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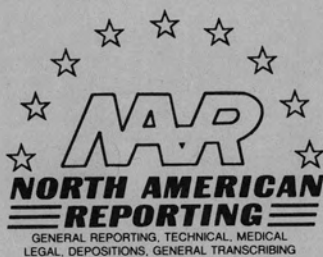
In the

Supreme Court of the United States

COUNTY OF IMPERIAL, CALIFORNIA, )  
ET AL., )  
 )  
PETITIONERS, )  
 )  
V. ) No. 79-1003  
 )  
GUILLERMO GALLEGO MUNOZ, ET AL., )  
 )  
RESPONDENTS. )  
 )

Washington, D.C.  
October 15, 1980

Pages 1 thru 40



1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - - :  
3 COUNTY OF IMPERIAL, CALIFORNIA, :  
4 ET AL., :

5 Petitioners, :

6 v. :

No. 79-1003

7 GUILLERMO GALLEGO MUNOZ, ET AL., :

8 Respondents. :  
9 - - - - - :

10 Washington, D. C.

11 Wednesday, October 15, 1980

12 The above-entitled matter came on for oral argument  
13 at 1:31 o'clock p.m.

14 BEFORE:

- 15 HON. WARREN E. BURGER, Chief Justice of the United States
- 16 HON. WILLIAM J. BRENNAN, JR., Associate Justice
- 17 HON. POTTER STEWART, Associate Justice
- 18 HON. BYRON R. WHITE, Associate Justice
- 19 HON. THURGOOD MARSHALL, Associate Justice
- 20 HON. HARRY A. BLACKMUN, Associate Justice
- 21 HON. LEWIS F. POWELL, JR., Associate Justice
- 22 HON. WILLIAM H. REHNQUIST, Associate Justice
- 23 HON. JOHN PAUL STEVENS, Associate Justice

24 APPEARANCES:

25 JAMES H. HARMON, ESQ., County Counsel, County of  
Imperial, County Courthouse, 939 West Main Street,  
El Centro, California 92243; on behalf of the  
Petitioners.

WILLIAM H. KRONBERGER, JR., ESQ., 1007 Fifth Avenue,  
Suite 1100, San Diego, California 92101; on behalf of  
the Respondents.

C O N T E N T S

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ORAL ARGUMENT OF

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on behalf of the Petitioners. 3

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on behalf of the Respondents. 17

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on behalf of the Petitioners -- Rebuttal. 39

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MILLERS FALLS  
ERASE  
COTTON CONTENT



P R O C E E D I N G S

1  
2 MR. CHIEF JUSTICE BURGER: We'll hear arguments next  
3 in County of Imperial, California, v. Munoz.

4 Mr. Harmon, I think you may proceed when you are  
5 ready.

6 MR. HARMON: Thank you.

7 ORAL ARGUMENT OF JAMES H. HARMON

8 ON BEHALF OF THE PETITIONERS

9 MR. HARMON: Mr. Chief Justice, and may it please the  
10 the Court:

11 The issue in this case is whether it is permissible,  
12 consistent with principles of res judicata and the Anti-  
13 Injunction Act, for the federal court to enjoin enforcement  
14 of a ground water exportation restriction in Mr. McDougal's  
15 use permit when the California Supreme Court earlier ruled  
16 the restriction enforceable.

17 If I may, before going to the facts of the case,  
18 I would like to briefly address the geographical setting for  
19 this case.

20 In this Court's recent opinion in Bryant v. Yellen,  
21 the Court described the Imperial Valley as an area located  
22 south of the Salton Sea in southeastern California. It lies  
23 below sea level and is an arid desert in its natural state.  
24 That case, the 160-acre limitation case, dealt with lands in  
25 Imperial County which are within the irrigation district



1 boundaries and are irrigated. Mr. McDougal's parcel, however,  
2 lies on the West Mesa of Imperial County, an area totally  
3 dependent on ground water supplies.

4           Going to the facts of the case, the California  
5 Supreme Court found Mr. McDougal estopped from challenging,  
6 and thereby bound by the export restriction in his use permit  
7 based on facts which showed that his predecessor, with counsel,  
8 agreed to the imposition of the export restriction, abided by  
9 it, and benefited from the limited permit as issued. Further,  
10 Mr. McDougal when he purchased the property was aware of the  
11 restriction. When Mr. McDougal went to the County officials  
12 and demanded removal of the export restriction, he was informed  
13 that he should make application for a new conditional use per-  
14 mit. Instead of applying for a use permit, Mr. McDougal  
15 simply defied the County authorities, entered the subject  
16 brokerage contract with respondent Munoz and immediately as  
17 many as 44 tank trucks carrying 250,000 gallons a day began  
18 export of water to Mexicali, Mexico.

19           One of the major allegations of the respondent's  
20 complaint is that enforcement of the subject export restriction  
21 will cause economic hardship to them by requiring them to go  
22 eight miles farther north in the County, to the so-called  
23 Clifford well, to buy water for export. It is alleged that  
24 the price of water is higher at the Clifford well, also in  
25 the County eight miles north.

1 QUESTION: How far away is Mexicali from this well?

2 MR. HARMON: Approximately, I would say, six miles,  
3 Your Honor. The well site --

4 QUESTION: So it would be more than twice as far to  
5 the other well?

6 MR. HARMON: The well is on Highway 98, which kind  
7 of parallels the Border, and the Ocotillo well is eight miles  
8 north on Highway 98.

9 I believe that the res judicata issue is the major  
10 issue in the case. The 9th Circuit Court of Appeals, of  
11 course, rejected the County's argument on res judicata by con-  
12 cluding that the McDougal decision is not a final judgment on  
13 the merits as to the respondents' cause of action. That's  
14 fundamentally incorrect.

15 QUESTION: Well, it was an estoppel judgment though,  
16 wasn't it?

17 MR. HARMON: Yes, it was an estopped judgment, and  
18 I've indicated what the facts were substantiated in that  
19 estoppel.

20 QUESTION: And your res judicata argument is that  
21 not Mr. McDougal should continue to be bound by that judgment  
22 but his vendees --

23 MR. HARMON: Exactly.

24 QUESTION: -- should also be bound by that estoppel  
25 judgment.

1 MR. HARMON: Exactly. And Justice White, I will  
2 get to the privity question in a moment, if I may. But im-  
3 portantly --

4 QUESTION: Well, you have to, I suppose.

5 MR. HARMON: Yes, indeed. Importantly, recognize  
6 that the 9th Circuit did not even reach the privity issue.  
7 It simply concluded that this is not a final judgment on the  
8 merits as to the respondents' action. That can't be true, it  
9 seems to me.

