

Supreme Court of the United States

October Term, 1969

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In the Matter of:

CITY OF PHOENIX, ARIZONA, et al.,

Appellants.

vs.

EMILY KOŁODZIEJSKI,

Appellee.

Docket No. 1066

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Place Washington, D. C.
Date March 31, 1970

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IN THE SUPREME COURT OF THE UNITED STATES

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CITY OF PHOENIX, ARIZONA, et al.,

Appellants,

vs.

No. 1066

EMILY KOLODZIEJSKI,

Appellee.

Washington, D. C.

March 31, 1970

The above-entitled matter came on for argument at

2:13 p.m.

BEFORE:

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

APPEARANCES:

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1 versus the City of Houma, the latter of which held that it was
2 unconstitutional to prohibit nonproperty owners from voting in a
3 revenue bond election.

4 Court in Cipriano applied its holding prospectively only
5 and held open the question of the applicability of Cipriano to
6 general obligation bonds.

7 Because of the cloud which Cipriano cast over the bonds
8 of the City of Phoenix, because of the urgent need on the part
9 of the City of Phoenix for the facilities which were to be financed
10 by these bonds, this suit was brought raising the question which
11 this Court now has before it.

12 Miss Kolodziejki, the plaintiff in this case is an
13 employee of the leading investment banking firm in the City of
14 Phoenix, specializing in municipal bonds. She owns no real
15 property, she rents her living quarters.

16 It is stipulated that the real property taxes which
17 her landlord pays have a material bearing on the amount of taxes
18 or on the amount of rent which she is charged.

19 A question which arises at the outset of this case con-
20 cerns the relevant test which is to be applied to determine the
21 right of the state through its constitution and its statutes to
22 prescribe qualifications under which resident citizens of the City
23 of Phoenix can participate in general obligation bond elections.

24 Q Let me ask you a preliminary question.

25 A Yes, sir.

1 Q It occurred to me that maybe there is an answer to
2 it. But under your state law could she have attacked this bond
3 issue as a matter of time limits of an act?

4 A Mr. Justice Harlan, in my opinion the answer to
5 that question is yes. But no one really knows the answer to that
6 question.

7 The State of Arizona, unlike the State of Louisiana,
8 does not have and so far as I know there is really one state that
9 has a statute exactly like it, the one in Louisiana. It does not
10 have the kind of statute that provides what they call a per-
11 emption period at the end of which there is no further challenge.

12 Arizona is really at the other end of the spectrum in
13 this sense: The only election challenge statute that exists is a
14 five-day period, which was obviously intended to apply to elec-
15 tion of officers.

16 There is one governing case which is rather difficult
17 to read and lawyers can differ on exactly what it means. Suffice
18 it to say that there is serious question under the laws of the
19 State of Arizona whether there ever comes a time that there is no
20 longer the opportunity to challenge a bond election.

21 Q I gather you are not raising that.

22 A No, sir, indeed we are not. Indeed we are not.

23 Q I suppose the state can waive it, can't it?

24 A Yes, sir, Yes, Mr. Justice White, in my opinion
25 we can.

1 Q You received a five-day limit here. After all ---

2 A It would have been five days after the canvass.

3 Q Which would have been July 28th or June 22?

4 A It would have been June 28th, yes, indeed.

5 Q Which would have been ---

6 A Before this action was filed.

7 Q Well, yes, but whoever was excluded from the elec-
8 tion knew that they were excluded on June the 10th.

9 A That is correct. We have ---

10 Q So they really have some time to file.

11 A That is correct, and did not file within the five-
12 day period. But I reiterate, we have not raised that and do not
13 wish to at this time. And we feel that as a matter of Arizona
14 State law, No. 1, there is a question of whether she did or did
15 not file it within the proper period of time; and, No. 2, in my
16 opinion it is a matter that can be waived.

