in the interdisciplinary science program at Bar-Ilan University. He received a Ph.D. in biomedical engineering at Case Western Reserve University (CWRU) and has been an occasional contributor to the CJN.

*Passport / 16*

## High court hears Jerusalem passport case

Passport from 1

The Zivotofskys have two older children who were born in Cleveland and Maryland, respectively, before the family made aliyah in 2000. They live in Beit Shemesh, a city of 80,000 people about 18 miles west of Jerusalem.

Their oldest child “finds (the case) a tad strange, because to him it is obvious that Jerusalem is in Israel,” Ari Zivotofsky said in an email. “It’s hard to believe that the case has gone this far, and we are gratified that the Supreme Court has agreed to hear it.”

### Congress v. the president

The case, *Zivotofsky v. Clinton*, places the Zivotofskys at the center of a dispute between Congress and the president over who has the power to determine foreign policy and recognize a sovereign nation. The State Department’s passport procedures stem from the Bush and later the Obama administration policy that no country has sovereignty over Jerusalem, whose status must be negotiated by the Israelis and Palestinians.

The 2002 law Congress passed just a few weeks before Menachem’s birth was a foreign relations appropriations bill that included a section giving Jerusalem-born Americans the choice to have their passports say they were born in Israel. When then-President George W. Bush signed the bill into law, he issued a signing statement that he would not abide by the Jerusalem provision because it “impermissibly interferes with the president’s constitutional authority to conduct the nation’s foreign affairs and to supervise the unitary executive branch.”

### The political question raised

In the lower federal courts, Nathan and Alyza Lewin, the father and daughter team who are the Zivotofskys’ attorneys, did not argue the merits of the case or the law Congress passed. Because the government says the case asks the courts to make a political decision that is outside their jurisdiction, the Lewins argued that courts do have authority to hear the case.

“What the court is being asked to do is determine if the law is constitutional,” Alyza Lewin told the CJN. “Did Congress have the right to pass this law? Courts are regularly asked to



Ari Zivotofsky and his son Menachem, center, with attorneys Alyza Lewin and Nathan Lewin outside the U.S. Supreme Court. The court heard arguments Nov. 7 in a Jerusalem passport case brought by the Zivotofskys.

determine if laws are constitutional. It does not make it a political question just because it touches on some policy issue.”

In the government’s court filing, the solicitor general asserts that the law prescribes that “Jerusalem should be recognized as the capital of Israel.” To the contrary, the Lewins argue in their court filing, the lawsuit does not affect the U.S. position on the status of Jerusalem, award the city to Israel, or jeopardize Middle East peace negotiations.

“The State Department claims that if American citizens who are natives of Jerusalem identify as born in Israel, the perception of Arab states will be that official American policy on Jerusalem has changed,” the Lewins said. “There is no evidence whatsoever that this misperception will result from a legally mandated change in how some American citizens are identified in their birth certificates and passports.”

### Rectifying discriminatory practice

The Lewins also contest the government claim that the Constitution gives the president exclusive power to recognize foreign sovereigns and conduct foreign policy, the so-called “recognition power.” Instead, the Zivotofskys’ attorneys argue that the Constitution

and the historical record demonstrate that Congress and presidents over the years have shared power on foreign affairs.

Furthermore, identifying Israel as the birthplace of an American born in Jerusalem does not amount to recognition of a foreign sovereign. Rather, the law rectifies a discriminatory practice of the State Department where the “only group not permitted to self-identify their place of birth are those American citizens born in Jerusalem,” Alyza Lewin said. The State Department allows opponents of Israel to list “Tel Aviv” or “Haifa” on their U.S. passports rather than the country of their birth, she said. The 2002 statute allows Americans born in the West Bank before 1948 to designate Palestine as their birthplace.

Similarly, even though the U.S. does not recognize the sovereignty of Taiwan as separate from that of China, the State Department lists Taiwan as the birthplace on American citizens’ passports if asked to do so.

“The government is arguing the world may misunderstand and think this (passport law) changes the U.S. position on Jerusalem,” Alyza Lewin said. “But the court is not being asked to recognize Jerusalem as the capital of Israel. It’s only being asked to recognize that Congress had the authority to pass a law that an individual born in

Jerusalem who wishes to identify as being born in Israel may do so.”

### Arguments before the Supreme Court

During arguments Nov. 7, the Supreme Court justices asked sharp, probing questions of both sides in the case.

Nathan Lewin argued for the Zivotofskys that the case is not about the recognition of another country but about a passport, a means of identification. The statute at issue is not “designed to create some political brouhaha or make a foreign policy statement,” he said.

The case can be a vehicle for the court to clarify the roles of the president and of Congress in conducting foreign affairs, Lewin said. History demonstrates that Congress and the president share power over foreign affairs, and if there is a dispute between the two, Congress takes precedence, he said. With that view, Justice Sonia Sotomayor asked, “Are you hobbling the president with respect to foreign policy situations that occur frequently, as happened in Egypt, perhaps overnight?”

