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**OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
THE SUPREME COURT  
OF THE  
UNITED STATES**

**CAPTION:** BOARD OF ESTIMATE OF CITY OF NEW YORK, ET AL., Appellants  
V. BEVERLY MORRIS, ET AL.; and  
FRANK V. PONTERIO, Appellant V. BEVERLY MORRIS, ET AL.

**CASE NO:** 87-1022 & 87-1112

**PLACE:** WASHINGTON, D.C.

**DATE:** December 7, 1988

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x

3 BOARD OF ESTIMATE OF CITY OF :

4 NEW YORK, et al., :

5 Appellants :

6 v. : No. 87-1022

7 BEVERLY MORRIS, et al.; and :

8 -----x

9 FRANK V. PCNTERIO, :

10 Appellant :

11 v. : No. 87-1112

12 BEVERLY MORRIS, et al. :

13 -----x

14 Washington, D.C.

15 Wednesday, December 7, 1988

16 The above-entitled matter came on for oral  
17 argument before the Supreme Court of the United States  
18 at 12:59 o'clock p.m.

19 APPEARANCES:

20 PETER L. ZIMROTH, ESQ., Corporation Counsel of City of

21 New York, New York, New York; on behalf of the

22 Appellants.

23 RICHARD DAVID EMERY, ESQ., New York, New York; on behalf

24 of the Appellees.

C O N T E N T S

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ORAL ARGUMENTS

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PETER L. ZIMROTH, ESQ.

On behalf of the Appellants

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RICHARD DAVID EMERY, ESQ.

On behalf of the Appellees

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REBUTTAL ARGUMENTS

PETER L. ZIMROTH, ESQ.

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P R O C E E D I N G S

(12:59 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 87-1022, Board of Estimate of the City of New York v. Beverly Morris; No. 87-1112, Frank Ponterlo v. Beverly Morris.

Mr. Zimroth, you may proceed whenever you're ready.

ORAL ARGUMENT OF PETER L. ZIMROTH

ON BEHALF OF THE APPELLANTS

MR. ZIMROTH: Good afternoon, Mr. Chief Justice, and may it please the Court.

The court of appeals in this case declared unconstitutional a body which for roughly 90 years has been -- has played a central role in both the history and the governance of the City of New York. It has been in the words of many commentators in virtually every, single serious study on this subject -- and there have been many -- the glue which has kept the City of New York together, the -- the -- the body of which has embodied the compromise that was necessary both to the creation of the City of New York at the turn of the century and also the -- its continued existence as times have changed.

The central factor, the central consideration,



1 the central structural point, of the Board of Estimate  
2 is that there is a combination of city-wide officials  
3 who control the majority of the votes and five borough  
4 presidents who -- who control the majority of votes.

5 And when the court of appeals declared this  
6 body unconstitutional, it simply ignored that structure.  
7 It split the body in two. It said the city-wides we're  
8 not going to consider. It said the five borough  
9 presidents we're going to consider as if it was -- as if  
10 it were a legislature, which the Board of Estimate is  
11 not, independent of the five borough presidents and  
12 declared that body unconstitutional. That body does not  
13 exist. It does not exist in New York City government.

14 And what the -- what the court of appeals did  
15 is basically said that it was not convenient to find  
16 methodologies to judge this complex body, and so it  
17 ignored the central truth about the Board of Estimate.

18 And to understand why this is the central  
19 truth about the Board of Estimate, you have to  
20 understand how the Board of Estimate came into being.  
21 The Board of Estimate was a product of the consolidation  
22 of many independent entities at the turn of the -- of  
23 the century, the consolidation of the City of New York.

24 QUESTION: Mr. Zimroth, is the Board of  
25 Estimate created by the state legislature in New York,

1 or what entity creates the Board and fixes the  
2 boundaries and determines its composition?

3 MR. ZIMROTH: It's the City charter.

4 QUESTION: The City charter.

5 MR. ZIMROTH: Yes, although ultimately it is  
6 -- it is under the authority of the state legislature.  
7 The state legislature, obviously, could change the  
8 boundaries or the voting structure. But -- but the  
9 voting structure that I'm talking about is set forth in  
10 the -- in this -- in the City charter --

11 QUESTION: Does the legislature specifically  
12 approve the City charter?

13 MR. ZIMROTH: Excuse me?

14 QUESTION: Did the legislature --

15 MR. ZIMROTH: There are --

16 QUESTION: -- specifically approve the City  
17 charter?

18 MR. ZIMROTH: In some -- there have been many  
19 charter revisions. There are charter revisions. There  
20 are two -- basically two ways you can have a charter  
21 revision. You could either have it by referendum, or  
22 you can have it by the state legislature. Both are true  
23 here. In other words, there have been charter revisions  
24 in 1901, 1938, 1961, 1975, and I think there was one, a  
25 minor one, in 1983. And I don't remember which of those

1 were by referendum and which were by the state -- by the  
2 state legislature. But this particular voting structure  
3 has been approved by both methods because in each time  
4 it -- when the -- when the -- either through referendum,  
5 the people vote on the charter or the -- or the state  
6 legislature votes so that in both ways this -- this  
7 structure has been -- has been approved.

8           And again, if -- if you look back to the  
9 history of the consolidation of the City, what you have  
10 is several independent -- independent entities who cede  
11 their authority to a central government and, obviously,  
12 demand to retain some manner of meaningful voice in that  
13 -- in that centralized government. And the Board of  
14 Estimate was precisely the mechanism. And this voting  
15 structure was precisely the mechanism which expressed  
16 that compromise to resolve the tension between the need  
17 for a broader municipality to give services, on the one  
18 hand, and the obviously understandable and legitimate  
19 desire for people to have government close to home. So,  
20 this was the body that incorporated that -- that  
21 compromise. And it has been in --

22           QUESTION: Were the -- Mr. Zimroth, were the  
23 boroughs part of this structure by charter also?

24           MR. ZIMROTH: Yes. Three -- at the time in  
25 -- in the turn of the century there were three boroughs.

1 The consolidation of the City of New York was the  
2 Borough of Richmond/Staten Island; the Borough of  
3 Manhattan, which was then the City of -- of New York;  
4 and the Borough of Brooklyn, which was the City of  
5 Brooklyn. Bronx and Queens were made up of amalgams of  
6 -- of towns and villages from either -- what was  
7 Westchester and Long Island. So, there were three  
8 counties that got together and many, many other  
9 independent entities that got together in this  
10 consolidation at the turn of the century.

11 And it's very interesting that -- I -- I sort  
12 of like to look at the -- the early history in a way  
13 analogous to the United States' Articles of  
14 Confederation and Constitution. In 1898 when -- when  
15 the body was first created, this voting structure did  
16 not exist. The borough presidents didn't have a vote on  
17 this Board. And that very fact threatened the very  
18 existence of the consolidation. And there was a -- you  
19 know, there was a very big uproar from the boroughs  
20 saying, in effect, we have been cheated -- we have ceded  
21 our powers and we have been cheated out of our ability  
22 to have a meaningful voice in the governance.

23 And so, in 1901 there was a second charter  
24 revision which -- which created the structure that we  
25 have now which has, in essence, existed to this day;



1 that is with a majority of city-wides, a minority of  
2 borough presidents, a system which, if you look at the  
3 arithmetic, you can -- with respect to all of the  
4 actions which the Board of Estimate has exclusive power  
5 over, they cannot take an action without a concurrence  
6 of -- of representatives representing a majority of the  
7 people of the City of New York.