17 We are not relying on it.

18 This Court over a period of a century has laid down the
19 very salutary rules and a rule that is reflected in, oh, at least
20 half a dozen separate decisions of this Court, that in determin-
21 ing which of its citizens will be allowed to vote. The states
22 are allowed a broad discretion in setting qualifications and
23 determining the circumstances and the qualifications under which
24 which of its resident citizens will be allowed to vote.

25 There was an exception carved out from that rule by this

1 Court's decision last term in Kramer versus Union Free School
2 District, and because that exception lies at the heart of the
3 resolution of the issue in this case, it is important to note the
4 precise circumstances under which that exception prevails.
5 Therefore, it is important, I feel, to look at the exact language
6 of the Kramer case.

7 Kramer spelled out that the circumstances under which
8 the exceptions to the general rule apply is as follows: That
9 the broad latitude which courts usually accord the legislative
10 judgments in this area is based on the assumption that the insti-
11 tutions of state governments are fairly constituted. And that
12 when the attack is an attack on that very assumption, then the
13 assumption itself can no longer serve as a basis for presuming
14 constitutionality.

15 It follows in view of the Kramer Court that the general
16 rule upholding the judgment of legislators, where reasonable, and
17 I am quoting, "does not extend to decisions concerning which resi-
18 dent citizens may participate in the election of legislators and
19 other public officials."

20 The Court was very specific on this point and reiterated
21 it a number of times. Now it is true, as Justice Stewart pointed
22 out in Kramer, that it was not limited to the election of New
23 York, legislators which necessarily imposed that limitation. Never-
24 theless, whether right or wrong in Kramer, and I accepted it as
25 fair -- whether right or wrong in Kramer, the rationale of Kramer

1 was that that limitation applied only when you are electing
2 people, when you are electing the general policy-making body of
3 the state or one of its political subdivisions, the Legislature
4 and the school board in Kramer, the City Council in this case,
5 and bond elections do not fit within that exception category.
6 Therefore, we submit that the limitation involved in this case
7 must be upheld.

8 Q What did you do in Cipriano?

9 A That Cipriano, Mr. Justice Harlan, is an enigma.

10 Q But it is on the books.

11 A Yes, it is on the books. But it did not overrule
12 -- in fact, both it and the Kramer decision itself specifically
13 said we are not overruling Lassiter, Pope v. Williams, Mason v.
14 Missouri and Harrington v. Rash.

15 Q Those are listed, or at least some are listed which
16 join in the defense of Kramer and found it impossible to sentence
17 Cipriano.

18 A And the reason that you found it impossible to sen-
19 tence Cipriano, Mr. Justice Harlan, is this: As I read your
20 dissent in Cipriano, that under any circumstances ---

21 Q No, I assigned Justice Stewart.

22 A Yes, and I realize you filed a separate one for
23 other reasons. But Mr. Justice Stewart's and Mr. Justice Black's
24 dissent in that case pointed out that under any circumstances
25 there was not a reasonable basis for the exclusion in Cipriano,

1 and the reason was that there simply was not a reasonable connec-
2 tion between exclusion of property owners in a revenue bond
3 election, and that hangs on the difference between revenue bonds
4 and general obligation bonds, and I propose to bear down very
5 heavily on that particular distinction.

6 The most that can be said about Cipriano, Mr. Justice
7 Harlan, is that it was *vere dictum*, and the *procuriam* opinion
8 handed down the last day of the term -- and I don't want to --
9 well, all I can say is it was simply a kind of a washover from
10 Kramer. And if you read Kramer carefully, it should not be made
11 to extend to any kinds of bond elections. And I do not feel, to
12 borrow the phrase used by the Solicitor General, that a century
13 of this Court's decisions should be laid to rest with nothing
14 more than the simple statements of compelling state interest in
15 the Cipriano without any attempt to reconcile it with the rather
16 careful reason, whether right or wrong, that was set forth in
17 Kramer.

