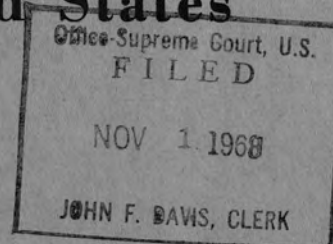


Supreme Court of the United States



In the Matter of:

Docket No. 10

WHYY, Inc.,

Appellant,

vs.

Borough of Glassboro and Division of
Tax Appeals of the Department of the
Treasury of the State of New Jersey,

Appellees.

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Place Washington, D. C.

Date October 17, 1968

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 October Term, 1968

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Appellant,

vs.

Borough of Glassboro and Division of
Tax Appeals of the Department of the
Treasury of the State of New Jersey,

Appelles.

Washington, D. C.

Thursday, October 17, 1968

The above-entitled matter came on for argument
at 11:00 a.m.

BEFORE:

EARL WARREN, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
ABE FORTAS, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

JAMES M. MARSH
1500 Seven Penn Center Plaza
Philadelphia, Pennsylvania
Attorney for Appellant

1 APPEARANCES (Cont'd.):

2 JOHN W. TRIMBLE
3 8 Tanner Street
4 Haddonfield, New Jersey
5 Attorney for Appellee
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1 P R O C E E D I N G S

2 THE CLERK: Counsel are present.

3 MR. CHIEF JUSTICE WARREN: Mr. Marsh?

4 ORAL ARGUMENT OF JAMES M. MARSH

5 ON BEHALF OF APPELLANTS

6 MR. MARSH: This is an appeal from the Supreme Court
7 of New Jersey and presents a single clear issue of constitu-
8 tional law which is whether or not a state can permit its
9 municipality to tax certain property to be used within New
10 Jersey by a foreign non-profit corporation which was used in
11 New Jersey and at the same time to permit them to exempt from
12 taxation the same type of property when used by a New Jersey
13 non-profit corporation.

14 The Appellant here, WHYI was formed under Pennsylvania
15 law in 1952. It is also licensed by the Federal Communications
16 Commission for the transmission of non-commercial radio and TV
17 programs. It is subject to a great many restrictions by both
18 the state and the FCC. It is not permitted to sell time. It is
19 not permitted to accept advertising. It cannot engage in any
20 activity which enures to the benefit of any corporation or person.

21 It is not permitted to pay dividends. The property
22 is the only property WHYI has in New Jersey. It is for trans-
23 mission of television programs on Channel 12. All the programs
24 from WHYI from Channel 12 are educational, cultural, or
25 recreational. They broadcast daily for the benefit of schools

1 in a number of school districts in the three or four states
2 involved, including a number in New Jersey. They have other
3 programs in the evenings and on Saturdays.

4 The population of the area reached by Channel 12 is
5 about eight million people. The records show that about 29 and
6 one-half percent are located in New Jersey. At pages 47, to 67
7 there is a detailed statement as to the nature of the activities,
8 its background and the restrictions imposed upon it.

9 This was put in the record at the request of the
10 Supreme Court of New Jersey before argument in that court. The
11 last two pages lists programs which were geared strictly to
12 New Jersey people. That statement also shows that WHYX is
13 supported completely by grants and donations from the Federal,
14 State and Local Governments, by payments from school districts,
15 by grants from foundations, by donations from corporations and
16 by the general public.

17 All of these donations are tax deductible. The
18 directors are unpaid. They are either public officials in the
19 states involved or they are civic leaders.

20 WHYX is exempt from the Federal, State and Local
21 taxes except for this particular tax and a few taxes they paid
22 because they were de minimus.

23 All the broadcasts and all other service performed by
24 WHYX are supported by the sources I have mentioned. They have
25 no sales of advertising. They have no commercials. This is what

1 you might call a 100 percent two-way charity operation. Every-
2 thing is given to WHYY for nothing and everything we do is done
3 for nothing. Under these circumstances it is obvious that it
4 is very important that we receive every proper economic
5 advantage so that this station can survive.

6 The taxes involved in this case are substantial. At
7 least they are substantial to WHYY. The assessed valuation of
8 the property from which the state seeks the tax is \$113,000.
9 There are four years involved in this case. This case involved
10 only 1964, but the result will also govern 1965, 1966 and 1967.

11 Q This is a real property tax?

12 A It is partly real property and partly personal. The
13 realty in New Jersey plus the site and everything that is in it.