8 QUESTION: Mr. Zimroth, I -- I take it for  
9 many years, until about 1958, the Board of Estimate  
10 followed a system of weighted voting?

11 MR. ZIMROTH: It still has a system of  
12 weighted voting. The weighted votes are: the  
13 city-wides have two votes each, and the borough  
14 presidents have one vote each.

15 QUESTION: Well, what was the change made in  
16 1958? It was some significant change.

17 MR. ZIMROTH: Well, it -- it --

18 QUESTION: And maybe you could enlighten us  
19 about that.

20 MR. ZIMROTH: Yes. The change was this. In  
21 1901 two boroughs, Manhattan and Brooklyn, had 88  
22 percent of the population. So, they were given a -- the  
23 original structure was three votes for the city-wides,  
24 two for Manhattan and Brooklyn, and one for the other  
25 three.

1           Nineteen fifty-eight, because of the change in  
2 population, the growth of Queens primarily and the fact  
3 that Manhattan and Brooklyn no longer had 88 percent of  
4 the population, the structure was changed to, in  
5 essence, what we have now. It was actually four and  
6 two, and then it was change just for arithmetic's  
7 purpose to two and one, but it's the same ratio. And  
8 that's what happened in 1958.

9           It has been an evolutionary process, and what  
10 has happened in the City of New York is that more and  
11 more power has been transferred from the formerly  
12 independent entities to the central government. And  
13 that very process has made it even more important that  
14 -- that there be some kind of a mechanism for the -- for  
15 the boroughs to have a voice in the central government.

16           It has been a body that's proved to be  
17 flexible enough to deal with changing dynamics of the  
18 City of New York. Just to give you one example among  
19 many, as racial minorities and ethnic minorities in the  
20 City have grown more and more populous and more and more  
21 powerful, the Board of Estimate has adapted itself.  
22 There are -- now, for example, two of the five borough  
23 presidents are minorities, one an Hispanic and one a --  
24 a Black.

25           The district --

1 QUESTION: Mr. Zimroth, what -- what would the  
2 voting deviation be, as this Court normally measures it,  
3 if we included the at-large members in your view?

4 MR. ZIMROTH: Well, as this Court --

5 QUESTION: The court below didn't include them.

6 MR. ZIMROTH: They did not.

7 QUESTION: And suppose we took account of that.

8 MR. ZIMROTH: They did not.

9 QUESTION: Then what's the deviation.

10 MR. ZIMROTH: We think -- there is no method  
11 that this Court has used that is capable of doing that.  
12 So, we have -- we have suggested two methods.

13 One method is -- is a sort of a -- I think a  
14 common sense method, which is what I said earlier, and  
15 that is that if you look at the -- the votes, there is  
16 no way with respect to those actions that the Board of  
17 Estimate can take on its own -- there is no way that an  
18 action can be taken without the concurrence of  
19 representatives representing a majority of the  
20 population.

21 Let me give you an example of what I mean.

22 QUESTION: Mr. Zimroth, is that true of budget  
23 matters?

24 MR. ZIMROTH: Budget matters is not -- it is  
25 not true of some budget matters -- some budget matters.

1           QUESTION: (Inaudible).

2           MR. ZIMROTH: I'm glad you raised the budget  
3 matters because, frankly, on reflection I wish -- I wish  
4 we had said more about that in -- in the briefs because  
5 there's a -- I think a very serious misconception about  
6 the Board of Estimate's role in budget matters.

7           Just to -- to sort of start with the  
8 conclusion and then to explain it, in fiscal year 1986,  
9 there were 93 votes on budget matters. The mayor was  
10 excluded from seven of those. Almost all budget matters  
11 include the mayor as a vote. Now I'll explain to you  
12 what that means.

13           The budgetary process has many different  
14 facets to it. The mayor actually is the premier person  
15 in this -- in this -- in this whole scenario. Why?  
16 Because under New York law, there has to be a balanced  
17 budget and the mayor estimates the revenues. So, once  
18 the mayor estimates the revenues, there can be no  
19 increase in the budget unless there's an increase in  
20 property tax. The only body authorized to do that is  
21 the City Council, not the Board of Estimate. The Board  
22 of Estimate plays no role whatsoever in that decision.

23           On the adoption -- original adoption of the  
24 budget, the mayor proposes the budget. And if there is  
25 going to be a change without the mayor's approval, it



1 requires the -- the joint action of both the City  
2 Council and the Board of Estimate, and one of those two  
3 bodies has to vote by a two-thirds majority. Otherwise,  
4 there can't -- there can't be any change. And as I say,  
5 there can't be a -- a raising without additional taxes,  
6 and the additional taxes can come only from the City  
7 Council, not the Board of Estimate. That's the --

8 QUESTION: Mr. Zimroth?

9 MR. ZIMROTH: Can I just finish the rest of  
10 the budgetary process?

11 QUESTION: Go ahead.

12 MR. ZIMROTH: That's only at one time in the  
13 year. Throughout the rest of the year, there are many,  
14 many changes in the budget because under New York law,  
15 the budget is -- is not a mandate to -- to spend. It's  
16 an authorization to spend. And the mayor doesn't have  
17 to spend any of it or any part of it. That's not -- I'm  
18 not talking about an impoundment kind of situation where  
19 there's a mandate to spend because the budget is not a  
20 mandate to spend. So, that's the first point, that this  
21 budget is not what you think of ordinarily.

22 The second point is that the mayor and the  
23 agency heads can without any further action transfer  
24 money from one part of the budget to another part of the  
25 budget as long as it's within the same agency and as

1 long as it's not so much as to -- there's a percentage  
2 that -- that can't be overcome.

3 And if that percentage is overcome, then there  
4 has to be another budget action. And on that budget  
5 action, the mayor votes on the Board of Estimate. And  
6 that's what most of the budget actions are. That's why  
7 I said that in fiscal 1986 --

8 QUESTION: But there are some on which he may  
9 not vote.

10 MR. ZIMROTH: That's correct.

11 QUESTION: And I presume they are of some  
12 importance or they wouldn't have a special legal rule  
13 for those particular votes.

14 MR. ZIMROTH: I don't deny that they have  
15 importance. I only say that the Board of Estimate's  
16 role in that process is very limited. They cannot act  
17 at all without the concurrence of the City Council.  
18 They cannot act at all if the City Council votes by a  
19 majority to disagree with the mayor. They -- they need  
20 two-thirds or vice versa.

21 And, I mean, the reality of the budgetary  
22 process is I think very clear. If you look at the  
23 budgets over history, the mayor is the central actor, a  
24 city-wide official elected by all the people of the City  
25 -- is the central actor. The changes in the budgets

1 year after year after year after year are frankly  
2 minuscule compared to a \$25 billion budget. You're  
3 talking about like a half of one percent of a quarter or  
4 a percent. That's the kind of -- of power you're talking  
5 about.

6 I don't say it's not important, you know, but  
7 -- but it is what it is.

8 QUESTION: (Inaudible) Justice Kennedy has a  
9 question for you.

10 MR. ZIMROTH: I'm sorry.

11 QUESTION: Well, Justice O'Connor began asking  
12 you about the population deviation. And I was  
13 interested in pursuing that.