18 I turn then to discussion of the ---

19 Q I would lay aside a lot of history, too, when we
20 went to Reynolds and Sims.

21 A Well, I recognize that, Mr. Justice Harlan. All
22 I am saying is ---

23 Q You were having an argument with that case?

24 A No, I didn't intend to reargue Reynolds v. Sims,
25 Mr. Justice White.

1 But all I am saying is, that all excepting Reynolds v.
2 Sims, excepting Kramer for its reasoning, accepting Cipriano v.
3 the City of Houma -- this is a different case and for reason
4 which I am not about to discuss, the Court should go no further
5 than it has gone in Reynolds v. Sims and in Kramer and Cipriano,
6 and I submit, Mr. Justice Harlan, because I know of your feelings,
7 that this is a different case and it does not involve the same
8 problem.

9 The reason that it does not involve the same problem
10 rests upon the difference between a revenue bond election, on the
11 one hand, and a general obligation bond election, on the other
12 hand.

13 In a general obligation bond election there are two
14 issues that are submitted to the electorate that are relevant
15 for present purposes. The first of these is, will the City of
16 Phoenix obligate itself -- borrow money and obligate itself to
17 repay that money through the imposition of taxes, real property
18 taxes perhaps supplemented by sales taxes.

19 That is one question.

20 Q Or anything else that is ---

21 A That is available, that is correct, Mr. Justice
22 White.

23 Q From any source, except some taxes ---

24 A Designated, that is correct.

25 In Allison v. the City of Phoenix the Arizona Supreme

1 Court said that there was an obligation only to impose real
2 property taxes where necessary, but if the city had available
3 some taxes from another source, they could use it. So I will
4 agree, Mr. Justice White ---

5 Q The only thing they promised the bondholders was
6 the property tax?

7 A The property tax plus the lien on the property.

8 Q That's what I mean. They ---

9 A They promised it. And by statute the City of
10 Phoenix is obligated to tax that property to a sufficient extent
11 to repay the bonds.

12 Q If they fail to do so, then there is real trouble,
13 isn't there?

14 A That is correct. The point of taking the property
15 and selling it at a tax lien sale.

16 And that brings me to the second issue. In any general
17 obligation bond election, and I will concede that there might
18 -- that Miss Kolodziejki might have about the same interest in
19 the first question, because it is true that maybe she is going
20 to participate to some extent or another in the payment of the
21 taxes on a year-to-year basis if things go well.

22 But there is a second issue really in any general obli-
23 gation bond election. And that is this: Will the City of Phoe-
24 nix impose a lien by way of collateral security for the obliga-
25 tion, the money that the City of Phoenix is borrowing on the

1 property of each individual property within the City of Phoenix.
2 That is the real difference.

3 The City of Phoenix is borrowing money. It is borrowing
4 it on a secured obligation, unlike revenue bonds which are unse-
5 cured obligations.

6 The City of Phoenix is putting up the security and, as
7 is the case with any secured loan, it can get a better interest
8 rate if it puts up security than if it doesn't put up security.

9 Q Well, when you say it puts up some security, it
10 puts up security of someone else's property, not its own property?

11 A Precisely. This property does not belong to the city
12 The property it is putting up as security belongs to the Robert
13 Baxsteins and the Fred Rosenfelds, who live within the City of
14 Phoenix.

15 Now under the normal course of events if all goes well
16 and we don't have a depression, and the City of Phoenix prospers,
17 then the City of Phoenix will probably be able to repay these
18 bonds over the entire 21-year period from a normal amount of
19 property tax revenues and from the sales taxes.

20 Q What is the rate of interest?

21 A The maximum rate of interest, Mr. Justice Black,
22 under the present statutory provisions of the State of Arizona
23 is 6 percent.