10 QUESTION: You could say it was true, but still  
11 the estoppel judgment shouldn't stand against these people.

12 MR. HARMON: I will get to that. Importantly, the  
13 issue of the enforceability of the export restriction was the  
14 central issue in the McDougal case. After five years of  
15 litigation, finally the California Supreme Court ruled it  
16 was enforceable. Indeed, the decision is based on --

17 QUESTION: Yes, it affirmed the injunction.

18 MR. HARMON: Affirmed that portion of the injunction.  
19 Now, on the issue of what is a final judgment on the merits,  
20 for purposes of res judicata, Professor Moore indicates that  
21 a test is where there is a measure of identity so that the  
22 different judgment in a second action would destroy or imperil  
23 rights or interest established by the first judgment. Here,  
24 Your Honors, the injunction issued by the District Court  
25 robs the California Supreme Court's decision of all of its



1 vitality and meaning. In one case we've got the California  
2 Supreme Court concluding that the export restriction is  
3 enforceable, now the District Court is telling the County  
4 officials that the export restriction must be enjoined. It  
5 seems to me that it's clear that the focal point made by  
6 the 9th Circuit is erroneous and requires reversal.

7 Now, going to the issue of privity, may I again  
8 remind the Court that the 9th Circuit did not address, did  
9 not even reach the issue of privity. The last page of the  
10 Circuit Court of Appeals decision there is a statement that  
11 indicates that assuming that the respondents are in privity,  
12 they would not be bound because of the prior conclusion on the  
13 cause of action issue. The record, however, establishes  
14 relationships between McDougal and the respondents which I be-  
15 lieve make it clear they should be regarded as being in privity  
16 with McDougal.

17 First of all, there is the contractual relationship  
18 between respondent Munoz and McDougal. Munoz has been an  
19 integral part of the McDougal operation since its inception.  
20 A verified complaint in the federal action indicates that  
21 Munoz is the broker for sale of water to bottling companies in  
22 Mexicali.

23 QUESTION: Well, don't many courts disagree with  
24 the 9th Circuit's rather limited definition of res judicata  
25 as limited to issues that have been litigated on their merits

1 and say that it's any issue that was litigated or might have  
2 been litigated?

3 MR. HARMON: I think that's correct. Certainly in  
4 the reading I've done, the thrust of many writers' opinions  
5 is that you're to look at the substance, not just the form of  
6 the situation, and if there has been a meaningful relationship  
7 between the parties and those who would also be bound by the  
8 preclusionary rule, where they've had the opportunity to  
9 intervene and litigate the case, they should likewise be  
10 bound.

11 QUESTION: Well, Mr. Harmon, didn't -- weren't  
12 those other issues, though, presented in the state litigation?  
13 It's just that the state court didn't decide them. They  
14 were presented and tendered, and the state court decided the  
15 case on estoppel.

16 MR. HARMON: That's correct.

17 QUESTION: But isn't estoppel itself a substantive  
18 ground?

19 MR. HARMON: Yes, it is. The leading case there is  
20 Enterprise Irrigation.

21 QUESTION: And the Court of Appeals for the 9th  
22 Circuit said it wasn't. So -- but that certainly is a fair  
23 issue.

24 MR. HARMON: The cases clearly establish that  
25 estoppel is an independent and adequate ground for --

1 QUESTION: Well, I guess McDermott, I suppose, at  
2 least, or McDougal, or whatever his name is.

3 MR. HARMON: I'm further suggesting that the respon-  
4 dents are in privity with McDougal. I've alluded to the con-  
5 tractual relationship. Furthermore, if I can draw the Court's  
6 attention to page 16a of the Appendix, specifically paragraph  
7 4 of the complaint, the last phrase of that paragraph. I'm re-  
8 ferring to roman numeral iv on page 16a. The last phrase reads,  
9 "all other plaintiffs" -- i.e., Martinez and de Leon -- "herein  
10 are third party beneficiaries of the contract between Guillermo  
11 Gallego Munoz and the defendant Donald Courtney McDougal, Sr."

12 So I think that there are interwoven interests here  
13 which are established in the record and for purposes of privity  
14 those relationships should suffice, with other things.

15 Now, additionally, these respondents actually had  
16 the opportunity to intervene in the state court litigation  
17 and/or participate, and in fact, respondent Munoz did partici-  
18 pate in the state court proceedings and he argued as an amicus  
19 curiae before the California Supreme Court.

20 QUESTION: Could you have named him a party to your  
21 lawsuit?

22 MR. HARMON: I think the County might have, but the  
23 problem with that, Your Honor, is conceivably there are hun-  
24 dreds of people who might have been named parties; namely --

25 QUESTION: But you think -- that bind all of



1 McDougal's customers on the privity theory.

2 MR. HARMON: On the facts of this case, yes.

3 Now, the other major issue, I think, that bears on the privity  
4 issue is the fact that we're talking about the same piece of  
5 property and the identical rights. The respondents have not  
6 applied for a conditional use permit themselves. They are  
7 instead simply trying to challenge the export restriction in  
8 Mr. McDougal's permit.

9 In reading Professor Vestal's law review article  
10 in the Iowa Law Review, cited in my brief, he talks about  
11 still another ground for binding non-parties, which is, I sup-  
12 pose, separate and apart from res judicata and that involves a  
13 situation where these third parties' rights are derivative of  
14 the party to the lawsuit. Here rights to sell water commer-  
15 cially from the well depend on the issuance of a permit to  
16 McDougal. Respondents' rights to purchase from McDougal for  
17 export are necessarily derivative of McDougal's, it seems to  
18 me.

19 QUESTION: Mr. Harmon, would you make the same argu-  
20 arguments if some new person in Mexico who formed a water  
21 brokerage business, was not involved previously as a  
22 customer of this well, came in and said, I'd like  
23 to attack the zoning ordinance. Could you defeat  
24 his claim?

25 MR. HARMON: There is not a zoning ordinance here in

1 effect.