14 If we use the Abate method and took the three  
15 at-large officers and factored them into the analysis,  
16 what would the population deviation be? Or can we not  
17 determine that based on this record?

18 MR. ZIMROTH: It depends on how you factor  
19 them in. There's one way of factoring them in which  
20 would divide the number of city-wide votes  
21 proportionately among all of the counties. That is, if  
22 Brooklyn has 31 percent of the population and there are  
23 six city-wide votes, you give Brooklyn 31 percent of  
24 six, whatever that is, and you say that's Brooklyn  
25 votes. If you use that method, you come up with a

1 number of 76 percent.

2 That methodology was rejected by plaintiffs,  
3 by plaintiffs' experts and by both courts below. They  
4 said it's completely arbitrary. It has -- I mean,  
5 you're dividing something, but what are you -- what are  
6 you measuring? But that's the answer to your question.  
7 That's the result you get if you use that methodology.

8 QUESTION: Did the parties stipulate to some  
9 deviation?

10 MR. ZIMROTH: No.

11 QUESTION: I thought there was some kind of a  
12 stipulation.

13 MR. ZIMROTH: To a -- no. There was not.

14 QUESTION: Using the same method, what would  
15 the deviation be if you added one more at-large member?

16 MR. ZIMROTH: Which -- which method?

17 QUESTION: The method you just described.

18 MR. ZIMROTH: The one that the district court  
19 and the court of appeals and the plaintiffs rejected. I  
20 don't know what the answer would be. I'd have to --

21 QUESTION: Before you started to say there  
22 were several ways to do it under the Abate method, and  
23 you --

24 MR. ZIMROTH: No, no.

25 QUESTION: -- described one.



1 MR. ZIMROTH: I didn't say there were several  
2 ways under the Abate method.

3 QUESTION: Oh, okay.

4 MR. ZIMROTH: I said we suggested two ways.  
5 One way is to -- is to just look at the body itself and  
6 say that with this narrow exception that Justice Stevens  
7 pointed to, that with respect to the other actions --  
8 and really those are actions which -- which the Board of  
9 Estimate acts exclusively. They don't have to act in  
10 concurrence with the City Council -- that there's no way  
11 that a -- that an action can be taken without the  
12 concurrence of -- of elected officials who represent the  
13 majority of people.

14 QUESTION: And that only takes one.

15 MR. ZIMROTH: Excuse me?

16 QUESTION: It only takes one of those --

17 MR. ZIMROTH: One of those, but if there's one  
18 of those --

19 QUESTION: Yes?

20 MR. ZIMROTH: -- It takes four borough  
21 presidents which at a minimum represents 70 percent of  
22 the people of the City. That's right.

23 Now, the other way that we suggested is the --

24 QUESTION: In that example, do you assume all  
25 the people elected at large will always vote in the same

1 way?

2 MR. ZIMROTH: Absolutely not. They don't.

3 QUESTION: Then I don't quite understand your  
4 argument.

5 MR. ZIMROTH: Okay. I'll tell you what it is.  
6 If -- if there are -- if there are three city-wides --  
7 If they all vote together, they obviously control the  
8 six votes. Okay? So, put that aside.

9 The only way that -- so then you have to say  
10 what happens if there's a two to one split. And as I  
11 just answered, the only way that the one can prevail  
12 over the two is if representatives of 70 percent of the  
13 people of New York join that person.

14 Now, that's one way of doing it. I think it's  
15 a common sense way. It obviously -- It describes much  
16 more realistically than what the -- what the courts  
17 below did what the actual body is. I mean, that is the  
18 body. What they judge unconstitutional is not the body.

19 There's another way that we -- that we  
20 suggested, and that is a method originally devised by  
21 Professor Banzhaf. And that method does two things.  
22 First of all, it --

23 QUESTION: You went a little fast for me.  
24 Seventy percent of the people of New York. You're  
25 talking about two representatives? Two -- two --

1 MR. ZIMROTH: No. I'm talking about the four  
2 -- the four borough presidents to join with the one,  
3 lone city-wide.

4 QUESTION: Well, they only -- they have one  
5 vote a piece. So, you need six votes all together.

6 But is it still not true that their votes are  
7 all counted equally in that -- among those four?

8 MR. ZIMROTH: It is true.

9 QUESTION: So that the people from the  
10 smallest borough have a larger voice in that vote than  
11 the people in the --

12 MR. ZIMROTH: They do have a larger voice. I  
13 don't deny that they have a larger voice.

14 My -- my point is how to measure that larger  
15 voice. And what is the meaning of that larger voice in  
16 the context of -- of this case? That is, to say what  
17 the court of appeals said --

18 QUESTION: The meaning I suppose is that the  
19 borough president from Staten Island has the same voice  
20 as the borough president from Brooklyn.

21 MR. ZIMROTH: Right.

22 QUESTION: And -- and they represent widely  
23 different populations.

24 MR. ZIMROTH: Yes, but -- but they represent  
25 them in a context where that difference is much, much

1 less significant than if there were a five-member body  
2 that had no city-wides. Supposing there were  
3 --supposing there were 100 city-wide votes, what you say  
4 would still be true, but those -- and those five borough  
5 presidents would still have equal power. Zero it would  
6 be.

7 QUESTION: Well, no, because if you assume  
8 that there's -- say there's some issue on the Bronx he's  
9 opposed to, he has got to pick up one vote to defeat the  
10 issue. And the one vote from -- from Staten Island is  
11 enough or the vote from Brooklyn is enough.

12 MR. ZIMROTH: Let me -- let me -- maybe  
13 there's another way I can illustrate this point. And if  
14 I could beg your indulgence to turn to page 34 of the  
15 brief where there's a chart which illustrates the point  
16 that I'm trying to make.

17 If you use the -- if you use the methodology  
18 chosen by the district court and by the court of appeals  
19 and simply ask that each borough president has a vote in  
20 proportion to the population of that borough, you get in  
21 essence meaningless results because that chart that  
22 --that appears on page 3 -- 34 is in exact proportion --  
23 34 of our brief -- is in exact proportion to population.

24 Now --

25 QUESTION: The -- the -- the chart being just



1 the setting forth --

2 MR. ZIMROTH: Yes.

3 QUESTION: -- of the various boroughs?

4 MR. ZIMROTH: That's it. That's it. That's  
5 in exact proportion to population. That adds up to 51  
6 votes.

7 If you give the three city-wide elected  
8 officials 50 votes each, you will see -- and you can  
9 work it out, and in the text it is worked out -- that it  
10 doesn't matter. It just doesn't matter what those  
11 weighted votes are. Every single combination indicates  
12 that Staten Island has exactly the same power as Bronx,  
13 Manhattan, Queens and vice versa.

14 I would be very curious, frankly, to hear from  
15 Mr. Emery whether he would accept this system which  
16 meets exactly the test of the court of appeals --  
17 exactly. He has got to say either one of two things.  
18 Either he says --

19 QUESTION: Well, it would seem to me what it  
20 boils to is if the Court goes ahead and enters relief  
21 along the lines they've discussed, it really won't do  
22 any harm to you.

23 MR. ZIMROTH: No, because what will happen is  
24 that in the remedy stage, Mr. Emery will get up and say,  
25 horrors, this is unconstitutional. Why? Because it

1 doesn't take into account the relationship between the  
2 borough votes and the city-wide votes. He'll have it  
3 --he'll want to have it both ways. He'll want to have  
4 it both ways.