24 It probably will be able to repay it. And it is very
25 possible that the landowners and the Emily Kolodziejks within

1 the City of Phoenix won't notice a materially different impact
2 from these bonds. But undeniably there is a difference in the
3 risk that is assumed by the property taxpayers and the nonproperty
4 taxpayers in that the property taxpayers have their property sub-
5 jected to a lien. Their property is put up as security for what
6 the City of Phoenix has borrowed, and I think the purest illustra-
7 tion of this lies in the bonds that are referred to by the amicus
8 brief that has been filed by the City of Salt Lake.

9 They refer there to airport revenue bonds, which are
10 revenue bonds in which the city anticipates will be paid from
11 revenues generated by the airport. But the city won't issue these
12 as general obligation bonds because it can get a better interest
13 rate.

14 Anyone who has ever had any experience, as I am sure
15 all the members of this Court have, with commercial transaction
16 know that a loan can be made on conditions more favorable to the
17 lender if he puts up some kind of security.

18 Q Mr. Lee, do you have a sales tax in Phoenix?

19 A Yes, sir, we do.

20 Q Personal property tax?

21 A Well, ---

22 Q May I also assume that some of the property there,
23 that the taxes there are paid by the people that are renting?

24 A That is correct, Mr. Justice.

25 Q Is there money involved?

1 A Their money is involved, Mr. Justice Marshall, in
2 the annual repayment or may be involved. The difference between
3 those people and the real ---

4 Q This will settle my question. Is the payment of
5 these bonds limited to real property taxes?

6 A No.

7 Q That is all I want to know.

8 A Under the decision of the Arizona Supreme Court in
9 Allison v. the City of Phoenix, you can use sales taxes. You
10 must use property taxes, if necessary.

11 My point is, there is not a constitutional difference
12 or we don't need to look to the difference in source of the
13 payments year by year for the constitutional difference. In my
14 view the constitutional difference appears in the fact of the
15 risk that the property owner is taking.

16 Now if the City of Phoenix were saying, we are going
17 to borrow money, we can get a more favorable interest rate on
18 this money if we put up some security and the security we are
19 going to put up, the cash surrender value of life insurance of
20 every citizen of the City of Phoenix, stocks and bonds investment
21 portfolios of every citizen in the City of Phoenix, and the
22 savings accounts. Then I think we would have a different case.

23 Q Could they do that? Those three things you mentioned

24 A It would be impractical, Mr. Justice. The reason
25 it would be impractic is because those things are made -- but

1 those things don't necessarily stay within the City of Phoenix.
2 The only thing of value that is clearly going to stay within the
3 City of Phoenix during the 21-year period is the land.

4 Now, in my view it is the same as though we had two
5 joint obligators on a promissory note, only one of them supplying
6 security for the note, and there is a material difference between
7 the interest of those two in whether the bonds are to be sold or
8 not, particularly when you bear in mind that the election --
9 which is what we are talking about here -- is only the second
10 step in a three-step process involved in the issues of bonds.

11 No bonds are ever issued by any municipality in any of
12 the states that have this kind of restriction unless, first of
13 all, the City Council or the school board or someone determines
14 the bonds should be issued.

15 That determination is made by a body that a la Kramer
16 has been property apportioned elected fairly by all the people.
17 The election is the second step, and the third step is the actual
18 issuance and sale, which again lies within the discretion of the
19 City Council or whatever the particular body may be.

20 Q Now is this an election by a majority vote ---

21 A We have no apportionment problems here.

22 Q --- without reference to the amount of their
23 property?

24 A That is correct.

25 Q I mean, if a man owned \$10 worth of real estate,

1 his vote would count as much as if he owns \$1 million worth who
2 votes.

3 A That is correct. We don't have the Louisiana prob-
4 lem here.

5 Now I would like to devote just a few moments to the
6 prospectivity-retroactivity problem. We do feel, and I reiter-
7 ate that under any conceivable test, there is a distinction
8 between general obligation bonds and revenue bonds, a distinc-
9 tion which under this Court's authority renders the Arizona
10 law constitutional.

