

In the

Supreme Court of the United States

GERMAIN H. BALL ET AL.,

Appellants

v.

ROLAND W. JAMES ET AL.

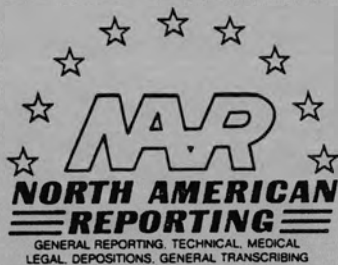
)
)
)
)
)
)
)

No. 79-1740

Washington, D.C.
February 23, 1981

Pages 1 through 53

ORIGINAL



202/544-1144

IN THE SUPREME COURT OF THE UNITED STATES

GERMAIN H. BALL ET AL.,

Appellants

v.

ROLAND W. JAMES ET AL.

No. 79-1740

Washington, D.C.,

Monday, February 23, 1981

The above-entitled matter came on for oral
argument before the Supreme Court of the United
States at 10:03 o'clock a.m.

APPEARANCES:

REX E. LEE, ESQ., 2840 Iroquois Dr., Provo,
Utah 84601; on behalf of the Appellants

BRUCE E. MEYERSON, ESQ., Arizona Center for Law
in the Public Interest, 112 North Fifth Avenue,
Phoenix, Arizona 85003; on behalf of Roland
James et al.

E Z E R A S E

C O N T E N T S

ORAL ARGUMENT OF

PAGE

REX E. LEE, ESQ.,
on behalf of the Appellant

3

BRUCE E. MEYERSON, ESQ.,
on behalf of Appellees

23

REBUTTAL ORAL ARGUMENT OF

REX E. LEE, ESQ.,
on behalf of the Appellant

50

-- --

E Z E R A S E

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in Ball against James.

Mr. Lee, you may proceed whenever you are ready.

ORAL ARGUMENT OF REX E. LEE, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. LEE: Mr. Chief Justice and may it please the Court:

The issue in this case is the constitutionality of the acreage based tele electoral system of the Salt River Project Agricultural Improvement and Power District.

Salt River Project is today, and it always has been, a federal water reclamation project. It's first owner and operator was the United States of America. The Salt River Valley Water Users Association, which is a private corporation organized under the laws of the Territory of Arizona, was formed in 1903 as the entity which could perform the statutory function of guaranteeing the repayment into the reclamation fund of the initial costs advanced by the United States. One of the obligations imposed on the Association by the United States in the initial 1904 contract between the two was the commitment that the only beneficiaries of the Project's water storage and development activities would be the landowners, who had subscribed their lands into -- membership in the Association. And that obligation, imposed on the

EZ ERASE

1 Association by the United States, is still in effect. So
2 that from the beginning, the benefits of this Project have
3 been proportionate to land ownership.

4 In 1917, the role of the Association changed from
5 guarantor to operator and for the next 20 years the care,
6 operation, maintenance and control of the Project were vested
7 in this private corporation. In 1937, the District was
8 brought into being by the landowners of the Association as
9 an agricultural improvement district, which under the laws
10 of the state of Arizona, is a political subdivision of the
11 state.

12 Prior to the creation of the District, the Asso-
13 ciation and its members had experienced severe financial
14 difficulties and the primary purpose of the District was
15 to give the Project a better interest rate on its bonds by
16 making that interest tax-free. Over the decades, since 1937,
17 the District has changed in several ways. And the most
18 important of those changes, for present purposes, are two:
19 the first is that though the physical boundaries of this
20 District and Association have remained the same, the number
21 of people living in those boundaries has increased so that
22 the number of landowners entitled to use the water stored
23 and developed by the Project, as well as the number of elec-
24 tric customers, has increased.

25 And the second change is reflected in a pair of

E Z E R A S E

1 statutory amendments in 1969 and 1974, through which the
2 Arizona legislature has significantly increased the extent of
3 small landowner influence in the election to board of direc-
4 tors. The 1969 change eliminated the formerly existing one
5 acre limitation as a condition for the franchise, and the
6 1974 change expanded the board from 10 to 14 with the further
7 provision that those four additional members of the board of
8 directors would be elected at large, on a one landowner/one
9 vote basis.

10 But even more important than how the District has
11 changed is how it has not changed. It still serves raw
12 water to the same lands, the number of persons benefitted has
13 changed but its purpose and function have not. The Arizona
14 Supreme Court has held and the parties to this case have
15 stipulated that the primary purpose of the Salt River Project
16 is today and always has been, the storage, development and
17 delivery of raw water for the benefit of those landowners
18 who were willing to risk their property in order to bring it
19 into existence. Now the Appellees take a different view of
20 the significance of these changes in the number of people
21 served by the Project. They contend that the significance
22 of this increase in population is that the District has
23 effectively been converted into the equivalent of a city.
24 And they refer, for example, to the District's city-like
25 status and have asserted that it has all the attributes of

1 sovereignty.

2 Two comments with respect to this view are appro-
3 priate. The first is that this view is absolutely essential
4 to their position. The second is that it is squarely incon-
5 sistent with controlling holdings of the Arizona Supreme
6 Court. Because the Arizona Supreme Court has ruled, and I'm
7 quoting, "that the District's function is purely business and
8 economic and not political and governmental, and that it's
9 limited governmental attributes have been conferred for the
10 purpose of better enabling it to function and accomplish the
11 business and economic purpose for which it was organized."

12 The significant point is that this pivotal issue is
13 an issue of Arizona law, out of the entire panoply of
14 governmental powers and governmental functions that any
15 entity might have, the issue is how many are enjoyed by this
16 creature of Arizona law, this Agricultural Improvement Dis-
17 trict. And the answer has been supplied by the Arizona
18 Supreme Court; only those incidents of public-ness, of
19 governmentality, that are absolutely essential in order to
20 enable the District to perform its proprietary business
21 economic activities. What this case really involves is state
22 encouragement of private investment in water reclamation.

23 Which, I submit, is a most appropriate endeavor
24 for an arid state like Arizona. But it's our position that
25 there's nothing in the United States Constitution that says

E Z E R A S E

1 that Arizona can't do that. And we also believe that that
2 is the thrust of this Court's decision in Salyer v. Tulare
3 Lake Basin Water Storage District.

4 QUESTION: There's nothing in the Constitution that
5 says Arizona can't do what? I didn't quite hear you.

6 MR. LEE: Cannot encourage private investment in
7 water reclamation. In other words, Arizona has an interest
8 in seeing to it that water reclamation be carried out. And
9 what it has done through these statutes is to encourage pri-
10 vate investment in that water reclamation by assuring that
11 those who make the investment will be entitled to keep the
12 fruits of their investment.

13 QUESTION: And the principal way by which Arizona
14 has done that is by making this a governmental entity, is
15 that --

16 MR. LEE: By making it a governmental -- well, it
17 makes it a governmental entity for the purpose of making
18 its -- for very limited purposes -- and the very limited pur-
19 pose, as the Arizona Supreme Court has said, is in order to
20 allow it to carry out its economic objectives. Now, its
21 economic objectives are to permit it to generate some income
22 which in turn can be used for reclamation purposes, in order
23 to conserve, store and deliver water.

24 QUESTION: It had the power to condemn before this,
25 didn't it?

1 MR. LEE: By virtue of Arizona statutes, Justice
2 Stewart, ARS, Section 121111, virtually any entity in the
3 state of Arizona has the power to condemn.