5 QUESTION: How -- how do we know that at this  
6 stage of the case?

7 MR. ZIMROTH: Well, I guess you could ask him.

8 QUESTION: Maybe you're arguing something you  
9 ought to be arguing after the case goes back.

10 MR. ZIMROTH: Well, but I mean, he -- his  
11 experts did exactly this below. They did this below  
12 because in the district court they tried to devise  
13 alternative methodologies of weighted voting. And when  
14 they -- and when they weighted -- when they decided to  
15 figure out how much the deviation was, they used a  
16 methodology very similar to what we are saying. And  
17 they rejected the methodology that they had just won  
18 on.

19 And the reason they did that is precisely  
20 this, that is, it's illogical to judge a --

21 QUESTION: You really are -- you really are  
22 convincing me there's not much at stake in this case.

23 MR. ZIMROTH: Only if you say -- only if you  
24 say that this system is constitutional because if you  
25 say that, maybe --

1 QUESTION: Well, you say it, don't you, that  
2 what you propose on page 34 would be perfectly  
3 constitutional?

4 MR. ZIMROTH: If the --

5 QUESTION: It may not be mandated, but if it  
6 had originally been done this way, there would be no  
7 constitutional difficulty, would there?

8 MR. ZIMROTH: If you accept --

9 QUESTION: Would you not agree with that?

10 MR. ZIMROTH: -- the methodology of the court  
11 of appeals which we say --

12 QUESTION: No. Forget the -- just -- I asked  
13 you a very simple question. In your view if your  
14 present system had the figures in it that you have on  
15 page 34 of your brief, would you think there was any  
16 constitutional problem?

17 MR. ZIMROTH: No. But for a different reason  
18 because I think --

19 QUESTION: And you -- and conceivably that's  
20 what you'll get when you get all through.

21 MR. ZIMROTH: Yes, but -- but --

22 QUESTION: You're afraid you may lose when you  
23 get back.

24 MR. ZIMROTH: That's right. And we'll lose  
25 because they'll -- they will reject the methodology of

1 the court of appeals. That's what -- that's exactly  
2 what's going to happen.

3 And it's exactly what did happen in the  
4 district court. They abandoned their previous method in  
5 the district court. They have to because if they accept  
6 that methodology, then they have to accept this, and  
7 they -- and they won't. The reason they won't is that  
8 this describes the same system or virtually the same  
9 system we have today.

10 The reason I think this is constitutional is  
11 because I think the present system is constitutional.  
12 And the reason I think the present system is  
13 constitutional is that this Court's one person/one vote  
14 jurisprudence pays very strong attention to all of the  
15 factors that -- that went into the creation of the -- of  
16 the Board of Estimate. It's -- it's a body which has  
17 been very successful and effective in keeping this very  
18 large City together.

19 Those findings were made by the district  
20 court. The district court found that this body was  
21 effective in that way. It's a structure that has proved  
22 flexible enough to accommodate the -- the changes in the  
23 City. It has met the test of time again and again and  
24 again. Charter revision commissions have looked at this  
25 system and said that this compromise is necessary to the



1 continued existence of the City and to the -- essential  
2 to the wellbeing of the City.

3 The question that I would ask is even in terms  
4 of the democratic principles that the one person/one  
5 vote is supposed to and does further, what is to be  
6 gained by destroying this body.

7 If you look at what happened, for example --

8 QUESTION: Why do you assume the body will be  
9 destroyed? I said why do you assume the body will be  
10 destroyed.

11 MR. ZIMROTH: Because --

12 QUESTION: It will be changed.

13 MR. ZIMROTH: Because the --

14 QUESTION: The voting will be a little  
15 different.

16 MR. ZIMROTH: Because the voting structure is  
17 the body, and if you change the voting structure, you  
18 have a different body. The voting structure is the  
19 compromise that allowed the City to get together. If  
20 you destroy that --

21 QUESTION: Supposing they made a compromise in  
22 Queens, women won't vote, and in -- in the Bronx they  
23 will, and we'd say that's how they made the deal. It  
24 happens to be unconstitutional. Are we going to just  
25 say, well --

1 MR. ZIMROTH: Well, of course --

2 QUESTION: -- it was good deal when they made  
3 it, so it has got to be preserved?

4 MR. ZIMROTH: Of course not, but -- but --

5 QUESTION: Well, what's the difference?

6 MR. ZIMROTH: The big differences are that  
7 this Court has always said -- it has to be rational. I  
8 mean, that is, the distinctions have to be rational.  
9 And when the Court -- and when the Court went -- In its  
10 one person/one vote jurisprudence has set forth the  
11 kinds of things that have been -- that are legitimate  
12 considerations, the respecting of the historical  
13 precedent, the consolidation --

14 QUESTION: If you had no history at all, could  
15 you start out constitutionally? Just start from scratch  
16 and say we want to dream up a new system, a brand  
17 --could you start and do what you've got there now? Or  
18 do you have to have this history to justify it?

19 MR. ZIMROTH: I would say that the history is  
20 a very -- the history and the success of it --

21 QUESTION: Well, sure. But supposing I've got  
22 a successful thing where women don't vote in the Bronx,  
23 and it has worked, can you keep it?

24 MR. ZIMROTH: I doubt that it would work.

25 QUESTION: Well --

1 (Laughter.)

2 MR. ZIMROTH: I mean, it -- I mean, in all  
3 seriousness --

4 QUESTION: We're limited to our past  
5 successes. We can't have any more successes in the  
6 future.

7 MR. ZIMROTH: Well, not --

8 QUESTION: Any good thing that was set up in  
9 -- in 1890 -- that can last, but --

10 MR. ZIMROTH: This is not something --

11 QUESTION: -- that's the end of the story.

12 MR. ZIMROTH: -- only that was set up in 1890.

13 It was something that has been reaffirmed by every,  
14 single charter revision commission since then. Every  
15 one has said that this structure is the glue that has  
16 kept the City of New York together and don't change it.  
17 And all I'm saying is --

18 QUESTION: Do you think New York is going to  
19 disintegrate if you lose this lawsuit? You really --

20 MR. ZIMROTH: Disintegrate? I think there  
21 will be very serious consequences, yes.

22 Or, alternatively, this is what will happen.

23 QUESTION: Do you think Staten Island is going  
24 to secede?

25 MR. ZIMROTH: There has been very serious

1 discussion of that. I don't know whether it will  
2 happen. But there has, in fact, been serious discussion  
3 of that. I hope it won't happen. I mean, obviously it  
4 will be very disastrous for the City of New York if that  
5 happened, but very important people in -- in Staten  
6 Island are -- are talking about secession. That's  
7 number one.

8           Number two is that -- I'm not suggesting to  
9 you that just because there has been this history, you  
10 know, one time 90 years ago, that's the end of it. It  
11 is a history that the court below has -- has found  
12 credible, has succeeded throughout time in creating the  
13 glue that has kept the City of New -- New York together.

14           QUESTION: But the City is a legislative  
15 construct, isn't it?

16           MR. ZIMROTH: Yes, it is.

17           QUESTION: Well, I mean, New York just can't  
18 say we're going to fall apart.

19           MR. ZIMROTH: No, of course, it can't.

20           QUESTION: It --

21           MR. ZIMROTH: But -- but the -- but the  
22 legislators and the people of the City will take very  
23 seriously the need for this -- this kind of problem.