14 Q The land, the buildings, and the contents?

15 A Yes, sir. During the course of this case the New
16 Jersey legislature amended this statute to grant this exemption
17 to non-profit educational television stations. From 1964
18 on there is no problem. We do have the problem with these four
19 years.

20 Q You have no quarrel with the amended statutes?

21 A No, sir. We are happy with the amended statute. We
22 wish they had made it retroactive, or had taken some other
23 remedial action. In New Jersey we ran the gambit of the
24 administrative proceedings. At that time, strictly on the
25 ground that WHYY having been domesticated was in effect a

1 domestic corporation and under the language of the statute it
2 could be granted this exemption.

3 The New Jersey administrative offices didn't see it
4 that way nor did the Superior Court of New Jersey. They went
5 solely on that ground. Federal constitutional issue was not
6 raised until the case came to the Supreme Court of New Jersey.
7 That court asked for a statement at pages 47 and 67 of the
8 record so they would have a full background to make their
9 judgment.

10 Unfortunately when they made the judgment on the
11 equal protection argument, they didn't discuss or distinguish
12 the cases in this court up to that time. They said there was
13 a presumption of validity of a statute and they indicated that
14 they believed there is a possibility of different treatment of
15 foreign non-profit corporations and local domestic non-profit
16 corporations.

17 We feel this is clearly wrong under the cases of this
18 Court which we have cited. Starting with the Southern Railroad
19 where this court said where a division of corporations into
20 domestic and foreign for purposes of taxation, taxing the foreign
21 and not the domestic, on the same property and the same activities
22 is unconstitutional. This Court has said many times that
23 once a corporation has been admitted, it is entitled to exactly
24 the same treatment as any other corporation in the same class in
25 the same state.

1 The difficulty with the New Jersey Supreme Court's
2 decision when faced with a statute unconstitutional on its face
3 is that they simply said that the legislature had some basis for
4 it or could have had some basis for it and that there could be
5 some reason for not taxing domestic corporations but taxing
6 foreign corporations.

7 This Court long ago invalidated this approach in the
8 Gulf, Colorado and Santa Fe case in 165 U.S. where Justice Brewer
9 said that to so treat the due process and equal protection
10 clauses of the Fourteenth Amendment would make them into a
11 "mere rope of sand" affording no protection from state action.

 It gives a description of what happened in this case.
12 The question of whether or not to exempt a particular group of
13 taxpayers or corporations from taxation is the legislative
14 function. The New Jersey Legislature made this judgment in the
15 statute which is set forth on page 26 of the record or page 26
16 of our brief and pages 14 and 15 of the record.

17 That statute provides that a non-profit or a foreign
18 corporation of any kind can qualify in New Jersey and get a
19 certificate entitling it to operate in New Jersey simply by
20 filing certain information about its composition, capital,
21 nature of activities and filing certain documents. WHY did
22 this. It is our view that the State Supreme Court cannot now
23 retroactively take back that certificate because had more data
24 been requested perhaps the legislature would have come to a
25 different conclusion.

1 What they have done is kind of dream up a phantom
2 session of the legislature and said, "Well, these fellows
3 probably could have found some basis. If they could have they
4 would have. We have a right to say that you have no right to
5 complaint."

6 Q Mr. Marsh, I understand you to say that you are
7 perfectly satisfied with the New Jersey law as it stands at the
8 present time insofar as the future years are concerned.

9 A We are exempt in the future years, as I understand
10 it.

11 Q You are satisfied with that? In this case, would you
12 have complied or been in compliance with the present law at
13 the time this case arose?

14 A The question of the compliance with the New Jersey
15 statute was not decided by the supreme court of New Jersey.

16 Q I didn't ask you that. I am merely asking you as a
17 matter of fact if in this case you would have been in com-
18 pliance with the present law if it had existed at that time?

19 A Yes, Your Honor.

20 Q You would?

21 A All it requires is a non-profit educational tele-
22 vision station. That is exactly what we are. Had this law
23 been on the books when this case come up, I think even the
24 Supreme Court of New Jersey would have granted us this
25 exemption.

1 We feel that with all due respect of that court they
2 have ignored the decisions of this court. Once we have been
3 admitted, we have a right to be treated the same as all other
4 corporations in the state. The New Jersey legislature made that
5 judgment that we could be admitted by doing certain things which
6 we did. Now we say the Supreme Court cannot turn around and say
7 they done otherwise, we would have gotten a different answer.