2 QUESTION: I understand.

3 MR. HARMON: Vis-a-vis use permit, I think that --  
4 yes, Your Honor, I think that the underlying --

5 QUESTION: So you really don't rely at all on the  
6 prior relationship between the Mexican broker and the property  
7 owner?

8 MR. HARMON: I rely extensively on the contractual  
9 relationship between McDougal and his broker, Munoz.

10 QUESTION: But you said the same argument would  
11 apply to someone who had no prior contractual relationship?

12 MR. HARMON: I think so. Going to the Anti-Injunc-  
13 tion Act --

14 QUESTION: You say it isn't a -- just to make it  
15 clear -- this isn't a zoning ordinance, this is a restriction  
16 on the sale of water, as the Supreme Court said?

17 MR. HARMON: This is a land use permit. That is,  
18 we're talking about -- this is what we're talking about --

19 QUESTION: But it's a restriction on the sale of  
20 water?

21 MR. HARMON: Right. But it applies -- what I was  
22 going to say is, it applies to a single parcel of property.  
23 There is no county-wide ordinance which restricts the applica-  
24 tion of water or any other product, for that matter. That's  
25 indicated, it seems to me, by the pleadings which indicate the

1 respondents can go eight miles north and purchase water from a  
2 well there.

3 QUESTION: Would it make any difference to your case  
4 if there were a county-wide restriction?

5 MR. HARMON: If there were a county-wide restriction  
6 which the respondents were individually affected by, I would cer-  
7 tainly believe under that set of circumstances they could have  
8 standing to challenge the restriction. One of the cases cited  
9 by the Court of Appeals and the District Court is Hale v. Bimco  
10 for the proposition that third party strangers are not barred  
11 by reason of a state court adjudication from subsequently chal-  
12 lenging in the federal courts a statute that's arguably uncon-  
13 stitutional. If the County had an ordinance which had county-  
14 wide application preventing export, an adjudication against  
15 McDougal, I don't think, would bind third party strangers  
16 separately and individually affected by that ordinance.

17 Here, though, this permit rose with a particular  
18 parcel of land, the McDougal parcel. I think that under all  
19 of the circumstances taken into consideration, the California  
20 litigation has got to once and for all under the theory under-  
21 lying res judicata adjudicate the rights that flow from that  
22 piece of property. Were the County to purport to enact an  
23 ordinance which says, no, there will be simply no export,  
24 then I would think any number of individuals might achieve  
25 standing to challenge it.



1           The Anti-Injunction Act, of course, prohibits the  
2 federal court from granting an injunction or staying -- to  
3 stay proceedings in a state court except where expressly  
4 authorized by Congress or when necessary to aid in its juris-  
5 diction. The Court of Appeals indicated that the Anti-Injunc-  
6 tion Act did not have application because there were no pro-  
7 ceedings pending, and further it, relying on Hale v. Bimco,  
8 indicated that if there were proceedings pending, nothing  
9 would prevent a third party stranger from challenging a stat-  
10 ute. Your Honors, I think that the California Supreme Court  
11 injunction contemplates ongoing jurisdiction in the court and  
12 inherent authority in the court to enforce the injunction.

13           As subsequently ~~there~~ has ~~actually~~ actually  
14 been a contempt proceeding, a contempt judgment, by the trial  
15 court judge against McDougal for having willfully violated the  
16 terms of the trial court injunction as affirmed by the  
17 California Supreme Court. I therefore think that the prelimi-  
18 nary injunction issued by the District Court likewise violates  
19 the spirit of the Anti-Injunction Act.

20           I think this Court's recent decision in Vendo is  
21 analogous. That case along with others -- Hill v. Martin --  
22 make it clear that the Anti-Injunction Act's prohibition is  
23 broad and to be strictly construed, and that it applies to any  
24 stage of a state court's proceeding, from the time of final  
25 judgment through enforcement.

1 QUESTION: Was McDougal held in contempt?

2 MR. HARMON: Yes, he was held in contempt.

3 QUESTION: But then the judgment was stayed, wasn't  
4 it?

5 MR. HARMON: The execution of the judgment was  
6 stayed, Your Honor.

7 QUESTION: And depending on how the Court of Appeals  
8 came out, it was stayed permanently?

9 MR. HARMON: That's correct; execution was.

10 QUESTION: Well, now, so what does that mean about  
11 the injunction?

12 MR. HARMON: Well, it certainly doesn't indicate to  
13 me that the state courts have deferred making a determination,  
14 as for example was the case in Hale v. Bimco, where the  
15 Florida State Supreme Court before ever getting to final  
16 judgment said --

17 QUESTION: Well, what if the state court was at  
18 least saying as to McDougal, this injunction doesn't mean any-  
19 thing; he can violate it if he wants to.

20 MR. HARMON: The state court was aware, I think,  
21 Your Honor, that cross-contempt proceedings were also going on  
22 in the Federal District Court, and --

23 QUESTION: Well, I know, but they stayed it pending  
24 the outcome of this case.

25 MR. HARMON: Stayed execution of the contempt judgment

1 against McDougal.

2 QUESTION: And if McDougal won this -- or if Muñoz  
3 won this case and McDougal was off the hook, then McDougal was  
4 off the hook. Right?

5 MR. HARMON: I think that's correct.

6 QUESTION: So what does the injunction mean?

7 MR. HARMON: The injunction or the --

8 QUESTION: Against McDougal.

9 MR. HARMON: The injunction against McDougal is  
10 clearly a final judgment, by the California Supreme Court.

11 QUESTION: Well, but it's been rendered -- it cer-  
12 tainly isn't the creature that it was, if McDougal can violate  
13 it at will.

14 MR. HARMON: Well, I think the final judgment of the  
15 California Supreme Court has been all but emasculated by the  
16 preliminary injunction issued by the Superior Court. -- Excuse  
17 me; the District Court.

18 QUESTION: The Superior Court is the one who issued  
19 the injunction in the beginning.

20 MR. HARMON: That's right. And its judgment has  
21 been affirmed by the California Supreme Court --

22 QUESTION: Well, that doesn't keep the Superior Court  
23 from setting it aside.

24 MR. HARMON: The Superior Court, Your Honor, has  
25 shown no intention to set aside its judgment; to the contrary.



1           QUESTION: Except insofar as it tells McDougal he  
2 doesn't need to obey it.

3           MR. HARMON: Except insofar as it has withheld exe-  
4 cution of the contempt judgment against McDougal until a final  
5 determination by the United States Supreme Court.