24           Let me give you an example. The Board of  
25 Education in the City of New York at one time was -- was



1 structured in a way similar to this, not exactly the  
2 same. There was five -- five -- the borough voted for  
3 five members of the Board of Education, and there were  
4 then two others city-wide. That was declared  
5 unconstitutional. Because of the -- of the perceived  
6 need for that kind of structure, what happened is that  
7 you have now an appointed system for the Board of  
8 Education where the borough presidents appoint. Now, is  
9 that a net gain for democracy?

10 That is what -- among the very many things  
11 that are being discussed now. That is, if this  
12 structure goes down, what you may find -- I can't say  
13 what will happen, but what you may find is each one of  
14 the powers of the Board of Estimate will be separated  
15 out and they'll be given to either an appointed body or  
16 to the mayor to --to increase the centralized power.

17 I don't see that that is a net gain for  
18 democracy when you have a system that has been  
19 effective, which has worked, and which overall respects  
20 majority rule. We're not talking about a situation  
21 where --

22 QUESTION: You keep talking about going back.  
23 Did this start back in the Tweed machine?

24 MR. ZIMROTH: What year was Tweed, Your Honor?  
25 I'm sorry.

1 QUESTION: Eighteen seventy.

2 MR. ZIMROTH: What?

3 QUESTION: Eighteen seventy.

4 MR. ZIMROTH: No. The consolidation was at  
5 the end of the 19th, beginning of the 20th century.

6 QUESTION: Nineteen twenty?

7 MR. ZIMROTH: No, no. The beginning of the  
8 20th century.

9 QUESTION: Yes, that's what I thought.

10 MR. ZIMROTH: Your Honor, may I -- may I  
11 reserve the rest of --

12 QUESTION: Yes, you may.

13 We'll hear now from you, Mr. Emery.

14 ORAL ARGUMENT OF RICHARD DAVID EMERY  
15 ON BEHALF OF THE APPELLEES

16 MR. EMERY: Mr. Chief Justice, may it please  
17 the Court.

18 In essence, the City makes a claim to an  
19 exemption in this case, an exemption from the Court's  
20 well-established rule that elected municipal governing  
21 bodies must be districted by population. Without ever  
22 having made any good faith effort to reapportion or  
23 establish a -- establish a scheme on the basis of  
24 population --

25 QUESTION: When you say elected municipal

1 governing bodies, do any of our cases apply to something  
2 just like this or something very close to it? It isn't  
3 the City Council, it's something different than that.

4 MR. EMERY: Yes. Well, that's correct, Your  
5 Honor. It -- It is in fact -- It does, in fact, have  
6 substantial legislative powers if not in law, in fact.

7 But the closest cases of this Court are  
8 clearly Avery v. Midland County which was a  
9 commissioners' court in Texas and which -- in which  
10 there were four representatives, one of -- and one of  
11 whom was at large -- and a fifth that was at large. And  
12 this Court did not take into account the at-large  
13 representation.

14 QUESTION: But that was the governing body of  
15 the county, wasn't it?

16 MR. EMERY: Yes. And this, in effect, is the  
17 governing body of New York City for all financial  
18 matters.

19 QUESTION: Well, but can you -- can you -- if  
20 you split it up that way, you can get to the position  
21 where every single board that has jurisdiction is the  
22 -- is the governing body for that minimal -- minimal  
23 responsibility that it has.

24 MR. EMERY: Well, this Court has announced the  
25 doctrine of special purpose bodies, and they are bodies

1 with limited franchise. Generally speaking, to date at  
2 least, this Court has held that the one person/one vote  
3 rule applies to municipalities where there is a general  
4 governmental activity and there is a -- a general  
5 franchise. The basis of that rule is the general  
6 franchise, and this Court's fundamental doctrine that  
7 every voter is entitled to participate equally in the  
8 elective process. It's an individual right. It's not a  
9 majoritarian right in this context. And as such, yes,  
10 it is true that certain bodies may be accepted if they  
11 are special purpose bodies with limited franchise for  
12 specific issues or for affecting specific people in a  
13 -- in a geographic area.

14 But the reality is that where there is a  
15 general franchise, this Court has uniformly held that  
16 where governing powers are involved, limited to the  
17 point of a school board in *Hadley v.* -- in the *Hadley*  
18 case, those cases make it clear that general governing  
19 bodies with a general franchise are under the one  
20 person/one vote principle.

21 Now, the point here is that Mr. Zimroth argues  
22 for New York as some kind of unique, special situation.  
23 That is simply not the case. In the United States of  
24 the 20 -- of the municipalities that have populations  
25 over 2,500, 25 -- 20 percent of them have mixed at-large



1 district schemes akin to the Board of Estimate. Of the  
2 -- of the City -- 13 of the largest --

3 QUESTION: Is this -- is that for the city  
4 council?

5 MR. EMERY: Excuse me?

6 QUESTION: Is that for the city council or for  
7 something like the Board of Estimate?

8 MR. EMERY: It is for city councils, but those  
9 city councils handle virtually all of exactly the same  
10 powers of the Board of Estimate plus some more.

11 QUESTION: Yes, but that doesn't tell us  
12 whether or not a city can split off some functions from  
13 the city council and still be governed by the one  
14 person/one vote rule.

15 MR. EMERY: Clearly a city can split off some  
16 functions from the city council and not be governed by  
17 one person/one vote as long as those functions are  
18 limited. I think that a contract function, for  
19 instance, could be given to a contract board and that  
20 would not have to be elected and, therefore, it could be  
21 limited.

22 But the Board of Estimate, you must  
23 understand, passes as a co-equal branch of New York's  
24 legislature on the \$25 billion budget every year. It  
25 implements that budget by letting \$5 billion a year in

1 contracts. It is closer to the people, the citizens, of  
2 New York City than any other governing body, much closer  
3 to the citizens of New York City than the City Council.  
4 It determines all -- how all property is developed. It  
5 determines the use of all City property. It places  
6 jails. It places homeless shelters. It places garbage  
7 dumps, incineration plants. Every major issue in New  
8 York City reaches the Board of Estimate.

9 QUESTION: How -- how -- why is it that the  
10 five borough presidents vote together so often?

11 MR. EMERY: Well, there is --

12 QUESTION: And what is it? About 97 percent  
13 of the time?

14 MR. EMERY: No. Well, you see, there are  
15 routine -- there are routine issues that come before the  
16 Board of Estimate. Every time a sidewalk cafe wants to  
17 put a little extension on its sidewalk cafe portion, it  
18 has to go to the Board of Estimate and get signed off.  
19 I mean, I suppose -- I'm not sure, but I suppose it's a  
20 little bit like certiorari petitions in this Court.  
21 There is an enormous amount of unanimity on the Board of  
22 Estimate for routine discussion matters. But the Board  
23 of Estimate's real role in the City, as Mr. Zimroth has  
24 argued -- and I think he has argued it here today -- and  
25 concedes, is the determination of the difficult

1 financial issues about the City's future, about how it's  
2 --

3 QUESTION: How often do the borough presidents  
4 disagree in that category of issues that you say are  
5 really --

6 MR. EMERY: Yes.

7 QUESTION: -- got some meat to them?

8 MR. EMERY: They disagree all the time. It's  
9 impossible to -- to statistically analyze it because the  
10 Board of Estimate votes are hand-counted. They don't  
11 even publish them. You'd have to go back to the  
12 newspaper records.