8 We submit that the judgment should be reversed. I
9 would like to reserve the balance of my time for any necessary
10 rebuttal.

11 Q Do you consider this legislation as overruling
12 the Supreme Court of New Jersey in your case?

13 A I would like to view it that way. It is hard to say
14 for one legislature to decide what another legislature meant.
15 Were they correcting it or changing it? I really don't know.
16 My view would be that they were saying that this is what they
17 meant it to be all along. We are satisfied it is unconstitu-
18 tional. There is nothing on the face of the new statute that
19 would tell you what they intended.

20 We have no way of knowing. But we certainly feel that
21 had this law been in effect at that time, there would have been
22 no doubt about our exemption. We feel under the decisions of
23 this court, the other statute which by its terms excludes us
24 from the exemption and by its interpretation excludes us,
25 we feel is constitutional.

Q What is the dollar amount of the taxes?

A The dollar amount of the taxes is not in the record.

1 My adversary and I have agreed it is in the neighborhood of
2 \$60,000 for these four years.

3 Q There is no question but that the new law is
4 prospective only in its application?

5 A That is right, Mr. Justice Stewart.

6 Q I take it that the new law may exempt you but there,
7 the other non-profit organizations that are not?

8 A I think that is right.

9 MR. CHIEF JUSTICE WARREN: Trimble?

10 ORAL ARGUMENT OF JOHN W. TRIMBLE

11 ON BEHALF OF APPELLANT

12 Q Am I correct the Attorney General in the Supreme Court
13 of the State of New Jersey is not here?

14 A The Attorney General was never in this matter. He
15 let me carry the ball all through the courts and filed a state-
16 ment in lieu of the brief that the situation had been adequately
17 argued and therefore he would not participate. The situation is
18 that the State of New Jersey

19 Q My son is assistant attorney, you know. I would like
20 to be sure whether I am disqualified.

21 A They have entered their appearances for the State of
22 New Jersey, but they have only entered a statement in lieu of
23 a brief and appeared at none of the hearings to argue the matter.
24 Throughout all the record here, you will see that the deputy
25 attorney general's name is listed there, but never did appear.

1 This is one of the problems faced in this matter, that
2 the State of New Jersey, of course, receives none of these
3 taxes. This is a law, of course, passed by the New Jersey
4 Legislature where the tax situation, as I am sure you are aware
5 of in New Jersey, is for the local purpose for the fire pro-
6 tection, and police protection, for the local municipalities.

7 None of this money ever enters into the State of
8 New Jersey. Since the Borough of Glassboro is the one interested
9 in this matter we have, of course, carried the ball through the
10 fight upholding the state statute on this matter.

11 In addition to the facts that are set forth by the
12 appellant, I would like to add that the Channel 12, WHYY, never
13 applied for an exemption under the statute 54:4-4.4. This was
14 not handled in the New Jersey Supreme Court because they felt
15 they didn't have to handle that. They upheld the statutes
16 and therefore they didn't consider this point.

17 The reason this may be very important is that the
18 procedure is set forth where a form is filled out for the tax
19 assess or to review the statement by sworn claim exemptions and
20 why they should be exempt.

21 The record is clear that the Borough was put on
22 notice. A letter was sent by the Attorney for the television
23 station asking for an exemption which was referred to the local
24 solicitor who then referred to the state statute and says you
25 not exempt because under the New Jersey Statute which is set

1 forth in the appendix on page 17, the section which excluded
2 them, of course, and which was the argument I might say all
3 through the New Jersey courts up to the Supreme Court that the
4 foregoing exemptions shall "Apply only when the association,
5 corporation or institution who claims the exemption owns the
6 property in question and is authorized to carry out the purposes
7 on account of which the exemption is claimed."

8 We agree that this Channel 12 is a non-profit corpora-
9 tion. There is no question that they comply in every way with
10 what New Jersey would consider a non-profit corporation. That
11 is not our argument today.

12 The situation is that the Borough of Glassboro has
13 followed the law of New Jersey by denying this exemption. We
14 had to list this over \$100,000 of ratables, both real and
15 personal on our books. The local citizens had to pay these
16 taxes because we have the county government that relies on
17 what you assess in your local municipalities to run the county
18 government.