6           Finally, the Court of Appeals directed that the 9th  
7 Circuit should determine the "export question" in accordance  
8 with Hughes v. Oklahoma. We contend that there is no export  
9 question before the Court and that the judgment of the California  
10 Supreme Court, based as it was on estoppel, furnished an independent,  
11 adequate, state court basis for the judgment. But assuming  
12 arguendo that there is some standing in the respondents, we  
13 wish to point out that Hughes v. Oklahoma should not have appli-  
14 cation because, first of all, Hughes v. Oklahoma involved a  
15 direct appeal challenging an Oklahoma statute to this Court.  
16 There were neither res judicata nor anti-injunction action  
17 issues in that case.

18           Finally, we have cited the Hudson County Water  
19 Company case wherein Justice Holmes upheld a New Jersey  
20 statute which did prevent diversion of a stream from outside  
21 the state and we think that that might be analogous here. If  
22 the Court were to ever get to the actual issue and the merits  
23 of the export restriction, we think that Hudson v. Hudson  
24 County Water presents an independent ground for sustaining an  
25 export restriction situation.

1 QUESTION: The merits are not really before this  
2 Court in this posture of the case, are they?

3 MR. HARMON: I believe not. Your Honors, I would  
4 like to reserve some time for rebuttal.

5 MR. CHIEF JUSTICE BURGER: Mr. Kronberger.

6 ORAL ARGUMENT OF WILLIAM H. KRONBERGER, JR.

7 ON BEHALF OF THE RESPONDENTS

8 MR. KRONBERGER: Mr. Chief Justice, and may it please  
9 the Court:

10 I think that we have to keep a couple of things in  
11 mind at the very outset of this case. The respondents are  
12 three citizens of the Republic of Mexico who have gone into a  
13 Federal District Court with a straightforward question to that  
14 Federal District Court. The Federal District Court -- there's  
15 an export ban that says that after McDougal has acquired water,  
16 pumped it from the ground, stored it in his storage tanks,  
17 McDougal cannot sell that water to me, a Mexican citizen, be-  
18 cause in granting a conditional use permit for no reasons re-  
19 lating to land use, intensity of use or anything, the County  
20 of Imperial has simply decided to ban the export of that water  
21 from that particular parcel.

22 QUESTION: Would there be any question of the stand-  
23 ing of these plaintiffs to bring a suit, quite apart from the  
24 question of res judicata?

25 MR. KRONBERGER: I don't believe so. I believe you

1 might be hinting at the question as to whether or not a for-  
2 eigner, non-citizen of the United States might bring an  
3 action --

4 QUESTION: Are these just three of probably thousands  
5 if not millions of potential buyers?

6 MR. KRONBERGER: Well, I would suggest that in our  
7 allegations we have pointed out that these particular plain-  
8 tiffs are lawfully within the United States, and once you are  
9 lawfully within the United States, it seems to me that the  
10 Constitution talks in terms of persons are protected, and it  
11 doesn't say, citizens of this country, and it seems to me  
12 that a person --

13 QUESTION: Well, we're talking about the Commerce  
14 Clause of the Constitution.

15 MR. KRONBERGER: That's correct, and I believe that  
16 a person lawfully in this country exercising the right as a  
17 purchaser ought to be able to invoke the basic fabric of this  
18 nation, the Commerce Clause, in a Federal District Court.

19 QUESTION: Well, Mr. Kronberger, what if your clients  
20 had litigated the precise same issue that you say they are  
21 now seeking to litigate here in the Federal District Court up  
22 through the California state court system, saying that this  
23 violates the Federal Constitution, the Supreme Court of Cali-  
24 fornia had ruled against them, certiorari denied here. Would  
25 you say that they would have the right to start all over again



1 in the district court?

2 MR. KRONBERGER: I think that that question is  
3 answered by the principles of res judicata, and if res judicata  
4 would apply because they were in those proceedings, then I  
5 would agree with your statement. However, I am somewhat con-  
6 cerned that, for example, I believe in one opinion of this  
7 Court -- I believe it was Huffman v. Pursue, Ltd., there was  
8 some language to the effect that a litigant in a state court  
9 might come back in a federal court and challenge, but that was  
10 a very limited statement in that decision --

11 QUESTION: But you weren't in the state --

12 MR. KRONBERGER: -- and I don't believe that I would  
13 press that point here.

14 QUESTION: You weren't in the state proceedings?

15 MR. KRONBERGER: No, we weren't; that was my next  
16 comment. My clients -- and this is something, I wish I could  
17 start over in this case. Instead of labeling it "Guillermo  
18 Gallego Munoz" as the first party, I would have put Juan de  
19 Leon in because Juan de Leon wasn't even in business when  
20 these state court proceedings were going forward, and my point  
21 is, my clients, these respondents have never had a day in a  
22 court, be it a state court or a federal court. They've raised  
23 an issue; at some point it has to be answered. And turning --

24 QUESTION: Mr. Kronberger, could I return for a  
25 moment to Justice Stewart's question? Supposing instead of a

1 total restriction on export, there had been a restriction on,  
2 say, you can only pump for four hours a day, something that's  
3 on a ~~no-- unless~~ clearly directed at a person in your  
4 capacity, would a vendee have standing to come in before the  
5 County and challenge that kind of restriction on the ground  
6 that if he produced more water, maybe I could buy more?

7 MR. KRONBERGER: No, I don't think so because I sub-  
8 scribe to the view that there is a legitimate police power in  
9 local and state government to regulate land use. Now, I  
10 think that what makes this case so unique is the direct,  
11 explicit holding of the California Supreme Court that this  
12 particular restriction is not land use or --

13 QUESTION: No, my question didn't go to the merits,  
14 it goes to standing, whether a customer of the property owner  
15 would have standing to say, I want to complain about this be-  
16 cause it affects my business? It's the standing question that  
17 I think we're seeking to answer.

18 MR. KRONBERGER: I would think that if that customer  
19 were raising it under the Commerce Clause, I believe he would  
20 have standing, and I would just revert to my position: that  
21 is, if you are in this country lawfully discharging a busi-  
22 ness, you have a right to invoke the protections afforded in  
23 the Constitution to raise it.