13 But, in fact, there are a number of  
14 disagreements which are very, very significant. There  
15 were three six to five votes recently where the borough  
16 presidents disagreed and where the at-large members  
17 disagreed and where Staten Island weighted by virtue of  
18 population, those votes on -- on a incineration plant,  
19 on homeless shelters, and on middle income housing in  
20 the Bronx, all would have gone the other way. They all  
21 would have been the opposite result had there -- had  
22 there been a weighting by vote. Most --

23 QUESTION: Even -- even if you had the system  
24 set up on page 34 of the --

25 MR. EMERY: well, Mr. --

1 QUESTION: -- petitioner's brief?

2 MR. EMERY: -- Mr. Zimroth's 34 -- page 34 is  
3 a bit of a red herring, I might say, because this 34,  
4 page 34 system, redesigns the entire system. In the  
5 system now, with the six to five majority needed, you  
6 need two city-wide and two borough presidents. If you  
7 look at this system, you need two city-wide and one  
8 borough president. This system gives the borough  
9 presidents far more power than they have today. So, I  
10 mean, this system is a little -- this -- this would be a  
11 radical change of the relative powers of the people who  
12 sit on the Board of Estimate as we know it today.

13 QUESTION: Would you say it would be  
14 unconstitutional?

15 MR. EMERY: No, in fact, I don't -- I don't  
16 know whether it would be unconstitutional, and this  
17 --this is the reason because under this Court's case  
18 law, the critical criteria is the equal right of a voter  
19 to participate in an election. This system does provide  
20 the equal right of a voter to participate in an  
21 election. But it's a sham. The system is a sham to  
22 create equal rights among borough presidents. And there  
23 might be some other basis to attack it.

24 I don't think it's -- I don't think it's  
25 permissible under the State constitution. I think

1 clearly the State constitution would hold this system  
2 absolutely unconstitutional.

3 QUESTION: Is -- Is there any system that  
4 gives the borough -- that would give the borough  
5 presidents a significant role and pass constitutional  
6 muster?

7 MR. EMERY: Oh, absolutely. This case -- this  
8 Court affirmed a case in 1971 I believe it was. It was  
9 called Franklin v. Krause. It came out of Nassau  
10 County, and it was a weighted voting scheme for the  
11 county legislature where they have different towns of  
12 radically different sizes, and the -- the mayor or the  
13 executive of each town, just by virtue of his office,  
14 appointed to the county legislature and assigned a  
15 weighted vote based on the population of -- of that  
16 which he -- of that town which he represents. And those  
17 weighted votes are calculated. So, they are meaningful  
18 representation because they are determined in  
19 conjunction with the power not the representation, but  
20 the power of that person to -- to effect a change, to  
21 effect a critical vote on the legislative body.

22 Consequently, this -- this Court has summarily  
23 affirmed a system that was adopted by a state deferring  
24 obviously to the state system in Franklin v. Krause, a  
25 system which this Board of Estimate could clearly and



1 easily adopt at any point it wished and guarantee  
2 meaningful representation, representation consistent  
3 with the amount of population in Staten Island and the  
4 Bronx and all the way down the line for -- for the --  
5 for purposes of perpetuating the Board of Estimate in  
6 exactly the way it looks now, but with votes that are  
7 apportioned appropriate to population.

8           The -- the point about the allocation is I  
9 think a very important one. It's in some ways central  
10 here, and that is does the presence of the city-wide  
11 officials in any way mitigate the drastic deviations of  
12 equal representation for two boroughs, such as Staten  
13 Island at 350,000 and Brooklyn at 2.2 million. Well, I  
14 say that we win under any method of looking at it,  
15 whether you allocate it in the way that Justice O'Connor  
16 was suggesting before, or whether you don't allocate it  
17 as the -- as the district court and the court of appeals  
18 did not allocate it.

19           And that -- the reason they did not allocate  
20 it makes sense although we do not rely on those reasons  
21 in order to win here. This is a two-tier body,  
22 representational body. It has city-wide representation,  
23 and it has community borough local representation. The  
24 City has argued that over and over again.

25           Staten Island has, in fact, come in here

1 --come to this Court and put in affidavits, the Lambert  
2 affidavit in the record and the Trautmann affidavit in  
3 the record. And they say they have preserved their  
4 suburban wonderful way of life in Staten Island by  
5 virtue of the equal vote that they have. They are  
6 argued that in this Court as the reason for sustaining  
7 the equal vote, the point being that it is a two-tier  
8 legislative body. Those two-tier representational  
9 system is the basis on which the court of appeals said  
10 you've got to measure them separately.

11 But more important even than what the court of  
12 appeals said, the logic of the system is very clear.  
13 When the city-wide officials want to go out and form a  
14 coalition to gain a majority on any given issue on which  
15 they have taken the initiative -- and usually they do  
16 take the initiative because they're the mayor, and  
17 they're the City Council president, and they're the  
18 comptroller.

19 But when they go out and try and create a  
20 coalition, there's no premium on getting the vote of  
21 Brooklyn or Queens where the major population is. There  
22 is no premium at all. In fact, the tendency will be to  
23 go get the vote of Staten Island because it's easier to  
24 get the vote of the Staten Island borough president.  
25 You only have to satisfy the needs of a homogeneous

1 350,000-person borough as opposed to the needs of a 2.2  
2 million borough or a 1.8 million borough.

3 QUESTION: But the issue -- but the issue is,  
4 for purposes of how you do this calculation --

5 MR. EMERY: Uh-hum.

6 QUESTION: -- how -- how -- how far away from  
7 a proper premium is it?

8 MR. EMERY: Oh, well, it's enormous and  
9 dramatic by any calculation.

10 QUESTION: Well, isn't what counts how far my  
11 -- my vote as an individual in -- in the decision that  
12 is made -- how far away from -- from fully equal that  
13 is? And for purposes of that, don't you have to decide  
14 how is the decision made?

15 MR. EMERY: Exactly.

16 QUESTION: Well, shouldn't the fact that I  
17 vote for the mayor and the controller and the City  
18 Council president -- shouldn't that be taken into  
19 account in deciding the whole thing?

20 MR. EMERY: Well, that's -- that is the -- I  
21 view that as one of the central questions in the case.  
22 And what I'm saying is that by any measure, even if you  
23 do allocate them -- and we did do that. We were the  
24 ones who offered the allocation. We didn't back off  
25 it. Our expert backed off it, and it came to 78 percent

1 when you allocated that way.

2 But to answer your question clearly, if you  
3 get in the voting booth and you're the voter, and you  
4 vote for the mayor, the City Council president and the  
5 comptroller, all those votes that you've just cast you  
6 have an equal right to participate with everybody else  
7 in the -- in the City in voting for those officials.

8 But when you vote for your borough president,  
9 you don't have an equal right to participate with  
10 somebody across the harbor in Staten Island. You don't  
11 have a -- equal access to that person. You don't have  
12 equal leverage over that person. You don't have equal  
13 responsiveness from that person. You're competing with  
14 2.2 million other people if you live in Brooklyn, 1.8  
15 million other people if you're in Queens. In Staten  
16 Island, you're competing only with 350,000 other people.