19 Now, they have been paying these taxes every year.
20 They had to make up this deficit every year which now amounts
21 to a sum of \$60,000. It is true we are only arguing back
22 taxes now. The new act that became effective January 1, 1968,
23 and I might say the same question was raised by the New Jersey
24 Supreme Court, whether this was an act to clarify the existing
25 law or was it a modification to carry on after January 1.

1 I might only add that the law firm that was handling
2 the matter in the state level was from a law firm where a
3 senator sponsored the bill. So, I think it is safe to say that
4 it was not declaratory act, but an act to amend 5443.6 and to
5 carry on after the first of January.

6 Q What does the new act do precisely?

7 A The new act simply says that non-profit corporations
8 whether they be domestic or foreign are exempt under the new
9 citation which is 3.6A, or something like that. It just
10 includes that in there, domestic or foreign corporations are
11 included in the exemption of this section.

12 The taxes, as I said, amount to approximately \$60,000.

13 I would like to address myself to the procedure point
14 here, that the fact that the Federal issue was never raised in
15 this matter until at the Supreme Court of New Jersey and it might
16 not have been raised then had it not been for the fact that the
17 appellate division of the Superior Court was unanimous in
18 upholding the statute as it was argued because it was argued
19 by Channel 12 that they are organized under the laws of New
20 Jersey because they qualified or because they had a registered
21 act in the state that could be served with a service of process.

22 So therefore they were "Organized." The word
23 organized as shown in the opinions of the Superior Court,
24 appellate division, and the State Supreme Court of New Jersey,
25 meant that it dealt with organizations such as religious

1 organizations that are not incorporated but nevertheless are
2 organized in New Jersey and are available for the exemption.

3 This is the argument that prevailed to the Supreme
4 Court. Then, the appellate in this matter was faced with the
5 problem of how to get into the Supreme Court because there was
6 dissent in the appellate division and no constitutional issue
7 raised.

8 It then for the first time raised the issue of the
9 equal protection of the laws under the 14th amendment of the
10 Federal Constitution.

11 Q Was that on a certificate?

12 A I believe it was on a direct appeal but for the first
13 time raised a Federal issue at which time the attorney general
14 did contact me and suggested at which I was doing at the time
15 that I entered a motion to dismiss for failure to raise any
16 federal issue or any constitutional issue up to that point since
17 it was no dissent in the appellate division.

18 There was no ground for an appeal to the New Jersey Supreme
19 Court. The New Jersey Supreme Court when faced with this
20 problem simply stated as is outlined on page 9 of the appendix
21 "This Court may, but need not accept a constitutional question
22 not raised below.

23 As this constitutional contention is one of great
24 concern to many municipalities and non-profit foreign corporations,
25 the public interest in this question demands that it be decided."

1 So they recognized that it had not been raised but
2 they accepted it to put this question to rest under this statute.

3 Q The New Jersey Supreme Court has cited the Federal
4 consitution?

5 A I argue, of course, that they waive the rule to hear
6 the case.

7 Q Whatever it was. They have decided it?

8 A They have decided that this statute is unconstitutional.
9 under the constitutional attact first raised there. Of course,
10 it is my understanding that this court demand that when a
11 constitutional issue is to be raised that it be raised at the
12 lowest level and not to be raised as an afterthought and
13 perhaps the last court in the state as set forth in the
14 appendix. The question was never raised.

15 It was just the statutory construction whether they
16 were organized and came under that exemption. Of course, they
17 lost all of those arguments through the state court.

18 Q Suppose the law provided that it could not be raised
19 and it had to be raised with the Supreme Court?

20 A Suppose the law required it could not be raised
21 below? Your Honor, I can't forseer of any type of a rule that
22 said you could not raise a constitutional issue at a trial.

23 Q Some courts are too small. They don't want to pass
24 on a constitutional question.

25 A The state supreme court did accept the case and

1 acknowledged that perhaps it was not raised but we want to hear
2 this case anyhow. So it could be argued either way, it was not
3 raised but we are not going to hear it anyhow or although it
4 was not raised we will allow you to hear it in this court.

5 I think in all fairness they did listen to the
6 constitutional argument in the highest court in New Jersey.

7 Q They dicided?

8 A They decided that as one of the points raised.

9 Q We have said that the constitutional question must be
10 raised in the lowest court where it became pertinent or haven't
11 we merely said that it is an adequate state ground for not
12 deciding a Federal question if the state holds that they didn't
13 properly raise it the first time it was available to them?