24 QUESTION: Well, could anybody who lives in Mexico  
25 be a potential plaintiff in this suit?

1 MR. KRONBERGER: I think you're going to have to  
2 show some interest --

3 QUESTION: Or anybody who lives in Canada?

4 MR. KRONBERGER: I think you'd have to show some  
5 interest in the outcome of the litigation. This Court has  
6 held --

7 QUESTION: The interest would be I want to buy water,  
8 or I may want to buy water sometime.

9 MR. KRONBERGER: Well, I think, arguably, yes.  
10 Let's put it in another light. What if I am driving from  
11 California to Texas and I have an old-type automobile with a  
12 radiator and I want to stop in at the McDougal well and fill  
13 up my radiator; McDougal says, no. You're taking the water  
14 outside of the County. It seems to me --

15 QUESTION: And then could you be a plaintiff in the  
16 federal court?

17 MR. KRONBERGER: It seems to me that I would have  
18 the right to bring that, because I have been directly harmed  
19 by a regulation of a governmental entity that has said --

20 QUESTION: Well, then, anybody who alleges that he  
21 now wants to or may in the future want to buy water is a po-  
22 tential plaintiff in the federal court, is that it?

23 MR. KRONBERGER: Well, I don't know that I would  
24 read it that far.

25 QUESTION: That is, anybody who does not live in the



1 United States?

2 MR. KRONBERGER: I think that somebody who can show  
3 a relationship --

4 QUESTION: Or does not live in the Imperial Valley,  
5 rather, in this county?

6 MR. KRONBERGER: Correct. I would say that someone  
7 who can allege and show that they have an interest in raising  
8 the issue can raise it. I don't think you could come into the  
9 federal court and say, well, I might want to purchase water  
10 sometime.

11 QUESTION: That's his interest. He wouldn't be in  
12 the federal court if he weren't interested.

13 MR. KRONBERGER: That's correct.

14 QUESTION: Well, doesn't that open the door to  
15 Mr. McDougal to just find somebody, kind of a straw man to  
16 go into Federal District Court and relitigate what he's already  
17 lost in the Supreme Court of California?

18 MR. KRONBERGER: I don't think the issue was lost  
19 in the Supreme Court of the State of California. I think the  
20 Supreme Court of the State of California specifically refused  
21 to rule on the issue. And I think that if we are going to  
22 assert that McDougal went out and found straw men and somehow  
23 manufactured a lawsuit, that that is an element of proof in  
24 the trial. And I have to point out, we're here on a prelimi-  
25 nary injunction. There is nothing in this record to show

1 any connection between these plaintiffs and McDougal save  
2 three isolated acts.

3 QUESTION: What about 16a, that was read to us  
4 before, paragraph iv? You say there's no connection. But  
5 they do say there is a connection.

6 MR. KRONBERGER: I point out to you that that is in  
7 the second cause of action wherein Munoz is seeking specific  
8 performance of his agreement with McDougal, and in that sense --

9 QUESTION: Is that a true statement?

10 MR. KRONBERGER: That is a true statement. For pur-  
11 poses of res judicata, though, I don't think that we can say,  
12 because I am going to be the buyer I have automatically been  
13 foreclosed because the seller has somehow been foreclosed in a  
14 state proceeding which did not reach the issue. I think we  
15 open a dangerous door if we tell government, local government,  
16 that it may grant and deny land use permits or any kind of  
17 permits for reasons wholly unrelated to the local purpose  
18 land use, and if a seller is somehow estopped to raise or  
19 challenge that issue, that the whole world is barred from ever  
20 challenging it. I would suspect that that would open doors to  
21 novel methods of discrimination against international commerce,  
22 state commerce, and a host of other things that I think are  
23 protected activities. If I might --

24 QUESTION: Well, the Commerce Clause doesn't by its  
25 terms protect any activities, it just gives the Congress of the

1 United States the power to regulate commerce among the several  
2 states or international commerce or commerce with the Indian  
3 tribes, period.

4 MR. KRONBERGER: That's correct.

5 QUESTION: It doesn't say anything about persons or  
6 protections or anything else.

7 MR. KRONBERGER: And in its self-executing form,  
8 the way restrictions imposed by state and local governments  
9 are raised, they are raised by those who are harmed, and that  
10 recognizes, I think, that a state has a right to regulate in  
11 an area that may impact interstate and foreign commerce. As  
12 this Court pointed out in Hughes v. Oklahoma, if you're going  
13 to regulate in that area, then you'd better do it in a manner  
14 that is not discriminatory or overly burdensome on interstate  
15 and foreign commerce. Here we've got a flat, outright --

16 QUESTION: In Hughes v. Oklahoma, it was a person  
17 who wanted to take the minnows out of the State who was the  
18 plaintiff, wasn't it?

19 MR. KRONBERGER: That's correct.

20 QUESTION: So, in other words, he was in the shoes  
21 of McDougal in this case?

22 MR. KRONBERGER: No, he would be in the shoes of  
23 perhaps Munoz.

24 QUESTION: No, no, he wasn't the purchaser. He was  
25 a person who wanted to take the minnows out of the State,



1 wasn't he? Wasn't that Hughes?

2 MR. KRONBERGER: Correct. What about Altus, Oklahoma v.  
3 Carr? It was the purchaser there who wanted to take the water  
4 out of Texas. And I think that decision stands for the propo-  
5 sition that the State of Texas could not enforce an export ban  
6 and the residents of Altus, Oklahoma, brought that suit.

7 I think in reviewing this decision, it is very  
8 important to keep in mind that these parties in this case  
9 have not had their day in court. They have not had an oppor-  
10 tunity to participate in the state proceedings. One of them  
11 didn't even exist in the business. And it seems to me that  
12 in order to have res judicata in this case we have to have  
13 two things: one, a final judgment on the merits which, when  
14 the California Supreme Court says it's not going to decide the  
15 issue, in my view does not constitute a decision on the merits.  
16 And the next thing we've got to have is some relationship  
17 between the parties and the party that appeared in the Cali-  
18 fornia court in order to hold him and bind them as privies.

19 Now, privy is kind of a shorthand method of saying  
20 simply that we think there's enough connection between these  
21 people that they ought to be bound by the judgment.

22 QUESTION: Well, Mr. Kronberger, let me get  
23 back to your definition of res judicata. Supposing in the  
24 California state court litigation Mr. McDougal thought of the  
25 Commerce Clause argument but his lawyer told him that this

1 just is too much of a long shot to raise. We won't bother  
2 with it right now. And the thing went all the way to the state  
3 Supreme Court and many issues were decided but that one wasn't.  
4 And then there was a petition for rehearing and the Supreme  
5 Court of California said, no, you're too late. Would you say  
6 that issue is not res judicata?