17 QUESTION: We're -- we're not talking about  
18 officials; we're talking about government decisions.

19 MR. EMERY: Right.

20 QUESTION: And it seems to me what's crucial  
21 is how far my input into a particular government  
22 decision is away from absolute equality with the other  
23 people in the -- in the City.

24 MR. EMERY: And that point -- again, I don't  
25 want to overly defend the court of appeals because by

1 any measure we win it. Seventy-eight percent is far  
2 above anything this Court has ever tolerated. And what  
3 I -- what I -- but put that aside.

4 To answer your question, the point is that  
5 when a governmental decision is made above and aside  
6 from the premium issue, the city-wide officials make  
7 their decisions based on their view of city-wide  
8 interests. They can't have to win the borough  
9 elections. It's not like a presidential election where  
10 there are states and you have to compile up each borough  
11 victory. Their coalitions for their constituency are  
12 comprised of city-wide coalitions, racial, ethnic,  
13 socioeconomic, whatever. And those determine,  
14 theoretically at least, what the city-wide official's  
15 interest is. And it's a city-wide interest.

16 The same cannot be said for the borough  
17 presidents. The borough presidents' issues are  
18 determined -- their point of view, their vote, their  
19 actions as public officials are determined by the view  
20 of their constituency which are of dramatically  
21 different sizes. And these are very real decisions, and  
22 they make very real differences. And in the record at  
23 least, it's very clear that there are -- there is  
24 evidence -- there is some certainly evidence of -- of  
25 some dramatic differences in the way that people



1 perceive their borough presidents and their  
2 responsiveness in the different boroughs.

3 QUESTION: (Inaudible) think that New York  
4 City would have been formed had the rule that you're  
5 urging been in effect at that time?

6 MR. EMERY: well, in fact --

7 QUESTION: The thing is we can all join  
8 together, but when we all join together, there's going  
9 to be no special election of any particular  
10 representative for Staten Island or for Brooklyn or for  
11 Queens?

12 MR. EMERY: The -- the history of the -- of  
13 the consolidation of New York City, as Mr. Zimroth has  
14 provided to you, is a bit of a mythology. We provided  
15 the history, the correct history, in the brief, plus the  
16 lodging material has it extensively.

17 Staten Island would do -- would have done  
18 anything to become part of New York City. They wanted  
19 to grab at the huge tax base of Manhattan and Brooklyn.  
20 They -- they overwhelmingly voted in straw polls, which  
21 were not binding. It wasn't a binding vote to -- to do  
22 this.

23 QUESTION: But I'm impressed by the fact that  
24 you say that a lot of other cities have voting systems  
25 such as this. And that suggests to me that very often a

1 municipal arrangement would never -- would never be  
2 arrived at unless the people of the relatively discrete  
3 units that vote to join together have some assurance  
4 that there -- that there is some home rule, so to speak,  
5 that they can vote as -- as a discrete unit.

6 MR. EMERY: well, I -- I overstate it because  
7 every other municipality, every other city including  
8 Washington, D.C., that has a mixed district and at-large  
9 system complies with one person/one vote. All the  
10 districts are substantially equal. They have their own  
11 peculiar geographic, historical and other  
12 --socioeconomic, political, unique qualities in history  
13 and in development and in the way that they've come to  
14 have the political system they have. They're no more or  
15 less unique than New York.

16 But each one of those cities, every single one  
17 -- New York is the sole exception that anyone knows of.  
18 We can ask Mr. Zimroth if there are any others, but I  
19 think for the 25 years that this Court has required  
20 municipalities to comply with the simple dictates of the  
21 arithmetic computation for substantially equal  
22 districts, that --

23 QUESTION: Mr. Emery, you --

24 MR. EMERY: -- rule has been extremely  
25 successful because every single city, every municipality

1 has compiled with it. If there is some other rule  
2 announced after the 1990 Census when redistricting is  
3 going to be very uncomfortable for everybody involved,  
4 there will be all kinds of new claims to the historic,  
5 geographic, socioeconomic and other factors which are  
6 going to attempt to skew reapportionment in the  
7 direction of either incumbency or in directions that we  
8 cannot foretell.

9 QUESTION: You talk about --

10 MR. EMERY: So, I think that --

11 QUESTION: -- how many -- how widespread this  
12 is. Give me a name of another city that has boroughs.

13 MR. EMERY: I mean -- another city that has  
14 boroughs. I believe there's a --

15 QUESTION: Or borough presidents.

16 MR. EMERY: Borough presidents. Well, borough  
17 presidents are name --

18 QUESTION: Well, I mean, you say that this is  
19 so common. I just --

20 MR. EMERY: I'm saying that district at-large  
21 schemes are common. None of them violate one person/one  
22 vote.

23 QUESTION: Can you give me one that's similar  
24 to New York?

25 MR. EMERY: Well, I think Dusch v. Davis.

1           QUESTION: Can you name me one that's similar  
2 to New York?

3           MR. EMERY: Well, I think the only one that is  
4 in any sense similar is the Virginia Beach case that  
5 came out of here. There was -- there were boroughs in  
6 Virginia Beach. There are cities with boroughs in the  
7 United States.

8           QUESTION: Have you got one more, just one  
9 more?

10          MR. EMERY: I don't know any off the top of my  
11 head.

12          QUESTION: Well, then what in the world are  
13 you talking about?

14          MR. EMERY: Well, boroughs -- I mean, what are  
15 boroughs anymore? Boroughs are not governmental units  
16 of any type. Boroughs are simply administrative  
17 districts for a very strong centralized New York City.

18          QUESTION: In Pennsylvania you have boroughs  
19 which are like towns in New England I think.

20          MR. EMERY: Well, are they within a county and  
21 they comprise a county? Or -- I don't know the  
22 Pennsylvania scheme.

23          QUESTION: They're towns.

24          MR. EMERY: They're towns.

25          well, you see, New York has a system which is

1 very analogous in the counties. As I've said before, in  
2 Franklin v. Krause, this Court upheld the system where  
3 you had the town officials elected to a county  
4 legislature. Justice Marshall wrote the opinion in --  
5 in Abate v. Mundt about the county of Rockland where by  
6 definition, becoming the town supervisor puts you on the  
7 county legislature which then acts as a legislative  
8 body. In Abate v. Mundt, the 11.9 percent deviation was  
9 found tolerable by Justice Marshall and for the Court.  
10 And that -- that was such a system. And what they had  
11 there was a multi-member system to accommodate for the  
12 hugely disparate populations within these towns --  
13 within these towns which comprised the county. So,  
14 there are systems which are very -- that are analogous I  
15 would say.

16 The difficulty here is that this -- this case  
17 presents two things together, each of which is fairly  
18 common, but both of which are fairly rare, and that is a  
19 mixed at-large and district system and a -- a system of  
20 -- of, as you put it -- of -- of -- where there are  
21 substantial at-large numbers and a system where  
22 components comprise an overall legislative scheme.