4 QUESTION: And Mr. Lee, does the state regulate the
5 rates charged for electricity in any way, directly or indir-
6 ectly?

7 MR. LEE: No. The Secretary of the Interior does
8 have the power to review and revise those rates. The state
9 has the power to regulate in other ways, but our position on
10 that is that there is nothing in the Constitution, again, that
11 says that the state must set the rates for any entity that
12 performs a public function, a public-type function, a public
13 service function, such as electricity.

14 QUESTION: The state does regulate the electric
15 rates of private utilities, doesn't it?

16 MR. LEE: That is correct, that is correct.

17 QUESTION: And under the existing legislation,
18 could the state regulate the rates of this District?

19 MR. LEE: There is some question about that, Justice
20 Powell. It is possible that it might take a constitutional
21 amendment which would involve state legislation followed by a
22 vote of the people. But the most important point is the one
23 to which you allude. And that is, that the state legislature
24 has a very active interest in the activities of this District
25 precisely because its numbers are large. Seventeen of the

30 districts, of the 30 legislative districts in the state of Arizona, are located either in whole or in part, 8 in whole, and 9 in part, within the physical confines of the Salt River Project. Fifteen times in the last 17 years, the statutes dealing with this District have been changed by the Arizona legislature.

The results have not been to gouge the electric customers.

QUESTION: Mr. Lee, I think you said earlier that whether or not it may regulate rates, there are other respects in which the state may regulate --

MR. LEE: Yes. Power plant siting, for example, is subject to regulation; its bonds are subject to periodic review, it is subject to the Public Utilities Regulatory Policies Act, which is a federal act --

QUESTION: Bonds are subject to periodic review in what sense?

MR. LEE: By the Arizona Corporation Commission which is the same entity which sets the rates for private corporations.

QUESTION: Is that the issuance or terms or what?

MR. LEE: The statute doesn't specify, in fact, it has been matters related to the bonds that have been reviewed by the Arizona Corporation Commission. But the point that I want to make is that the real significance of this

1 change in increase in population is what Justice
2 Powell, your opinion for the Court said in San Antonio School
3 District v. -- the closing line, in the Rodriguez case, is
4 that these are the kinds of matters that ought to be left
5 to the legislature and to the democratic pressures of those
6 who elect them. Because it's an easy enough matter to change,
7 whether through statute or through constitutional amendment,
8 and constitutional amendment in Arizona is not the impediment
9 that it is in the -- of the United States Constitution --

10 QUESTION: To amend the state constitution, it has
11 to be proposed by the legislature and then voted --

12 MR. LEE: That is correct, proposed by the legis-
13 lature, but voted on by the people at the following election.

14 QUESTION: And a simple majority --

15 MR. LEE: And a simply majority, in both instances,
16 or it can be done by initiative.

17 QUESTION: And then you are arguing that it's
18 easy?

19 MR. LEE: Well, it is certainly, Justice Marshall,
20 not the task that it has been to amend the United States -- to
21 amend the United States Constitution. But the mechanism is
22 there, and as this entity becomes more and more open-eyed,
23 so also do the Democratic pressures of those who elect the
24 elected legislators increase.

25 And the other point to make is that over the years,

1 though the rates have not been subject to regulation by
2 the Corporation Commission, neither have they been excessive.
3 They have always been comparable to the rates set by Arizona
4 Public Service, which is the other public utility operating
5 within the same general area. And there is nothing that
6 says regulation is expensive and it's -- it takes time. There
7 is nothing in the -- Munn v. Illinois said that the state has
8 the power to regulate entities affected by the public inter-
9 est if it chooses to do so. Munn v. Illinois nor any other
10 case has said that the state has an obligation to impose
11 such regulation. And if the state wants to say, all right,
12 we're going to have one entity whose rates are set and another
13 entity whose rates are not. And then we're going to monitor
14 it and see if there are any abuses. And it observes that
15 over a period of 40 or 50 years there have not been abuses,
16 then there is no reason for judicial management, judicial
17 regulation, under the aegis of constitutional adjudication,
18 to upset that kind of arrangement.

19 QUESTION: Then Mr. Lee, what kind of governmental
20 powers does the Project exercise now?

21 MR. LEE: The Supreme Court has said only those
22 that are absolutely necessary to enable it to carry out its
23 business purpose. It is, it has the power to tax but has
24 never exercised it, and it never would because it is con-
25 tractually obligated to ask the Association to impose its

1 acreage assessment power instead of the taxing power. Its
2 bonds are tax-exempt.

3 And that's about it. Now it's true that it has the
4 power of eminent domain, but so does Arizona Public Service
5 and so does Sears, as -- under the laws of the State of
6 Arizona. And that brings us back to this question of the
7 governmental function and governmental -- because it's
8 limited -- governmental purpose, the first test, under Salyer.
9 It really gets much closer, indeed we say that this case
10 follows a fortiori from Salyer, because the only differences
11 between this case and Salyer are in the increased numbers of
12 people. And the only significance in the increased numbers
13 of people are simply that the ability of the people to get
14 their views effected by the legislature in the event that
15 the views are really different from those of the management
16 of the District, are much more effective, simply because the
17 numbers are larger. In Salyer, you had one corporation that
18 had a virtual hammerlock over the entire corporation; an
19 election wasn't even held for 23 years. By contrast, the
20 people who live within this District really control the
21 legislature, and if they want changes they can have them
22 made.

23 QUESTION: Salyer did not involve the generation
24 of electricity?

25 MR. LEE: That is correct, that is correct. It

1 did not involve -- they had the power to do it but they did
2 not do it.

3 QUESTION: Did not.

4 MR. LEE: And in our view, the only significance
5 there is simply that that's the way that they make the money
6 that makes the reclamation --

7 QUESTION: And how many electric utility customers
8 are there in this case?

9 MR. LEE: There are over 300,000; there are about
10 320,000, I believe.

11 QUESTION: And how many beneficiaries of the -- how
12 many voters --

13 MR. LEE: How many voters? The technical answer
14 to that is around 210, around 220 thousand, in the sense of
15 acres that are voted. Now some of those are broken down into
16 portions of acres so that people may -- may vote fractions of
17 acres.

18 QUESTION: How many people are voters?

19 MR. LEE: Well, I'm not certain that I know the
20 answer to that question, but it would be more than --

21 QUESTION: Well how many, do you know how many
22 votes -- you must know how many votes were cast in the last
23 election?

24 MR. LEE: Yes. I do know that. But it was a
25 fairly small fraction of the --

1 QUESTION: Total number of people entitled to vote?

2 MR. LEE: Of the total eligible --

3 QUESTION: Voters?

4 MR. LEE: Of the total eligible voters. It was on
5 the order of somewhere around 10 or 20 thousand, 10 or 20
6 thousand people.

7 QUESTION: Could you tell me what remedy the Ninth
8 Circuit envisioned? Or did it envision any --

9 MR. LEE: No, I can't. They simply held that
10 this scheme was unconstitutional. And --

11 QUESTION: What were -- well, I suppose I should
12 ask your colleague, and I will -- what remedy he had in mind?

13 MR. LEE: Well, I think I can answer that. His
14 brief says, and we agree in this respect, that in the event
15 that the Ninth Circuit were to be affirmed, we think that
16 it ought to go back to the Arizona legislature.