7 MR. KRONBERGER: It would be as to McDougal, who  
8 participated in that litigation. I think that with respect to  
9 parties who were not party to the state litigation, we're  
10 talking about collateral estoppel and we're talking about  
11 issues that were actually decided, issues that we might use as  
12 a sword or a shield against those non-parties and for purposes  
13 of collateral estoppel it seems to me that the only items that  
14 might be asserted for that purpose are issues that were actual-  
15 ly decided. And I come back to the central issue that the  
16 question presented to the Federal District Court, i.e. and to  
17 wit, the ban on the export of water, has never been decided  
18 by any court. At some point in time, I think it's fair to say  
19 that third parties who have never been in a court proceedings  
20 ought to have the right to have the question decided either  
21 for them or against them, unless we can say that those parties  
22 were so close to the proceedings in California that they ought  
23 to be bound, and that somehow McDougal stood in their shoes.  
24 I would point out, how could McDougal stand in the shoes of  
25 the three Mexicans, when the very issue that they were

1 concerned with was the one that he's estopped to raise?

2 QUESTION: Are you going to argue the anti-injunction  
3 issue?

4 MR. KRONBERGER: Yes, sir, if I might.

5 QUESTION: Because I wonder why -- the federal court's  
6 judgment did do away with the state court injunction. Isn't  
7 that true? Didn't it?

8 MR. KRONBERGER: Not really. There were other  
9 things that the County of Imperial could have done.

10 QUESTION: Well, didn't it -- yes, but, the injunc-  
11 tion was lifted. It was rendered unenforceable by the judg-  
12 ment.

13 MR. KRONBERGER: It was rendered unenforceable in  
14 the sense that the County of Imperial was restrained from  
15 enforcing the regulation. It seems to me that McDougal's  
16 duties --

17 QUESTION: Why do you say that doesn't violate the  
18 Anti-Injunction Act?

19 MR. KRONBERGER: Well, okay, I rest on Hale v.  
20 Bimco, number one. I think the holding in Hale v. Bimco in  
21 this Court is that third parties simply are not bound by  
22 2283. This Court in Mitchum v. Foster said that the test to  
23 determine the applicability of 2283 is to look back at the  
24 law as it existed before Toucey v. New York. Mr. Justice  
25 Frankfurter wrote Toucey v. New York and Hale v. Bimco, as



1 well as footnoted Hale v. Bimco.

2 QUESTION: Well, they may not be bound, they may not  
3 -- perhaps the injunction doesn't apply to them, but that  
4 doesn't mean the injunction shouldn't continue to apply to  
5 the person to whom it applies, namely, McDougal.

6 MR. KRONBERGER: Well, that's exactly what happened,  
7 though, in Hale v. Bimco. Hale v. Bimco is on all fours with  
8 this case. The State of Florida sued Hale and said, enforce  
9 this interstate regulation. It went to the Florida Supreme  
10 Court and the Florida Supreme Court after demur said, yes,  
11 that's constitutional. Bimco Trading Company, third parties,  
12 come in, sue Hale, say, don't enforce that; I want an injunc-  
13 tion barring you from enforcing it. The Federal District Court  
14 issues it, the Florida courts stay proceedings as have the  
15 courts in California, in deference to a final determination of  
16 the federal issue. And in that decision the Court held, in  
17 Hale v. Bimco, that third parties are not bound by the provi-  
18 sions of the anti-injunction statute and proceeded to render  
19 unconstitutional the particular regulation in question and said  
20 that they found it very hard to do so after it had been decided  
21 constitutional by the highest state court of Florida, but they  
22 felt that they had to do it. I would say that --

23 QUESTION: It's at least clear that the result of  
24 this federal judgment is that the state court injunction is  
25 unenforceable against McDougal.

1 MR. KRONBERGER: It's unenforceable to the extent  
2 that McDougal has commenced selling of water, and I'm not sure  
3 what the status of that injunction is anymore, after the some-  
4 what delphic contempt order issued by the state courts.

5 QUESTION: Well, what exception to the Anti-Injunc-  
6 tion Act do you think this falls under?

7 MR. KRONBERGER: I've said, first of all, the anti-  
8 injunction statute doesn't apply because of Hale v. Bimco and  
9 the policies of federalism underlying that. Secondly, though,  
10 if we are going to say that the anti-injunction statute applies  
11 we have pled this case in the context of a civil rights pro-  
12 ceeding. I believe that in that sense that Mitchum v. Foster  
13 provides the exception there.

14 I think that to hold 2283 applicable in this case  
15 we're going to have to seriously diminish the holding in Hale  
16 v. Bimco, or overrule it. And I would submit that the princi-  
17 ples of federalism that this Court has announced in a series  
18 of cases don't warrant it in this particular fact. One of the  
19 principles that we look at in the question of enjoining a state  
20 court, when we say, you shouldn't, is we want to allow the  
21 state courts to try the cases before them free from inter-  
22 ference by federal courts. There is no proceeding pending in  
23 a state court of California wherein this constitutional issue  
24 is going to be interfered with by any Federal District Court.  
25 The state courts have deferred to the federal courts with

1 respect to the issue. They have not interfered, so that par-  
2 ticular policy does not require 2283 to be applied in this  
3 case.

4 QUESTION: But in Hale, didn't the Supreme Court of  
5 Florida stay all further proceedings in the state courts pend-  
6 ing determination by this Court?

7 MR. KRONBERGER: Yes, it did, and I think that  
8 that's exactly what happened in this case. First of all, the  
9 Superior Court, as I said, in a delphic order it said to  
10 McDougal, McDougal, you're ordered to stop selling water 30  
11 days after the 9th Circuit judgment against you becomes final,  
12 and if the County loses in the 9th Circuit the thing is stayed  
13 until resolution on appeal.

14 QUESTION: But the Supreme Court of California never  
15 said that?

16 MR. KRONBERGER: It went to the Court of Appeals  
17 because McDougal filed a writ of mandate when he was found in  
18 contempt. It went up to the District Court of Appeals in  
19 California and the District Court of Appeals has stayed any  
20 proceedings with respect to the contempt against McDougal,  
21 pending the outcome of this decision in this Court, so far as  
22 even citing the case. And it seems to me that the two courts in  
23 California have specifically deferred.