14 A I think the latter part of your statement is correct,
15 that this court has held it that way.

16 As was stated, Channel 12 is now exempt from this
17 time on from '68 on and we are only arguing about back taxes.
18 Now, of course, the Borough of Glassboro now finds itself in a
19 position where it is arguing for these back taxes that their
20 local citizens have paid which they apparently will not be
21 able to retrieve if now this contract were to decide that this
22 statute that was effective up to 1968 is in fact unconstitutional.

23 This court has upheld in cases where a foreign corpora-
24 tion need not be given equal treatment with domestic corporations.

25 The thrust of Glassboro's argument in this matter is

1 that these cases deal with profit corporations that are involved
2 in interstate commerce, and the reasoning behind these is that
3 they should not discriminate against foreign corporations
4 because at the Federal level we look at the nation as a whole
5 and we don't divide it into boundary lines and there shouldn't
6 be adverse discrimination between these corporations.

7 However, in this situation, I think the focus is
8 directed wrong. Here the State of New Jersey is giving a gift.
9 We are allowing a complete exemption from any taxes. It appears
10 to me that the State of New Jersey should be able to decide who
11 they are going to give this gift to. These people pay no taxes
12 whatsoever or they are demanding that they pay no taxes whatever

13 They don't want to pay any for any local municipal
14 services at all. They want to be completely free from all
15 taxes. New Jersey says that we will grant these exemptions
16 if you follow some simple procedures.

17 No. 1, that you be non-profit, they are.

18 No. 2, of course that you own property which they do
19 and No. 3, that you be organized or incorporated in the State of
20 New Jersey.

21 Q What is the reason for the last one?

22 A Your Honor, the New Jersey Supreme Court handled that
23 problem previously. I don't say that the statements they made
24 is the end of the reasons that might be put forth on why you
25 should be incorporated in New Jersey.

1 For instance, of course, we are trying to figure out
2 what the legislature had in mind some 25 years ago when they
3 enacted this legislation. This corporation derives all of its
4 assets from the contributions of the public, many of which are
5 in New Jersey and, of course, the Federal Government and
6 different foundations donate money to provide the facilities that
7 they give.

8 I could foresee the situation where WHY? would become
9 insolvent for one reason or another. New Jersey may have an
10 interest on what happened to the donations of the people in New
11 Jersey. They may have a jurisdictional problem since it is a
12 foreign corporation, the New Jersey people have donated money
13 to the facilities involved here whereas if they were incorporated
14 in New Jersey our chancery court would take jurisdiction of an
15 insolvent corporation and there is a procedure set for on
16 listing assets and what happens to this money and where it is
17 to be distributed.

18 Q So you can put a tax on it?

19 A We asked them to incorporate. If they had incorpora-
20 ted and followed the law --- for some reason unbeknownst to
21 me --- No. 1, the Borough of Glassboro wouldn't have them on
22 their books and I wouldn't be here arguing for their back taxes.

23 We have been put in a position where we are in a
24 bind. We are defending New Jersey statutes for our back taxes
25 and they have amended it on us which is fine, but, of course,

1 the local citizens have had to pay out of their own pocket these
2 back taxes. We are in a dilemma here. I am only trying to
3 pick reasons out of the air. To be quite frank with you, it is
4 difficult.

5 I think the New Jersey Supreme Court had a little
6 bit of trouble when they mentioned the point about perhaps the
7 local assessor should not be burdened with the problem of trying
8 to figure out what a foreign jurisdiction considers as non-
9 profit.

10 Of course, it is not applicable in this case because
11 we agree that there is no question that WHYY is non-profit.
12 I feel this is a suggestion put forth by the New Jersey Supreme
13 Court. It is not the end reasoning of the New Jersey Legislature.

14 Q Do I understand you to say that unless there is or
15 unless we can really think up some substantial reason, to justify
16 the statute, that the statute is bad?

17 A I feel on the surface of it it appears that it does
18 discriminate against a foreign corporation as compared to a
19 local corporation basically on the ground that they didn't
20 incorporate in the state of New Jersey.

21 Q Is this organization entitled to equal protection?

22 A I haven't raised that point. I think they are. I
23 don't think there is any question that the --- if you are
24 alluding to the problem of whether corporations are allowed to
25 raise the equal protection clause as not being a person, I

1 didn't think that was of much moment to raise that point although
2 it has been raised in many, many times before. It appears it
3 doesn't carry that much weight in this court. So I didn't raise
4 to the court that they are not a person under the 14th
5 amendment.