17 But that, in itself, demonstrates why it ought not
18 be affirmed, because the Arizona Supreme Court has already
19 made its judgment as to what the answer ought to be in this
20 case. And these matters, the issues that are involved here
21 in this case, are really fundamentally economic, and resource
22 allocation issues. They are issues like how extensively
23 should the state permit nuclear fossil fuel generation. How
24 heavily should the states be involved in flood control and
25 should any flood control responsibility be vested in a

1 project whose mission is to conserve water rather than to
2 get rid of it? Those are the kinds of decisions --

3 QUESTION: Excuse me. Before you leave the point,
4 you said there were about 300,000 customers. How many of
5 those lived in the District?

6 MR. LEE: All but about 15 percent, Justice Stevens.

7 QUESTION: About 15 percent. Thank you.

8 MR. LEE: The case is similar in this respect to the
9 San Antonio School District case where the majority of this
10 Court pointed out that what was really involved in that case
11 more basically than equal protection, were matters of fiscal
12 and economic policy, which lie within the responsibility and
13 the expertise of state legislatures rather than this Court.
14 And the same is true here, as is very apparent from the amici
15 brief. This fight is really over electric rates, flood
16 control and nuclear and fossil fuel generation. And those
17 are matters that lie within the prerogative ultimately of
18 the Arizona legislature and if there are changes that need
19 to be made in that respect, the changes can be made. And
20 that -- excuse me --

21 QUESTION: Are you saying that under the Arizona
22 constitution the legislature could forbid all nuclear power?

23 MR. LEE: Oh, I think so. I think so. I think that
24 would lie within their police powers.

25 QUESTION: They could do the same with fossil fuel?

1 MR. LEE: I think that is correct.

2 QUESTION: But you're not saying, I gather, Mr.
3 Lee, that the Arizona legislature could transfer the voting
4 power from the landowners to the electrical consumers,
5 are you?

6 MR. LEE: I'm not sure, Justice Brennan. I've
7 thought about that one; it does raise serious constitutional
8 questions. Fortunately, it's an issue that this Court need
9 not reach in this case. Because the Court has held in
10 the United States v. Vuitch and many others, that in those
11 kinds of cases you will decide in such ways as to avoid con-
12 stitutional issues of that type, rather than to raise it.

13 QUESTION: I'm a little puzzled, frankly, and per-
14 haps I have the same difficulty Justice White does, don't
15 we necessarily have to know what the class is that's entitled
16 to equal treatment? This is an equal protection case, isn't
17 it?

18 MR. LEE: That is correct.

19 QUESTION: And some way -- if your opponent is
20 right, all members of whatever class it is are entitled to
21 equal right to vote, whether they are all consumers or all
22 residents or all property owners; don't we have to know what
23 the theory of the violation is and won't that dictate the
24 the remedy?

25 MR. LEE: I've been searching for the theory of the

1 violation in this case for some time, Justice Stevens, and
2 I hope that Mr. Meyerson will respond to that. He's the
3 Plaintiff here and that's his burden. Our contention is that
4 they are being treated with respect to any relevant interest
5 that you can identify, there is no difference in treatment
6 between electric customers -- and that's the only status in
7 which they appear -- and the customers of Arizona Public
8 Service. To the extent that there is an objection to fossil
9 fuel and nuclear generation, there is the same objection that
10 can be raised by Arizona Public Service customers. To the
11 extent that its electric rates, those electric rates are
12 identical with the ones that are being charged by Arizona
13 Public Service customers.

14 QUESTION: Well Mr. Lee, we are reviewing a judgment
15 for the Ninth Circuit, not some plaintiff's views;
16 what do you think the violation was the Ninth Circuit found?

17 MR. LEE: Well --

18 QUESTION: How did it, you can read its opinion.
19 What do you think it said?

20 MR. LEE: I think that what the Ninth Circuit
21 said was exactly what the Plaintiffs are saying, as I understand them,
22 that because of the changes in size that the
23 District has taken on a different kind of function that has
24 made it something like a city. And for that reason, we treat
25 it like a city, unlike the situation in Salyer --

1 QUESTION: Well wasn't it any more specific than
2 that?

3 MR. LEE: What it said is, that these functions
4 have acquired an independent significance of their own, and
5 I have to read it -- I have to read that into that -- I am
6 not --

7 QUESTION: What functions? What functions? Supply-
8 ing power and developing water?

9 MR. LEE: Yes, yes sir. And I say that that is in-
10 adequate for this reason: that if you look at the -- the
11 decisions of this Court, starting from the state legislature
12 end of the spectrum, it has come as far down into the total
13 complex of state and local governmental entities as the
14 general governing body of a county in Avery, of cities and
15 school boards. Starting from the other end, those entities
16 as to which the -- which this Court will defer to the legis-
17 lative judgment, it has come as far as water conservation dis-
18 tricts. Now the one distinction, the thing that distinguishes
19 the School Boards in that respect is that this is -- that is
20 the only instance in which this Court has applied the Reynolds
21 v. Sims rationale, to an entity that does not exercise general
22 governmental power, that is, such as a city or a county
23 that has general power over an entire geographic area. The
24 reason that school boards are distinctive is because of the
25 nature of the function that they perform. This Court said in

1 Brown v. Board of Education, and later in Rodriguez, that
2 today education is possibly the most important function
3 of state and local government. And so the inquiry is, how
4 central to the operation of government qua government is
5 the function? This Court has held in Hadley that education
6 is such a function, but it squarely held, if you look at the
7 function in the Salyer case and in Jackson v. Metropolitan
8 Edison, that neither water conservation nor electricity is
9 such a function.

10 QUESTION: Well I take it then, your argument
11 really is a functional one and you don't rely on the fact
12 that the landowners have special burdens to any great extent?

13 MR. LEE: To --

14 QUESTION: You'd be making the same argument if
15 there were no lien on their property?

16 MR. LEE: That is correct. That is correct. We
17 would be making the same argument if there were no lien on
18 their property.

19 QUESTION: Which there won't be one of these days,
20 right?

21 MR. LEE: Well, I'm not certain. My opponent has
22 asserted that. It is true that for the past 5 years no
23 general obligation bonds have been issued, but I am advised
24 -- you see, revenue bonds can be used only for the electric
25 service side, and there have been rather severe flood damages

1 to the dams and to the water service side, and it's possible
2 that the general obligation bonds may have to be issued again.
3 Of course, that's not --

4 QUESTION: I would -- you certainly wouldn't argue
5 that the development of water or flood control wouldn't be
6 a proper governmental function?

7 MR. LEE: Of course not. Of course not.

8 QUESTION: And perhaps in effect, do you think
9 the Ninth Circuit is saying that in a state like Arizona
10 that necessarily is a governmental operation so important
11 to everyone that everybody -- ought to vote on it or something?