24 QUESTION: But not the highest court?

25 MR. KRONBERGER: Well, in order to get a deferrance



1 from the highest court, the Court of Appeals would have had to  
2 turn down McDougal's writ of mandamus and then he would have  
3 gone to the state court. The Florida thing is a little dif-  
4 ferent in Hale v. Bimco because you were dealing in a situa-  
5 tion of original jurisdiction in Florida. The original  
6 action was brought in the Florida Supreme Court by virtue of  
7 some statutes in Florida which allowed initial proceedings in  
8 the Supreme Court there. We couldn't -- McDougal could not  
9 get to the California Supreme Court, absent denial of relief  
10 at the Court of Appeals level, and he was granted that relief.  
11 It seems to me that the policy that we talk about is when  
12 we're in doubt about issuing an injunction we're to resolve  
13 that doubt in favor of allowing the state court proceedings to  
14 proceed in an orderly manner to a final decision on the merits.

15 There are no state court proceedings proceeding any-  
16 where with respect to getting us a decision on the merits of  
17 the simple question provided by these three Mexican nationals:  
18 is the export ban constitutional or not? It's not proceeding  
19 in any court in the State of California. And I think that when  
20 we look at 2283, it uses the word "pending proceedings."  
21 And I think that those phrases have to have some meaning of  
22 currency, something in the present tense that must be occurring.  
23 In this case there is no California court contending that the  
24 regulation is constitutional or unconstitutional. It's not  
25 before any California court. The only parties contending that

1 the regulation is a constitutional exercise is the County of  
2 Imperial. It seems to me that we have not violated any prin-  
3 ciples of federalism when a third party comes in under this  
4 Court's decision in Hale v. Bimco and there is no decision  
5 or proceeding going forward in the state court, we simply have  
6 not violated those principles of federalism on which 2283 rests.

7 QUESTION: Was there any proceeding pending in the  
8 Florida courts?

9 MR. KRONBERGER: I'm sorry, I didn't hear that.

10 QUESTION: Was there a proceeding pending in the  
11 state courts in Hale?

12 MR. KRONBERGER: Yes, there was. In fact, in Hale --  
13 well, pending in the sense that it was commenced and in Hale  
14 the Florida Supreme Court stayed those proceedings, awaiting  
15 result on the constitutional issues from this Court. So in  
16 that sense I think it was pending. They had brought a suit in  
17 Florida to specifically enforce the regulation in question.

18 QUESTION: But your argument here is there's not  
19 even that much of a proceeding pending in the California  
20 courts?

21 MR. KRONBERGER: No California court is considering  
22 the constitutionality of the ban in question. The California  
23 Supreme Court has just simply said, we're not going to decide  
24 it. And then they footnote us to Altus, Oklahoma, v. Carr,  
25 which seems to say that the particular export ban is

1 unconstitutional. They hint at it; they don't come out and  
2 say it. I think we have a policy underlying 2283 of avoiding  
3 duplication of legal proceedings when a single suit could  
4 satisfy the interests of the parties and all the issues could  
5 be resolved.

6 There is only one single suit in which the interests  
7 of the parties can be resolved and the questions answered,  
8 and that's the suit that is here today.

9 QUESTION: Well, res judicata avoids duplication of  
10 legal proceedings too, does it not?

11 MR. KRONBERGER: I think I would agree with you on  
12 that. As a matter of fact, the more I thought about the 2283  
13 issue, the more I came to believe that when you're dealing with  
14 third parties 2283 is not applicable and you're dealing with  
15 principles of res judicata because the analysis that you would  
16 go through in res judicata ought to answer most of the ques-  
17 tions that deal with 2283. So that that would reinforce in my  
18 view this Court's holding in Hale v. Bimco, that 2283 does not  
19 apply to third parties.

20 Because when we have third parties, I think we're  
21 talking about res judicata. I would agree with  
22 that.

23 QUESTION: Did you say earlier, Mr. Kronberger, did  
24 I understand you to say, correctly, that you've cast your  
25 lawsuit as a 1983 lawsuit?



1 MR. KRONBERGER: We couched our lawsuit in civil  
2 rights terms indicating --

3 QUESTION: I see a reference here to 1981.

4 MR. KRONBERGER: I was getting to that. It says,  
5 1981, there. I think the rule in the federal courts is notice  
6 pleading, and I think that as we have spelled it out in that  
7 cause of action it can be read as a civil rights cause of  
8 action under 1983 --

9 QUESTION: Because you talked about the applicability  
10 of the doctrine of Mitchum v. Foster.

11 MR. KRONBERGER: That's correct, and had I to do it  
12 over again today, I would like to change the "1" to a "3" to  
13 make that point more explicit. But you're correct; it says  
14 "1" in the pleadings, but the pleadings are couched in the  
15 terms, I think, of the Civil Rights Act and I do believe the  
16 courts have held pleaders to specific numbers when dealing  
17 with civil rights actions.

18 We have alleged that there is much more to this  
19 than meets the eye. In that fact, I would just turn your  
20 attention to page 90, 91 of the Appendix, so that we can see  
21 what kind of local interests are involved. The minutes of the  
22 hearing, when the particular export ban was placed on the  
23 property, the attorney for the predecessor in interest,  
24 Mr. Sands, he says, Mr. Sands --

25 QUESTION: You're talking about the footnote here?

1 MR. KRONBERGER: Yes, 91a. Those are the minutes of  
2 the proceedings before the Board of Supervisors and the Plan-  
3 ning Commission. "Mr. Sands questioned if he would be in  
4 favor of a limited period of time as previously requested, up  
5 to 12-31-68." That's to allow the continuation of sale of water  
6 to Mexico, and a statement that it would not increase the  
7 amount of water exported from the County of Imperial; it would  
8 be the same amount of water. Response: "Chairman Kilgore  
9 stated that in regard to a temporary period of time five  
10 minutes would be too much." Yes, we have alleged civil rights  
11 allegations in this case, so that it is more than simple  
12 interstate commerce. And if we are going to apply 2283, I  
13 believe we're within an exception to that.

14 I think that, 2283, the final outcome of 2283 being  
15 applied in this case is simply going to be to divest Federal  
16 District courts of diversity jurisdiction in this circumstance.  
17 You are going to be saying, go to the state courts.