6 Q Is the amended statute, the repeal of the New Jersey
7 Supreme Court decision, or is it a clarification of the act
8 originally?

9 A It is a repeal effective January 1, 1968 of the New
10 Jersey decision in this matter.

11 Q How do you make the differentiation, as to whether
12 it was a repeal or merely a clarification?

13 A The language of it, as it is set forth, it is clearly
14 aimed --- of course, the information I have and the knowledge
15 I have in this matter is without the record. It wouldn't be
16 fair to bring up why I feel that this is clearly meant to repeal
17 it. The fact that the senator that sponsored the bill was the
18 law firm was that arguing this matter through the state court
19 may be of no moment but I think it might be significant.

20 The fact that this litigation has been going on through
21 this time and soon after one of the decisions was handed down
22 this thing was put through the legislature I think in about six
23 or seven weeks which was unusual. It was made effective six
24 months afterwards, which was the first of January, 1968.

25 Q I thought Mr. Marsh conceded that this new legislation

1 didn't overrule the Supreme Court decision for the years of which
2 that decision was a part but simply amended the statute to
3 provide the exemption. I thought he conceded that.

4 A He did. I think the Chief Justice's question was
5 what was the background of this, whether it was a clarification
6 or repeal and I think Mr. Marsh said he would like to think of
7 it as a clarification rather than an appeal of it.

8 It is my position, of course, that it was an appeal
9 of it specifically for the act which is for educational
10 corporations either domestic or foreign.

11 The main case that I am faced with, of course, is the
12 case in the Glander case which this court has ruled on and has
13 upheld in previous cases on discrimination against foreign
14 corporations which has concern with the domestic corporations.

15 The Glander case, as I have said before, the focus
16 is on profit corporations that are in the business for a
17 profit but the firm in the Ohio corporation there --- the foreign
18 corporation in Ohio, was paying all of its proper taxes, its
19 personal property taxes, its franchise taxes and then they
20 were attempting to tax the accounts receivable in that matter,
21 a discrimination of the foreign corporation as compared to the
22 domestic corporation.

23 The problem we are faced with here is an outward
24 grant by the State of New Jersey, a gift. The point is that they
25 should be allowed to decide who gets this.

1 Q You are not suggesting, are you, that the exemptions
2 are not subject to constitutional restraint?

3 A Exemptions for non-profit corporations?

4 Q Tax exemptions.

5 A I think they should be reviewable.

6 Q The state can discriminate with regard to these
7 exemptions without regard to the constitution.

8 A I don't think as a profit corporation ---- New Jersey
9 could have well become the mecca of non-profit corporations
10 without the state putting in any type of guidelines on what
11 they have to do to get in here.

12 All they do when they say they have been domesticated
13 they simply file an application as to a registered agent. What
14 is set forth in the appendix here concerning applications to
15 become or to register in the State of New Jersey deals mainly
16 with profit corporations.

17 It is even under title 14, which is our profit
18 corporations. Non-profit is the title 15. It asks for such
19 things as stockholders. These people don't have any stock-
20 holders. The amount of the outstanding stock and assets like
21 that. It is not applicable to these people. They just have a
22 registered agent to the State of New Jersey who knows who they
23 can contact in the event of a lawsuit or any other type of
24 service.

25 Q Do you have an agency or officer in New Jersey who is

1 responsible for supervising non-profit corporations as they do
2 in some states? In my own state, the attorney general is
3 charged with the responsibility of supervising the non-profit
4 corporations.

5 A I am sure the attorney general's office has some type
6 of control. But for taxing purposes ---

7 Q I don't mean for taxing. For other purposes; for
8 instance, to determine whether they are actually carrying out
9 their educational activities or whether they are using it to
10 cover up for something else.

11 A I don't know whether I could give a direct answer to
12 that.

13 Q I don't think you can.

14 A Unless there was a complaint lodged against someone
15 that was circumventing the non-profit status, New Jersey
16 wouldn't be concerned because the taxing problem is a local
17 one so the local tax assessor must review the situation to make
18 sure that they are fulfilling this status and there is a
19 provision where every year they are supposed to refile to show
20 that their activities do continue to be non-profit so they are
21 entitled to the exemptions as set forth in the statute.