12 MR. LEE: Possibly that is what the Ninth Circuit
13 is saying.

14 QUESTION: And that's in conflict with what the
15 State Supreme Court has said, is it not?

16 MR. LEE: That is concurrent with what the State
17 Supreme Court has said and I believe that it's in conflict
18 with the thrust of what this Court necessarily held in Salyer;
19 that you look to function -- and that water conservation --
20 we're not engaged in flood control, the only reason that
21 we're engaged in electric service is just to make more effec-
22 tive the flood control and the Arizona Supreme Court has also
23 held that -- and --

24 QUESTION: Well certainly no one suggests that
25 power generation is -- exclusively a public function?

1 MR. LEE: Indeed, this Court held squarely the
2 contrary in Jackson v. Metropolitan Edison.

3 QUESTION: Mr. Lee, your argument so far is that
4 -- most of your time is gone --has emphasized the limited
5 purpose requirement of Salyer. Are you going to get to the
6 disproportionate effect --

7 MR. LEE: Thank you Justice Brennan. Thank you
8 very much.

9 It would be difficult, quite frankly, even to
10 hypothesize an entity in which landowners as a group are
11 more disproportionately affected than are the owners of this
12 District --

13 QUESTION: Before you get into it, may I just ask
14 one question?

15 MR. LEE: Yes.

16 QUESTION: I gather there's about two billion
17 dollars of these general -- bonds --

18 MR. LEE: Of the total obligations, yes.

19 QUESTION: Yes. And it's only about 240 million,
20 I understand --

21 MR. LEE: In general obligations, --

22 QUESTION: Well, now, may there be a default
23 merely by a change in the voting constituency?

24 MR. LEE: I don't know. I doubt --

25 QUESTION: I mean, is there a covenant in the bonds

1 which a default --

2 MR. LEE: No, there would not be.

3 QUESTION: Well, and I gather there are covenants
4 which require the proceeds of the electrical service to be
5 applied in the payment of the general obligation. Now can
6 they -- when can you ever get to a default that means that
7 the lien on the --

8 MR. LEE: I think those general obligation bonds
9 are pretty secure and I doubt that there would be a default
10 in, virtually in any -- because the lands are very secure.

11 QUESTION: Which would trigger any lien on the
12 land?

13 MR. LEE: That is correct. They stand in first
14 place. The disproportionate effect comes from two facts:
15 the first is, the stipulated fact that the value, the assess-
16 ed value of agricultural lands within the Salt River Project
17 in the District and the Association are generally twice the
18 value of comparable, otherwise comparable lands outside the
19 District. And there is no question why. That's also been
20 stipulated. It's because of the water conservation activity
21 that has been carried out by this District. But second,
22 and from a broader perspective, this District is owned by the
23 landholders. They brought it into existence, they nursed it
24 through some very hard times, where not only the security
25 of their lands but also acreage assessments were necessary

1 to keep it going. The mistaken premise of the appellees and
2 the amici in this respect, is significant but nevertheless
3 mistaken. The amici assert that the District already belongs
4 to private owners, or to the public. It does not belong to
5 private owners. That is directly counter to the holding of
6 the Arizona Supreme Court which has said the public does not
7 own the District, instead, the owners --

8 QUESTION: Of course, the District is permitted to
9 exercise one of their prerogatives of the sovereign, namely,
10 to have its obligations be tax-free?

11 MR. LEE: That is correct. The same as are many
12 industrial entities within the State of Arizona, through
13 these industrial revenue bonds. I would like to reserve the
14 rest of my time for rebuttal.

15 MR. CHIEF JUSTICE BURGER: Mr. Meyerson.

16 ORAL ARGUMENT OF BRUCE E. MEYERSON, ESQ.,

17 ON BEHALF OF THE APPELLEES

18 MR. MEYERSON: Mr. Chief Justice, and may it
19 please the Court:

20 There are two principal issues raised by the
21 Appellants. First, whether the District is so like a busi-
22 ness that traditional constitutional principles should not
23 apply. Secondly, whether an economic subsidy to District
24 landowners is a constitutionally sufficient reason to warrant
25 acreage voting. Our remarks will address these

points. Preliminarily, it should be emphasized that in this case we are dealing with the most narrow of exceptions to this Court's consistent ruling that in cases of this kind the presumption is always in favor of equal access to the ballot.

QUESTION: Well, cases of this kind, that's kind of begging the question, isn't it? If you begin with an entity -- a subdivision of government, then that perhaps is correct.

MR. MEYERSON: That's right, Your Honor --

QUESTION: It Isn't the issue here whether this is an entity of government?

MR. MEYERSON: Well this of course is an entity of government, because it is a political subdivision of the state of Arizona, Your Honor. I think the question really becomes is it so like a business that --

QUESTION: Was the Salyer case decided on the ground that the entity there was so like a business that the rule of Reynolds v. Sims was inapplicable? Was that it's rationale?

MR. MEYERSON: No, Justice Stewart, I think the rationale of Salyer was the Court accepted the fact that there was state action because there was a political subdivision --

QUESTION: It wasn't that all based on the proposition that the entity there was so like a business, was it?

COTTON CONTENT

1 MR. MEYERSON: Well if the Court --

2 QUESTION: I haven't read it recently, but I --

3 MR. MEYERSON: I think the Court first concluded
4 that because no general public services were provided and
5 becuae there was a disproportionate effect on landowners --

6 QUESTION: Right.

7 MR. MEYERSON: A rational basis test should be
8 used to evaluate the acreage voting system, rather than
9 the compelling interest standard. So I think Salyer stands
10 for the principle that the argument that the District here is
11 much like the business and therefore no principle of consti-
12 tutional laws should be applied is incorrect. I think we are
13 entitled to an equal protection analysis regardless, we
14 suggest that it is the compelling interest analysis because
15 we don't believe that by applying the standard of the Salyer
16 case, to the facts of this case, the result in Salyer would
17 apply here.

18 QUESTION: Well Mr. Meyerson, what if the District
19 did not generate electricity, but simply engaged in flood
20 control activities under authorization from the Arizona legis-
21 aturæ and the -- it could levy unpaid assessments for that
22 purpose. Would you say it was still governæd by the one man-
23 one vote principle?

24 MR. MEYERSON: Justice Rehnquist, I would, because
25 we're not in 1903 and we're not in 1937; this is 1981, where

MILLERS FALLS

1 the Arizona legislature has recognized that ground water
2 depletion is a state-wide and local crisis in the Phoenix
3 area where there are flood control problems, where this is
4 the District that controls the water supplies for a metro-
5 politan area of 1.5 million people. This is not like the
6 Salyer case where the District there only supplied water for
7 agriculture. Now in Phoenix, the metropolitan cities
8 there receive 60 percent of their water from the Salt
9 River Project.

10 QUESTION: How many people were involved in Salyer?

11 MR. MEYERSON: There were only 77 people involved,
12 Justice Marshall, in the Salyer case. So, I think even if
13 this District was solely restricted to water delivery activ-
14 ities, the changed circumstances require a different result
15 today than had this suit been brought in 1903 or 1937,
16 because --

17 QUESTION: And which class? What is the class
18 that's being unconstitutionally treated?

19 MR. MEYERSON: The class of -- Justice Stewart,
20 the class of residents of the District who own no property
21 or only own fractional acres of property.

22 QUESTION: Not those residents who are users of
23 electricity or water?

24 MR. MEYERSON: That's correct.

25 QUESTION: But all residents of the geographical

COTTON CONTENT

1 boundaries of the District and otherwise qualified to vote,
2 correct?

3 MR. MEYERSON: That is correct. That is correct,
4 Justice Stewart.

5 QUESTION: But then, Mr. Meyerson, why does the
6 case have to go back to the state legislature? Isn't there
7 only one simple remedy, if you are right? All residents
8 have to have a right to vote?

9 MR. MEYERSON: Justice Stevens, I think that that
10 could well be the ultimate outcome, but --

11 QUESTION: Not could well be, it must be.

12 MR. MEYERSON: It must be, except the Arizona
13 legislature would have discretion, perhaps, to adopt an
14 appointed board. That in fact, has already been discussed
15 and debated by some of the legislators in Arizona, so that
16 could be an outcome. But if some type of voting structure
17 is ultimately established --

18 QUESTION: Would it be constitutional for the
19 government to appoint a committee of landowners to select
20 the board of directors?