18 QUESTION: Well, it isn't diversity jurisdiction.  
19 If you really mean what you say, you're raising -- it's a  
20 federal question case.

21 MR. KRONBERGER: It's a federal question case and  
22 the ultimate result of 2283's application would be to tell a  
23 plaintiff such as the plaintiffs here, the respondents, to  
24 bring these questions in a state court because --

25 QUESTION: Well, that's what --

1 MR. KRONBERGER: 2283 would bar you from injunc-  
2 tive relief.

3 QUESTION: That's what the Anti-Injunction Act does  
4 in cases to which it applies, that -- it says if you want to  
5 get the injunction set aside, go raise your federal issues  
6 in the state court.

7 QUESTION: Which issued the injunction.

8 QUESTION: And you could have done that, you know;  
9 you still could.

10 MR. KRONBERGER: Well, we could go to a state court  
11 but I think the parties --

12 QUESTION: To the, to the Superior Court and say --

13 QUESTION: The court that issued the injunction.

14 MR. KRONBERGER: Well, we would have had to have  
15 brought a new lawsuit. The result of that would be 2283 does  
16 not say, thou shalt continue your pending lawsuits. It  
17 says, thou shalt leave federal court and just start a new  
18 lawsuit.

19 QUESTION: What did the Superior Court, how did the  
20 Superior Court rule on your claims originally?

21 MR. KRONBERGER: I have no claims -- we have never  
22 been in the Superior Court.

23 QUESTION: Well, where did you start -- did you start  
24 the case -- where did you start the case?

25 MR. KRONBERGER: I started this case in the Federal



1 District Court.

2 QUESTION: No, no. Where did McDougal litigate?

3 MR. KRONBERGER: McDougal was hit with an injunctive  
4 and declaratory relief by the County of Imperial from the  
5 Superior Court.

6 QUESTION: But he defended on constitutional  
7 grounds, didn't he?

8 MR. KRONBERGER: And the Superior Court said, no,  
9 the export ban is not with respect to interstate and foreign  
10 commerce.

11 QUESTION: So the views of the State Superior Court  
12 are well known?

13 MR. KRONBERGER: Yes, the State Superior --

14 QUESTION: So, if you went to the state court, you  
15 know what the judgment would be in the Superior Court, but  
16 then you may not be bound in the State Supreme Court?

17 MR. KRONBERGER: That's correct but I would just  
18 for the record say, my clients don't want to be in the state  
19 court. They have a right to access to the federal court and  
20 for a variety of reasons choose not to be in the state court.  
21 Following the line of what happened, McDougal was first told  
22 that the restriction was land use oriented and did not burden  
23 interstate commerce. It got to the Court of Appeals and this  
24 California Court of Appeals said, it's patently unconstitu-  
25 tional, it burdens interstate commerce, and they declared the

1 entire conditional use permit void. And McDougal was left with  
2 nothing. McDougal appealed to the California Supreme Court,  
3 which sidestepped the issue of what happens in California with  
4 respect to a conditional use permit which has an unconstitu-  
5 tional condition attached to it, it sidestepped it by saying,  
6 you're estopped. And that makes, I think, a good deal of sense,  
7 because there are thousands of restrictions on conditional  
8 use permits in the State of California, very few of which  
9 probably rise to the dignity of a constitutional challenge,  
10 and I don't think California courts wanted to open their courts  
11 to those kinds of challenges.

12 QUESTION: Did McDougal petition for certiorari to  
13 this Court?

14 MR. KRONBERGER: Yes, he did and this Court deter-  
15 mined that the estoppel was an independent state grounds upon  
16 which the judgment might rest. Yes, he did.

17 I would like to just, briefly at the end, say that  
18 the federal policies that would be thwarted by application of  
19 2283 -- and I think the implicit overruling of *Hale v. Bimco*,  
20 will be to tell plaintiffs that 2283 may be used as a forum  
21 shopping tool by the respondent or defendant. All they need  
22 do is raise 2283 to a third party and that third party who  
23 has never been in a state court -- he's told, gee, you should  
24 have started your lawsuit in a state court when we had a fed-  
25 eral question with diversity jurisdiction.

1           In conclusion, I would suggest that to apply 2283  
2 to third party non-litigants would elevate the provisions of  
3 that section against the basic fundamental notion and concept  
4 that parties ought to be given their day in the court of their  
5 choice and with respect to federal questions they ought to be  
6 able to bring federal questions to a federal court to litigate  
7 it. I don't think that Congress ever intended that parties  
8 who were not participating in state court proceedings should  
9 ever be denied injunctive relief in a federal court when it is  
10 properly brought before that court. Thank you.

11           MR. CHIEF JUSTICE BURGER: Do you have anything fur-  
12 ther, Mr. Harmon?

13           MR. HARMON: Briefly, Mr. Chief Justice.

14           ORAL ARGUMENT OF JAMES H. HARMON

15           ON BEHALF OF THE PETITIONERS -- REBUTTAL

16           MR. HARMON: I do wish to dispute counsel's assertion  
17 that he has pled a 1983 action. I've reviewed the pleading  
18 carefully. I only find one reference to the Civil Rights Act,  
19 and that starts at page 19. That cause of action is the cause  
20 of action pled against McDougal, as I read it, for breach of  
21 contract. There is no reference whatsoever to 1983 as a possi-  
22 ble exception to the Anti-Injunction Act.

23           Furthermore, at page 121 of the Appendix the Court  
24 may notice that a notice of reliance on a broader claim was  
25 filed by the respondents here. I guess that's kind of an



1 amendmemt to the pleading. Neither was 1983 mentioned in that  
2 notice of reliance on a broader claim.

3 QUESTION: That's a "1." Had they at any time tried  
4 to change the "1" to a "3" --

5 MR. HARMON: No, sir.

6 QUESTION: -- until just now?

7 MR. HARMON: No, Your Honor, they have not.

8 MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.  
9 The case is submitted.

10 (Whereupon, at 2:22 o'clock p.m., the case in the  
11 above-entitled matter was submitted.)

12 MILLERS FALLS  
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North American Reporting hereby certifies that the attached pages represent an accurate transcript of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

No. 79-1003

County of Imperial, California, et al.,

v.

Guillermo Gallego Munoz, et al.

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY: WJW  
William J. Wilson

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