22 I would like to reserve any time remaining to any
23 rebuttal.

24 CHIEF JUSTICE WARREN: Under our arrangements, you
25 complete your argument now, and Mr. Marsh will then conclude his.

1 REBUTTAL ARGUMENT OF JOHN W. TRIMBLE

2 MR. TRIMBLE: A case was alluded to in the appellant's
3 brief. The Board of Education of Kentucky versus Illinois case,
4 which is the only case involved in the appellant's brief with
5 non-profit corporations, is a situation where a state did
6 discriminate on a taxing basis for a non-profit corporation and
7 it was upheld.

8 The basis was that this money was going to be or had
9 to be used exclusively in the State of Kentucky and therefore
10 Illinois would not receive any benefits from it and therefore
11 could tax it, or it was an inheritance tax in that matter.

12 It can be differentiated in the fact that WHYY is
13 claiming that they do benefit the State of New Jersey or
14 Southern New Jersey with their transmitter.

15 The problem of rebutting the volume news information
16 that was supplied was that this information was supplied just
17 prior to arguing before the New Jersey Supreme Court. This
18 question apparently came up in their mind, what benefits does
19 New Jersey receive from your Channel 12 and this was supplied
20 as is outlined in their appendix.

21 However, I don't think an extension of that rule of
22 the Illinois case could be applicable here and that the
23 discrimination that New Jersey is attempting or alleged
24 discrimination is not that far that it would be unfair to the
25 local residents of Glassboro, that that rule could be extended

1 to this situation, that they should incorporate in the State
2 of New Jersey so that Glassboro wouldn't tax them and be found
3 in this situation they find themselves today.

4 The case cited of Railway Express versus Virginia
5 where Justice Holmes wrote the opinion in that, where they
6 forced a foreign corporation to incorporate to do any business
7 in the state and this was held not to be unreasonable and if
8 they wanted to do business in the state, they should incorporate.
9 This was upheld.

10 Thank you.

11 REBUTTAL ARGUMENT OF JAMES M. MARSH

12 MR. MARSH: Just to clarify, first, Mr. Justice
13 Brennan's problems about the attorney general, I think it may
14 be explained by the reason of the fact that during this
15 litigation and up to today the Attorney General of New Jersey
16 is a member of the Board of WHYY, which might have made his
17 participation a little awkward.

18 The other problem about the statute, the statute we
19 have talked about was passed after the decision of the Superior
20 Court of New Jersey, but before the decision of the Supreme
21 Court of New Jersey.

22 So, I suppose you would say it was a repeal of the
23 decision of the Superior Court of New Jersey, but it had no
24 bearing ---

25 Q I thought you said that the new statute has no

1 retroactive application?

2 A No, it doesn't. But as far as the passage and its
3 relation to the Supreme Court decision, it intervened between
4 the Superior Court's decision and the Supreme Court decisions.

5 As far as the statement that we should have been
6 required to incorporate in New Jersey, the New Jersey legisla-
7 ture took care of that by not making any such provision. We
8 have complied with all the laws and regulations they did put
9 down. We feel we have fully qualified for all the rights and
10 privileges that a non-profit corporation has in New Jersey.

11 This is also a distinction between the Kentucky case
12 which I put in my brief because in that case you had a question
13 of the Kentucky corporation which hadn't qualified in Illinois,
14 couldn't give any benefits to the people of Illinois and
15 Illinois said rightly that they didn't have to give them this
16 inheritance tax.

17 I think it is a quite different case.

18 The only other question I wanted to touch on was the
19 question of the exemption. The requirement that you apply for
20 these exemptions is not in this exemption section.

21 Secondly, it is placed on the assessor not on the
22 taxpayer.

23 Thirdly, there was substantial compliance in that we
24 did make a request on November 7, 1963 as opposed to November 1.

25 The final thing, probably the most significant thing,

1 is the Supreme Court of New Jersey did not decide the case on
2 that ground. Had they thought much of it, it seems to me
3 they would have because they could have avoided deciding a
4 Federal constitutional issue by simply telling us what your
5 rights are, you gave them up.

6 I submit we have complied with all the laws of
7 New Jersey and under the decisions of this Court are
8 entitled to the same treatment as New Jersey corporations
9 for this purpose.

10 Thank you very much.

11 (Whereupon, the above-entitled oral argument was
12 concluded.)
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