21 MR. MEYERSON: I think this Court has held that
22 when the state adopts an appointive system of government
23 within the general terms, the states are free to do what they
24 will --

25 QUESTION: And the governor could delegate that

COTTON CONTENT

1 power to precisely the same people who are now the electors,
2 I suppose?

3 MR. MEYERSON: That would be a realm of discretion
4 left to the legislature.

5 QUESTION: You'd have a Pyrrhic victory if he did that.

6 MR. MEYERSON: Well, I hope that would not happen.
7 I'd like to emphasize that when the state delegates the
8 electoral process, that raises different constitutional
9 considerations and that's what the state of Arizona has done
10 here.

11 QUESTION: But is it just a matter of labels?
12 You call it the electoral process; one might also call it
13 the process of selecting the board of directors of this
14 entity.

15 MR. MEYERSON: Well -- I think that this Court --

16 QUESTION: And it would seem to me that you've
17 conceded that the state constitutionally could have precisely
18 the same people do the selecting.

19 MR. MEYERSON: Well the state constitutionally can
20 appoint a dentist to the dental board, it can appoint a
21 cosmetologist to the cosmetology board; when we are engaged
22 in the appointive process there is more lee-way given to the
23 state than we are -- then we have in the electoral process.
24 I think the opinions of this Court are quite clear, that
25 when the state decides that a matter is so important to

1 submit a vote to the people that that raises the constitu-
2 tional concerns --

3 QUESTION: And here, Arizona has decided this is
4 not that kind of a situation. They have decided for a
5 special method of electing these people. I don't know why
6 that's any different than saying the governor can do the
7 same thing, and constitutionally.

8 MR. MEYERSON: Well I think it is quite different.
9 Mr. Lee says that the state of Arizona should be free to
10 make decisions with respect to nuclear power generation,
11 water allocation, utility rates. Well of course the state
12 should be free to do that because the state legislature is
13 elected by the people on one person-one vote. But if the
14 state delegates those important decisions to a local group,
15 it then must provide that the election of that local group
16 must be in accordance with constitutional principles. So
17 I think there is a difference when the state delegates
18 decision-making authority to a local governmental agency and
19 provides for an election of the directors of that local
20 governmental agency. And I --

21 QUESTION: What about agricultural cooperatives
22 that are, say, furnishing a great share of the food for the
23 people of the city and -- they have elections, they ~~they~~
24 run their own business, set their own prices, -- a rather
25 vital function to be furnishing food, people have to eat.

COTTON CONTENT

1 Would you say those elections have to be open to everybody
2 who buys food?

3 MR. MEYERSON: No. Of course, Justice White, there
4 are many important activities carried on by cooperatives
5 and private businesses.

6 QUESTION: Well isn't it your theory that -- and
7 the theory of the Court of Appeals that the furnishing, the
8 development of water and its control is so important that it
9 should be considered a governmental function?

10 MR. MEYERSON: Justice White, I don't think that
11 was the holding of the Court of Appeals?

12 QUESTION: Well what's your position?

13 MR. MEYERSON: I think that in Arizona is an essen-
14 tial and important function, but I don't think that's the
15 legally determinative --

16 QUESTION: What is it, then?

17 MR. MEYERSON: The legally determinative factors
18 in this case, Your Honor, I think are that this is a polit-
19 ical subdivision created by the state of Arizona, and that
20 it's given powers and authority that substantially affect
21 people in important ways, by providing essential electric
22 and water services.

23 QUESTION: Well how much different is that than
24 what I said, except for the fact you've added that it is a
25 public entity?

1 MR. MEYERSON: I think that's a major distinction
2 in the American system --

3 QUESTION: Well -- so, but you don't say every
4 public entity that's doing anything is subject to your rule?

5 MR. MEYERSON: That's right, Justice White --

6 QUESTION: So it's a public entity that's really
7 engaged in a function that is important enough to all the
8 people?

9 MR. MEYERSON: Of course. That-- I think that's
10 what this Court's holding --

11 QUESTION: Well isn't there another relevant, Mr.
12 Meyerson, in your -- in your submission, and that is that
13 the state has set up a method of election for the people
14 who are going to run the public entity?

15 MR. MEYERSON: That's exactly right.

16 QUESTION: And you say that when that's done, it's
17 got to be on a one man-one vote basis?

18 MR. MEYERSON: That's right, --

19 QUESTION: Unless it falls within the Salyer
20 exception?

21 MR. MEYERSON: That's right. If it does not fall
22 within the Salyer exception, I think this Court's holdings
23 are clear. But --

24 QUESTION: But it's very important, is it not, to
25 your submission, that the state has set up a system of

COTTON CONTENT

1 election?

2 MR. MEYERSON: That is critical to our case; that
3 the state has adopted an election process. It has restricted
4 that election process to property owners.

5 QUESTION: Excuse me. A few minutes ago you
6 seemed to have a distinction between water being provided
7 for people in the cities to drink and other purposes, and
8 water provided for irrigation. Do you consider those on a
9 different level, one higher than the other?

10 MR. MEYERSON: Mr. Chief Justice Burger, I think
11 this Court has given some higher consideration to municipal
12 type functions such as electric and water activities in the
13 Cipriano case, because there, in a municipal bond election
14 this Court held that you could not restrict voting to property-
15 owners because the activity of the municipal utility affected
16 all citizens. Whereas in the Salyer case, because there the
17 water delivery activities had its effect solely upon the
18 landowners and the water was used for agricultural purposes
19 only, this Court permitted the acreage voting system. So I
20 think this Court has given a higher use or more important
21 use, if you will, to water uses that affect residents in
22 their capacity as citizens as opposed to farmers.

23 QUESTION: So you wouldn't be taking this position
24 if the District didn't sell water to the city?

25 MR. MEYERSON: If all the District water was used

COTTON CONTENT

1 solely for agricultural purposes, that would have an effect
2 on the merits of our case.

3 QUESTION: Well does it affect -- how much of an
4 effect?

5 MR. MEYERSON: I don't think it would have the
6 effect that it would result -- that it would change the
7 outcome, Your Honor, because here the District finances all
8 of its activities primarily through electric sales, and if
9 the electric activities have a significant impact on the
10 entire lifestyle and economic livelihood of the Phoenix
11 metropolitan area.

12 Now I'd like to address one other --

13 QUESTION: Are you suggesting that the furnishing
14 of electric power is inherently or primarily a governmental
15 function?

16 MR. MEYERSON: No, I'm not suggesting that, Chief
17 Justice Burger, at all. What I am suggesting, when it is
18 taken on by a governmental entity such as, in this Court's
19 opinion in the Cipriano decision, then this Court has said
20 because the provision of electric service is an essential
21 function that affects all citizens, it is impermissible to
22 exclude non-property-owners from voting. So I think the
23 important distinction is whether the activity is carried out
24 by government or not, and here it is carried out by a polit-
25 ical subdivision of the state of Arizona.

1 QUESTION: What would you say about a drainage
2 district in Florida that's purpose was to drain the land
3 rather than to bring water to it? It would generate no
4 electricity.

5 MR. MEYERSON: Justice Rehnquist, I think we'd
6 have to examine whether or not those drainage activities
7 had the type of far-reaching effect that that this Court
8 singled out in Salyer, that is, whether it would be a general
9 public service and perhaps it would not be in your example
10 -- but then we'd have to look at whether its activities
11 disproportionately affected the landowners as a class. And
12 if we found that there was that disproportionate effect, I
13 think we would conclude then that the one person-one vote
14 standard wouldn't apply. I'd like to address the issue
15 of whether this is really a business or whether it's a
16 political subdivision, and specifically talk about these
17 decisions of the Arizona Supreme Court.