Congress has the “power of the purse,” and if it disapproves of the president’s recognizing some country, it can withhold approval of the ambassador or money to fund an embassy, Sotomayor said. “But what entitles Congress to trench on a presidential power that has been exercised virtually since the beginning of the country?”

However, the court could decide the case on much narrower grounds than the separation of powers and simply rule on whether Congress can make laws about passports, Lewin argued. “All that happens with this statute is that 50,000 American citizens (born in Jerusalem) have the same passport as 100,000 other American citizens who were born in Tel Aviv or Haifa. It just says ‘Israel’; it doesn’t say ‘Jerusalem, Israel.’”

Justice Elena Kagan responded, “It’s a passport case that seems to have nothing to do with the immigration functions that passport statutes usually serve. It seems to have everything to do with Congress’s declaration of a foreign policy, as opposed to Congress’s exercise of power relating to immigra-

# Cover

tion control.”

Solicitor General Donald Verrelli argued on behalf of the government that the passport policy was part of the executive branch’s “exclusive recognition power” committed under the Constitution and neither the court nor Congress can override that judgment. Therefore, it’s a political question and not one the court has authority over.

Some of the justices seemed to agree, but others said it was within their power to rule on the constitutionality of a law.

“If we call this a political question and don’t address the merits, the outcome is that the president is saying that he’s entitled to ignore the Congress,” said Sotomayor. “I don’t know what kind of message that sends, but it’s a little unsettling (if) a court charged with enforcing the laws passed by Congress (is) basically saying that we are not going to determine whether this law is constitutional or unconstitutional.”

Verrelli argued that the passport is an official U.S. document that communicates the position of the government, and thus identifying Jerusalem as part of Israel has foreign policy significance. Recognition of another country is the exclusive power of the president, and it is important that the country speak with one voice, he said.

Justice Antonio Scalia said the president is the sole instrument to implement foreign policy, but “it doesn’t necessarily mean that the president determines everything in foreign policy” with no say from Congress.

Susan Tuchman, director of the Zionist Organization of America’s (ZOA) Center for Law and Justice, was at the Supreme Court for the arguments. ZOA filed a friend-of-the-court brief supporting the Zivotofskys’ suit, one of five amicus briefs Jewish organizations and other groups submitted to the court.

“From the way the questions and comments were going, it seemed the justices had rejected the argument that this was a political question that the court doesn’t have the ability to decide,” Tuchman said. “It seems to me the court is going to decide on the merits of the case.”

The justices seemed to appreciate the fact that “having Israel on the passport is not mandatory but is an option for those Americans born in Jerusalem who want to identify with Israel,” said Tuchman. “And that there are ways the State Department could

make clear that indicating Israel on the passport was not a decision by the (U.S.) government on who had sovereignty over the city of Jerusalem. I think the justices appreciated that the (Jerusalem passport) statute could be enforced without impinging on anyone’s power.”

## How the court may rule

It’s impossible to predict how the Supreme Court will view the issue and decide the case, Alyza Lewin said.

But if the justices do decide to rule on the separation of powers, “this will be a very significant case,” she said. “There has not been a separation-of-powers case in many years. But even if they decide on the separation-of-powers question, they will try to narrowly tailor it.”

The case is an unusual one because it “pits Congress against the president,” said Michael Scharf, a former State Department attorney who is a professor of international law at CWRU School of Law. “The only way for the president to win on the merits is to argue that his authority under the Constitution to recognize diplomats and countries trumps congressional authority to pass a law allowing Jerusalem-born Americans to list Jerusalem as Israel (on their passports).”

The last time the Supreme Court ruled on a balance-of-powers question was in 2008 in the case *Medellin v. Texas*, in which the federal government ordered Texas to stay the execution of a Mexican convicted of murder who had not been read his rights to contact his consulate, said Scharf. The Supreme Court sided with Texas, saying the president did not have the power to implement the international treaty granting consular rights without an authorizing act of Congress.

“It was seen as a huge blow to the power of the presidency and affirmed the power of Congress,” Scharf said. “In cases lately of presidential authority, the courts have tended to prune back the powers of the president, siding with Congress. My guess in this case is they will do so again.”

He thinks the court will decide the case on the merits. “To fall back on the political question doctrine is a huge dodge, saying the court doesn’t have the power to decide something. Then they have to admit their weakness. That’s not the inclination of this particular court.”

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## Dad’s my hero.

He can fix everything from hot water tanks to BB guns. My son has the only two-story tree fort in the neighborhood thanks to him.

He’s my go-to guy. Ask him about the big Cleveland game in ’64, stocks, deep frying turkeys—he knows it all.

But he doesn’t get around like he used to.

He’s getting older and he can’t fix that. Wonder what he wants for the future? How do I bring it up?

What should our game plan be?



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