23 The -- I think in fact the -- the notion that  
24 there is unanimity --

25 QUESTION: (Inaudible).



1 MR. EMERY: Excuse me.

2 QUESTION: Do you think the Virginia Beach  
3 solution would be acceptable in this --

4 MR. EMERY: well --

5 QUESTION: -- situation where you --

6 MR. EMERY: There's --

7 QUESTION: -- elect everyone at large, but  
8 --but you have residence requirements?

9 MR. EMERY: would I? I think that's something  
10 for the court at the remedy stage. I think that it is  
11 certainly constitutional. It is certainly a  
12 constitutional system under one person/one vote. Your  
13 opinion in -- in Avery v. Midland County for the Court  
14 stated as such, that the flexibility of -- of -- within  
15 the one person/one vote rule was the -- was -- was  
16 demonstrated by the fact that the case in Virginia  
17 Beach, Dusch v. Davis, was allowed to go forward because  
18 it was a totally at-large scheme.

19 I might say that this mixed district and  
20 at-large scheme, which we've talked about as relatively  
21 popular in the United States right now, is a scheme  
22 which is growing in popularity. In fact, it's -- this  
23 mixture of at-large and district schemes is something  
24 that is completely desirable. The only thing that the  
25 plaintiffs object to in this case is the assignment of

1 equal votes for each of the boroughs within this scheme  
2 instead of assignment for equal opportunity to  
3 participate in the electoral process by the -- by the  
4 voters.

5           And the interesting thing is here -- and we  
6 can ask Mr. Zimroth this. I mean, you can ask Mr.  
7 Zimroth this in rebuttal, and that is what interests  
8 that he has cited for upholding the current Board of  
9 Estimate -- and he has cited many interests. He cited  
10 interests in history, in natural boundaries and  
11 integrity of subdivisions, in effectiveness, in  
12 meaningful participation, in check on executive powers.  
13 What, if any interests of those in retaining the current  
14 Board of Estimate in any way relate to the retention of  
15 equal votes for the borough presidents?

16           QUESTION: Well, if -- if -- if you're trying  
17 to make some sort of a place for Staten Island in the  
18 system, I suppose if the -- if the representative from  
19 Staten Island has one vote and the representative from  
20 Brooklyn has 20 votes, maybe the guy from Staten Island  
21 just won't come to the meetings.

22           MR. EMERY: Well, the -- the --

23           (Laughter.)

24           MR. EMERY: The representative from Staten  
25 Island can have one vote, and the representative from

1 Brooklyn can have six votes, or it can be apportioned in  
2 such a way that the Staten Island representative will  
3 come to the meetings because he will make a meaningful  
4 difference.

5           And it -- I guess the -- the opposite of your  
6 hypothetical is let's say we wanted to give Staten  
7 Island and absolutely guaranteed role in the system.  
8 Why not have total at-large elections and give every  
9 Staten Islander six votes; every Brooklyn; one, every  
10 Queens, two; every Bronx, three -- Manhattan, three; and  
11 Bronx, four? Could we do that? It seems to me that  
12 would be plainly unconstitutional and that is the exact  
13 import of the system that now is in existence.

14           The point about the -- about the  
15 justifications that Mr. Zimroth offers here is that none  
16 of them support this equal vote for boroughs. And, in  
17 fact, as Justice O'Connor pointed out, the equal votes  
18 for boroughs is a relatively new part of this scheme.  
19 This scheme, for 60 of its 90 years, did have votes  
20 roughly weighted for purposes of population. And in  
21 1958 when they equalized the votes, the deviations went  
22 up substantially -- population deviations under the Abate  
23 method.

24           The -- Justice O'Connor asked whether it would  
25 make a difference whether an at-large representative was

1 added. Well, you can figure approximately. I can't do  
2 it because I don't have the calculator ready, but  
3 basically it's 132.9 percent if you ignore the  
4 city-wide. It's 78 percent if you add the city-wide.  
5 And that's three of them. So, if the difference between  
6 70 -- 100 -- is about -- 40 plus twenty is 60. Sixty  
7 percentage points are added by three -- or sorry --  
8 lowered by addition of three. So, four would probably  
9 bring it down to 58 percent.

10 In fact, this Court -- this Court has  
11 summarily affirmed the invalidation of a city council  
12 scheme in New York City that had 50.8 percent  
13 deviations. And that city council scheme had  
14 essentially exactly the same interests underlying it as  
15 the Board of Estimate scheme. In that scheme each  
16 borough had two extra city council seats assigned to the  
17 borough as borough representatives. This Court summarily  
18 affirmed in *Andrews v. Koch*, which is in the brief, the  
19 -- the invalidation of that scheme which assigned equal  
20 -- equal -- two votes/two new city council each for each  
21 borough.

22 And the justifications there were actually  
23 stronger because there was an added justification that  
24 the -- there would be a minority party representative on  
25 each of those -- one of the two would have to be a

1 minority party representative. It could not be a  
2 democrat. It would have to be some other party in the  
3 City of New York. And the -- that was thought to be a  
4 good thing, and that was offered as a justification for  
5 -- an added justification besides the equal  
6 participation of the boroughs.

7           So, what we have here in the end -- and one  
8 should be aware of this -- is many alternatives that can  
9 work for New York City. Mr. Zimroth is wrong in my  
10 opinion in saying that this is the only system that will  
11 let New York City survive. The fact of the matter is  
12 that I'm not sure we've done very well with it, but some  
13 say we have. I'm not sure that effectiveness can ever  
14 be a criteria for this Court because that will place it  
15 in -- more in the midst of any political thicket than it  
16 ever has been so far it seems to me.

17           And it's also important to note that there is  
18 a charter revision commission standing in abeyance  
19 waiting for this Court's decision to make a  
20 determination with the many alternatives that it has  
21 already assessed and already made determinations about  
22 as appropriate to maintain the wisdom and the good parts  
23 of this mixed district and at-large scheme.

24           In conclusion, I would just say that we know  
25 that the one person/one vote rule works at the municipal



1 level in just this kind of system nationally. You can't  
2 avoid by any method of computation the huge disparities  
3 that exist between boroughs that range in population  
4 from six to one -- by a factor of six to one. There's  
5 no question that the Queens and Brooklyn voter gets less  
6 responsiveness from the borough president than the  
7 Staten Island voter. It's clear in the record. And  
8 there is absolutely no evidence that the City has  
9 presented or that could be presented that the at-large  
10 city-wide officials favor the large boroughs. There's  
11 no evidence of that sort already, and that we hope that  
12 this Court will not accept an equal vote for boroughs,  
13 but will again reaffirm its doctrine of an equal vote  
14 for voters.

15 Thank you very much.

16 QUESTION: Thank you, Mr. Emery.

17 Mr. Zimroth, you have less than a minute left.

18 REBUTTAL ARGUMENT OF PETER L. ZIMROTH

19 MR. ZIMROTH: Wow. Very quickly.

20 Mr. Emery cites Franklin v. Krause as an  
21 example of the kind of case that this Court should give  
22 credence to. That was a case in which the courts in New  
23 York rejected the Abate method and used a method of  
24 analysis similar to the one that we have suggested.

25 Mr. Emery is now, in effect, backing off from

1 the court of appeals methodology.

2 CHIEF JUSTICE REHNQUIST: Thank you.

3 The case is submitted.

4 (Whereupon, at 1:57 o'clock p.m., the case in  
5 the above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

No. 87-1022 - BOARD OF ESTIMATE OF CITY OF NEW YORK, ET AL., Appellants V. BEVERLY MORRIS, ET AL.; and

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No. 87-1112 - FRANK V. PONTERIO, Appellant V. BEVERLY MORRIS, ET AL.

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and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY alan friedman

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