18 Now in Arizona, the delivery of water service by
19 a municipality is called a proprietary function. Now that
20 wouldn't make it any different, I don't think, for this Court
21 to conclude that a city could not restrict voting in a bond
22 election to improve the water system to property-owners
23 simply because the Arizona Supreme Court says that it's a
24 proprietary function. Time after time, in these voting
25 cases, this Court has said it will not be bound by state

COTTON CONTENT

1 law characterizations and descriptions of what local govern-
2 ments are.

3 QUESTION: I suppose the -- that holding of the
4 Arizona law has been in connection with tort liability,
5 sovereign immunity, hasn't it?

6 MR. MEYERSON: That's right, Justice Stewart. The
7 cases are entirely different fact situations, whether or not
8 the District is authorized --

9 QUESTION: Entirely different context.

10 MR. MEYERSON: It's a different context. And I
11 think this Court has to be bound by what the District's
12 enabling act says about it and that's A.R.S. 45-902. An
13 agricultural improvement district is a public political tax-
14 ing subdivision of the state, and a municipal corporation,
15 to the extent of the powers and privileges granted by this
16 chapter or granted generally, to municipal corporations by
17 the constitutions and statutes of this state. Now that is
18 what an agricultural improvement district is, under Arizona
19 law.

20 QUESTION: Does the District have the power to
21 impose general taxes or just real estate taxes?

22 MR. MEYERSON: It is an acreage tax, Justice Stevens.

23 QUESTION: So it would have to be in acres?

24 MR. MEYERSON: That's right. There has been much
25 implication that there is some investment in this District,

COTTON CONTENT

1 that there are people who put up money, 90 or 80 years ago
2 and they should be entitled to their rewards. That is a
3 factual error and I hope the Court will pay close attention
4 to the stipulation of facts and exhibits because there is
5 nothing in this record that suggests that anyone put up
6 equity capital to support the original development of this
7 reclamation project.

8 I hope the Court will also look at the latest
9 annual report which is filed with the Clerk's office and
10 examine the balance sheet of this District. There's no
11 shareholder equity in the Salt River Project. There's no
12 capital that's been invested here. The only item on the
13 liability side of the balance sheet is debt, and that debt
14 is 90 percent revenue bonds, which are secured by the elec-
15 tric revenues. There is no financial stake that the
16 Appellants have in this District whatsoever. Even going
17 back to 1903, the Appellants' predecessors did not put up
18 any money, it was the United States that put up the money
19 in the form of loans to build the Theodore Roosevelt Dam
20 and the Granite Reef Diversion Dam. And they paid back those
21 loans and they didn't pay any interest. And that's the way
22 the Salt River Valley water users association was financed
23 originally. There is no shareholder equity. When we talk
24 about the shareholders here, every landowner within the Salt
25 River Project District that stretches across the whole Phoenix

COTTON CONTENT

1 metropolitan area, got one share per one acre of land. You
2 got a share whether you wanted one or not. If you owned a
3 piece of land you got one vote.

4 QUESTION: Excuse me, Mr. Meyerson. If -- I
5 gather that as presently constituted, the governing body now
6 allocates money to water irrigation and other water projects.
7 doesn't it?

8 MR. MEYERSON: That's right, Justice Brennan.

9 QUESTION: And some of that money, I gather, are
10 the proceeds of electric generation, is it not?

11 MR. MEYERSON: That's right.

12 QUESTION: Now suppose you had an expanded voting
13 scheme, which, as you suggest, would take in all of the non-
14 landowners in the District, could they then take that money
15 now used on irrigation projects and lower electric utility
16 rates?

17 MR. MEYERSON: Justice Brennan, I think that today's
18 -- day of inflation, lower rates are probably not in the
19 horizon, but --

20 QUESTION: I know, but could it --

21 MR. MEYERSON: It could, but I'd like to emphasize
22 that in paragraph 60 of the stipulation of facts we agreed
23 that the precise amount of the subsidy is not fixed. In
24 other words, the present landowners or water users are not
25 entitled to -- under law -- any particular level of subsidy.

COTTON CONTENT

1 The parties still --

2 QUESTION: Yes, but they now, because of their
3 voting power, don't they now control the allocation?

4 MR. MEYERSON: That's right, they --

5 QUESTION: They do, in fact.

6 MR. MEYERSON: And they do in fact.

7 QUESTION: And if they -- if there were a new
8 board elected by a district-wide constituency, I take it
9 they would say well we won't give that much to water irri-
10 gation, rather we'll reduce electrical rates.

11 MR. MEYERSON: They might do that, Justice Brennan,
12 but I'd like to emphasize that this Court has said, time
13 after time, in the Carrington v. Rash case, and in the Evans
14 V. Cornman case, that the mere fact that one group may vote
15 the way the people who are --

16 QUESTION: Well, I'm sure you recognize what I'm
17 getting at is the second element, the disproportionate
18 impact element of Salyer, whether or not that is
19 satisfied.

20 MR. MEYERSON: Well Justice Brennan. I think they've
21 turned Salyer on its head because the disproportionate
22 impact there was and it has always been in the dissenting
23 opinions of this Court, who is paying the cost of government?
24 This Court has looked at whether or not the landowners
25 were financing the District in Salyer, and concluded that

COTTON CONTENT

1 because all of the costs assessed against the -- or, the
2 District's costs were assessed against the land. And ~~and~~
3 the dissenting opinions of this Court, the emphasis has
4 always been to look at who is paying the bill. And at a
5 very minimum, this Court has said those people at least have
6 to vote. What the Appellants have now done is turn that
7 upside down, and said we're getting the benefit, because it's
8 the customers and everyone else that's paying the bill
9 through the electric rates and through the lien on the land,
10 they are now saying that just -- that acreage voting is
11 justified because they get a small economic benefit. And I
12 think we would respectfully suggest to you that out of ~~all~~
13 three billion dollar utility in a political subdivision ~~that~~
14 has 500 million dollars in revenues a year, that a ten
15 million dollar subsidy is no reason to continue to restrict
16 voting in this vital organization to landowners and by the
17 way, that means very large landowners.

18 Now, Mr. Lee was in error when he told you that
19 200,000 people vote in these elections, or that 200,000 people
20 can vote in the elections. Out of 230,000 acres of land,
21 there are only about 160,000 that are eligible to be voted
22 because the corporate-owned lands can't be voted. And that's
23 an important distinction in the Salyer decision, where Justice
24 Rehnquist recognized that there everybody could vote, whether
25 they were individual owners or corporate owners or not.

COTTON CONTENT

1 But in the stipulated facts, we pointed out that in the years
2 1970, '72 and '74, only about 400, 500 and 600 people were
3 voting and they were voting thousands of acres of land. And
4 so with a metropolitan area of one and a half million people,
5 you have literally a handful of people who have controlled
6 this important institution.

7 QUESTION: Is proxy voting permitted?

8 MR. MEYERSON: I don't believe it is, Justice White.
9 You simply have to be a qualified elector in the state of
10 Arizona --

11 QUESTION: Do you know if -- in those elections
12 where you say 400 to 600 people did the voting, how many
13 acres were voted, do you know?

14 MR. MEYERSON: I can tell you very quickly.

15 QUESTION: Well, if it's in the stipulation --

16 MR. MEYERSON: In 1970, 621 voters voted 19,000
17 acres; 1974, 900 voters voted 43,000 acres -- that was 1972,
18 excuse me, and in 1974, 561 voters voted 15,000 acres.

19 QUESTION: Do they vote at regular polling places?

20 MR. MEYERSON: They are not regular polling places,
21 Justice Brennan. You have to know where you're going if
22 you're going to find one, believe me.

23 QUESTION: And so, that's just a tiny fraction of
24 the eligible acres?

25 MR. MEYERSON: That's right. We suggest --

COTTON CONTENT

1 QUESTION: And how many -- do you know how many
2 eligible people there are to vote?

3 MR. MEYERSON: In our stipulation --

4 QUESTION: How many people are landowners?

5 MR. MEYERSON: In our stipulation, there were 359,000
6 property-owners in the District. Now --

7 QUESTION: Who all -- who would be eligible to vote?

8 MR. MEYERSON: Who would be eligible to vote, but
9 of course, most of them would be homeowners who would be
10 voting fractional votes, out of that -- we are never able to
11 identify the number of one-acre votes and above -- but those
12 359,000, I would suspect, are primarily homeowners who are
13 the people who own one-quarter and one-eighth, one-sixteenth
14 of a vote.

15 QUESTION: Well doesn't the District notify the
16 members of when and where the election is going to be held?

17 MR. MEYERSON: Justice Rehnquist, in recent years
18 they have placed ads in the paper and I believe bill stuffers
19 go out in the electric bills, but frankly as you can see
20 from the history of the voting pattern, when you ask people
21 to vote an eighth of a vote or a sixteenth of a vote, that
22 is so antithetical to democratic processes, that people just
23 don't go out and do that. And of course, it would take as
24 we pointed out in our memorandum, in the case of one of the
25 board members who owns 800 acres of land, at least he did

COTTON CONTENT

1 at the time we filed the action, it would take about 3500
2 homeowners to equal his vote, 3500 homeowners would have to
3 go to the polls to have the same voting --

4 QUESTION: Do you know how many landowners there
5 are who -- who could make up -- who would own a majority of
6 the acres?

7 MR. MEYERSON: I'm sorry, Justice White, I really
8 don't know that. I understand that in a number of the sub-
9 divisions of the District and there are ten of these divis-
10 ions, that theoretically in a number of those, if all the
11 homeowners went out and voted, they could have the same
12 number of votes as the large landowners.

13 QUESTION: It's rather strange if a very few people
14 could vote a majority of the land, it's very strange that a
15 majority of the eligible land has never been voted, appar-
16 ently? People with that much of an interest, you would think
17 would vote.

18 MR. MEYERSON: Justice White, I'm afraid that what
19 has happened over the years is that because people with very
20 large land holding -- holdings have been able to control this
21 entity by casting relatively few individual votes; that has
22 so discouraged --

23 QUESTION: Yes, but if a few landowners -- if a
24 few very large landowners, not very many, could cast more
25 than 19,000 acres, could vote more --

COTTON CONTENT

1 MR. MEYERSON: Well now, over 50 percent of the
2 land is urbanized. I frankly don't know how many large land-
3 owners there are. I suspect as we go on into the 21st
4 century that number will be declining, of course.

5 QUESTION: Well then, let's suppose that every land-
6 owner in the District owned only one -- less than an acre.
7 Then what's wrong with the voting system; it's one man-
8 one vote almost, isn't it?

9 MR. MEYERSON: I guess theoretically that might
10 work.

11 QUESTION: Theoretically, yes.

12 MR. MEYERSON: But, that hasn't happened and that
13 isn't the case.

14 QUESTION: Well I don't know, if you can't tell us
15 how many people are around in this District who own large
16 acres of land, one of your fundamental complaints is that
17 just a few people can run this District?

18 MR. MEYERSON: It's one of our fundamental practical
19 complaints; it's not one of our fundamental legal complaints.
20 As a practical matter, yes, a few large landowners can con-
21 trol the District and we would refer the Court to the exhibits
22 which are attached that indicate the resumes and the affili-
23 ations of the District board members, I think that proves our
24 point that that has happened.

25 QUESTION: But don't you say the tendency is in the

COTTON COTTEN

1 opposite direction, -- more and more subdivisions so that
2 there will be more and more one acre votes and less and less
3 large landowner votes.

4 MR. MEYERSON: I think eventually that will happen,
5 but we'll still be excluding all of the non-property owners.
6 We seem to have forgotten about them in our analysis that
7 they are also paying the bills, paying the freight, so to
8 speak, and are also benefitting from the availability of the
9 electric system and the water delivery system, I think this
10 discussion has focussed too much on the rights and roles of
11 the fractional acre owners. I think that we don't rest our
12 case on an argument that weighting the voting system is
13 wrong, we think that's offensive to the Constitution. Our
14 case is based upon the fact that property ownership is a
15 condition at all. And so the mere fact that more subdivis-
16 ions, or more homes, are built, in no way in my opinion,
17 undercuts the fundamental constitutional principle that
18 we're articulating here, and that is that non-property owners
19 should not be excluded.

20 QUESTION: How many are they, do you know, Mr.
21 Meyerson?

22 MR. MEYERSON: I'm sorry, Justice --

23 QUESTION: How many are non-property owners -- what
24 percentage are non-property owners, do we know?

25 MR. MEYERSON: Well, Justice Brennan, we don't know

1 exactly, but we do know that this -- that Maricopa County
2 has over 1 and 1/2 million people, it's the largest metro-
3 politan area in Phoenix, and the parties stipulated there
4 were substantial numbers of people and I just avow to you
5 that there are a lot of people out in Phoenix --

6 QUESTION: Who are renters.

7 MR. MEYERSON: Pardon me?

8 QUESTION: Who are renters?

9 MR. MEYERSON: Many of them are renters. I think
10 this Court can take judicial notice that in any large metro-
11 politan area there are going to be substantial numbers of
12 people who don't own property.

13 QUESTION: Two questions, Mr. Meyerson. First,
14 does the record tell us whether there's ever been an election
15 contest?

16 MR. MEYERSON: Yes, it does, Justice Stevens. There
17 are some charts that indicate in 1970, '72 and '74, where there
18 were different farmers who were running for the same seats
19 on the board, I believe there were a few contests in those
20 years.

21 QUESTION: And I take it those years there were
22 more votes than the ones --

23 MR. MEYERSON: I think that might explain it.

24 QUESTION: Yes.

25 MR. MEYERSON: Before I summarize, I'd like to

1 address another point which Mr. Lee made, and his implication
2 that this case is really an attempt to undercut or change
3 a policy decision of the Arizona legislature. But that
4 clearly is not what is involved here. Because there is an
5 important difference between an equal protection challenge
6 to a substantive piece of legislation and this case which
7 is an equal protection challenge to a statute which restricts
8 voting. This is not an action which challenges a substantive
9 policy. The Arizona legislature can and should be free to
10 make substantive policy choices, but when the legislature
11 delegates public decision-making to a unit of local govern-
12 ment which exercises power and authority on matters
13 important to the welfare of all residents, must provide
14 for a system --

15 QUESTION: What public -- you said public
16 decision-making? That sort of assumes the question in the
17 case, doesn't it? What is the public decision-making that's
18 going on?

19 MR. MEYERSON: Justice White, I don't believe it
20 assumes that, because this is a political subdivision of the
21 state of Arizona. It's just like a city, it's just like
22 a decision in the Cipriano case to sell municipal bonds to --

23 QUESTION: So the decision-making of the District,
24 of which --

25 MR. MEYERSON: That's right. And I'd like to

COTTON COTTON

1 emphasize that I don't believe that the issue here turns on
2 whether the Court finds that there's a governmental function
3 involved. I don't know --

4 QUESTION: Well what if the Arizona legislature
5 decided that the governor should appoint all of the judges
6 who are certainly public decision-makers and that the
7 people should have no say other than in the election of the
8 governor as to how the judges were chosen, would that vio-
9 late the one man-one vote principle?

10 MR. MEYERSON: I don't believe it would, Justice
11 Rehnquist. We have that in Arizona, judicial merit selection
12 of judges.

13 QUESTION: Well if it's public, they certainly
14 are engaged in public decision-making.

15 MR. MEYERSON: But there, you're hypothetical
16 assumes that the governor has appointed the judge. If the
17 governor were to appoint the board of the Salt River Pro-
18 ject under a statute adopted by the Arizona legislature, we
19 would not be here today. But that is not what the Arizona
20 legislature has done. It has established a political sub-
21 division and it has said that the directors of that political
22 subdivision will be elected, and once we enter the election
23 process as opposed to the appointive process, I believe this
24 Court's opinions are very clear that that election must be
25 governed by the equal protection clause and the limitations

of the Constitution.

In summary, the District landowners here have no risk, and we would emphasize again that every time this Court has evaluated one of these cases it has looked at what is the risk borne by the property-owners -- there is no risk here. The revenues are derived from the sale of electricity, the bonds are secured by a pledge of revenues, there is no economic risk. And so what the Appellants are asking this Court to do is adopt an entire new standard and that is that a subsidized group is entitled to exclusive voting control of government. The implications of that new standard that the Appellants are proposing to this Court are frightening. Are welfare recipients to be the only voters for congressional elections because they are the primary recipients of government transfer payments? Is the dairy industry to vote in Wisconsin on a one farm-one vote because they have a subsidy? Are daycare mothers to vote only in Arizona because the legislature just appropriated 2 and 1/2 million dollars to subsidize daycare. What the Appellants are telling you is that they are entitled to exclusive control of this entity because they get a subsidy. They haven't put up any money, they didn't put it up in 1903, they have no economic risks today and their case hinges on whether this Court concludes that a subsidized group is entitled to exclusive control of such an important entity.

1 Yes, Your Honor?

2 QUESTION: Could I ask you if there is a -- who
3 makes the decision to issue revenue bonds?

4 MR. MEYERSON: The Salt River Project District
5 board does, Your Honor, and I'd like to --

6 QUESTION: They don't have an election?

7 MR. MEYERSON: They don't have an election.

8 QUESTION: About revenue bonds?

9 MR. MEYERSON: That's right.

10 QUESTION: Thank you.

11 MR. MEYERSON: Now, Mr. Lee alluded to the fact
12 that the Arizona Corporation Commission approves those revenue
13 bond sales, and that's true. My experience, and I have been
14 a participant in these proceedings, is that that is not
15 effective regulation at all because once the district board
16 makes the decision to build the plant, it's somewhat academic
17 then to get the financing to build it, because the decision
18 has already been made. And so the mere fact that there is
19 approval to sell these revenue bonds in no way gives us any
20 greater accountability. Finally --

21 MR. CHIEF JUSTICE BURGER: I'm afraid your time
22 has expired, Mr. Meyerson.

23 MR. MEYERSON: Thank you, Mr. Chief Justice.

24 MR. CHIEF JUSTICE BURGER: Mr. Lee, do you have
25 anything further?

1 MR. LEE: I do, just a couple of brief matters, Mr.
2 Chief Justice.

3 ORAL REBUTTAL ARGUMENT OF REX E. LEE, ESQ.,

4 ON BEHALF OF THE APPELLANTS

5 MR. LEE: First, with respect to the financial
6 stake, with all due respect, Mr. Meyerson is wrong. Para-
7 graph 11 of the stipulation specifies that the Association
8 has levied and collected assessments upon the lands and that
9 hasn't been done for some time. There is an annual assess-
10 ment that comes each year, but in addition -- there have been
11 these special assessments to which Paragraph 11 of the
12 Stipulation refers.

13 But even more important, from the beginning it was
14 these people, because of taking, they were the ones who sub-
15 mitted their lands and they did not have to submit them, it
16 was a voluntary matter. And some of the lands were excluded
17 because the residents of Tempe, for example, elected not to
18 submit their lands.

19 Now with regard to the interchange between Justice
20 White and Mr. Meyerson concerning the fact that the funda-
21 mental complaint is the large landowners can run the District.
22 I'd like to clarify just exactly to what extent the large
23 landowners do have control of this District at the present
24 time. Mr. Meyerson has informed the Court, outside of
25 the record but I have no objection because it was correct

1 information, that today a majority of the lands within the
2 Salt River Project are urban. It's about 55 percent. But
3 the consequence of that shift has been that out of the 14
4 members of the board of directors, ten of them are elected
5 by constituencies that are also dominantly urban. And
6 that includes the four members elected at large and includes
7 six of those elected from districts. And with regard to
8 the question, Justice Stevens, has there ever been a contest
9 -- in the last election, there was a lawyer who beat out a
10 landowner in one of these at-large districts.

11 Now with respect to the matter of the fairness of
12 the polling procedures and Mr. Meyerson's assertion --

13 QUESTION: I suppose the lawyer was a landowner,
14 also, wasn't he?

15 MR. LEE: Yes, he would have been -- not neces-
16 sarily.

17 QUESTION: But in fact he was?

18 MR. LEE: I happen to know him and he is. With
19 regard to the difficulty of finding these polling places,
20 they are the regular precinct polling places, notice is
21 given of these elections through bill stuffers, through
22 newspaper ads and through news releases, and the entire
23 procedure was submitted to the Justice Department, which
24 determined that we complied with the Voting Rights Act of
25 1965, as amended, in 1970.

Now finally, it simply -- this Court simply has never held that every public entity which bears the municipal label is therefore precluded from obtaining some other benefit, some other objective, by encouraging private investment in some private kind of activity which has an incidental benefit to the government and permitting those who make the investment to keep the benefits and to run the project. That is the essence of the holding in Salyer, and indeed an alternative ground for the holding in Toltec, the companion case was, that to whatever extent there are inequities that can be cured by the Wyoming legislature which is fairly elected on a one person-one vote basis, now what we have overall in this case is this circumstance. That over 2/3 of a century ago these people put up their property, lands and money to bring this project into existence. They were assured that if they did so they could operate it their way, so long as they fulfilled the basic requirements of the law including equal protection of the law. You have to ask yourself, with a system that has been so favorable to the landowners and to the state of Arizona, because of the water benefits that have come to the State of Arizona, why is it that all of this, that these circumstances have to be upset and why is it that the differences to the extent they exist, amount to a constitutional difference.

We submit therefore that the judgment of the Court

of Appeals should be reversed.

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

(Whereupon the hearing in the above-entitled
matter was submitted at 11:05 o'clock a.m.)

CERTIFICATE

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:

GERMAIN H. BALL ET AL.,

Appellants

v.

ROLAND W. JAMES ET AL.

No. 79-1740

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

BY:

Will J. Wilson

William J. Wilson

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE

1981 MAR 2 PM 3 29