11 However, in the event that this Court should disagree, I
12 do suggest very strenuously that the decision should be prospec-
13 tive only and I would like to discuss that briefly with the Court,
14 because of the great interest which has been created and because
15 of the importance of this matter also to the City of Phoenix
16 and its need for the \$170 million worth of financing.

17 The Court has noted, I am sure, that there have been
18 12 different briefs filed from a collection of about eight dif-
19 ferent statements across the country, whose provisions are similar
20 to those of Arizona. I would simply submit that as this Court
21 held in Cipriano, that the various interests bearing on retro-
22 activity vis-a-vis prospectivity indicated that the decision
23 should be prospective only are compounded in the case of general
24 obligation bonds, and that there is even more reason why general
25 obligation bonds or why the decision in this case, if the decision

1 should affirm the lower Court's decision, should be prospective
2 only from the date of this Court's decision in this particular
3 case.

4 Q May I ask you what effect that would have on the
5 City of Phoenix?

6 A Well, we hope, Mr. Justice Black, that it would
7 hold them -- that it would validate these bonds. And let me
8 say why I hope that this would be the case.

9 May I point out, first of all, that in the Allen case
10 two terms ago, which also involved an election under the '65
11 Voting Rights Act, this Court held its decision prospective not
12 only as to other elections, but also as to the election involved
13 in the particular case that was at issue.

14 The City of Phoenix held its election prior to Cipriano,
15 six days prior to Cipriano. There are three different questions
16 that are raised by this Court's decision in Cipriano and in the
17 Allen case that we feel are relevant and helpful in the determina-
18 tion as to prospectivity in the instance case.

19 In Cipriano this Court mentioned significant hardships
20 which were the result from a retroactive decision made. May I
21 simply point out not only in the case of Phoenix, but also in
22 others, the hardships are much greater in the case of general obli-
23 gation bonds than they are in the case of revenue bonds.

24 Q Is Cipriano the one in which we draw the line
25 depending on whether the election was still subject to challenge?

1 A Yes, sir.

2 Q That was Cipriano?

3 A Yes, sir, and I want to discuss that, because it
4 fits fine in Louisiana, but not in Arizona.

5 Q I was just wondering how you felt about that.

6 A Yes, sir.

7 Q Because by your own indication this election is
8 subject to challenge?

9 A Right. And it may be, Mr. Justice White. We just
10 don't know. Well, let me address myself to that problem.

11 In those states that have a Louisiana-type statute and
12 off-hand I think there is only one, then that rule works fine.
13 In those states which do not have that type statute, and Ari-
14 zona does not, then we submit it should be that -- that the cut-
15 off date should be the time of the election.

16 Q Why shouldn't it be within the period that the
17 election is subject to challenge?

18 A We don't know what that is.

19 Q Well, I thought it was ---

20 Q Well, if somebody wants to challenge elections in
21 Arizona, I thought it was five days.

22 A Well ---

23 Q Five days after the canvass.

24 A But that is not bond elections. We are not sure
25 whether that is bond elections. Let me tell you why that is not

1 a good ---

2 Q You mean there aren't any states -- you mean it
3 is more general than not that the states have no time limit on
4 when you can challenge a bond election?

5 A Mr. Justice White, this is separate.

6 Q I wouldn't think the bond lawyers would ever pass
7 an opinion on a bond issue.

8 A We have a great battery of bond lawyers here.

9 Q Yes, I see them here.

10 A They have informed me, and I rely on their opinion,
11 that Louisiana stands alone insofar as that degree of protection.
12 That is a correction period. I would say that Idaho has one that
13 is the closest.

14 Q Well, how does anyone know in your state whether
15 any bond is good? You can challenge an election forever.

16 A You always have the argument of latches, and there
17 is always a possibility that -- there will come a time, but it
18 is not an identifiable time, such as was involved in Louisiana.

19 Q What is it you are contending for, Mr. Lee?

20 A For the date of the election.

21 Q By that you mean if we are to say that you lose on
22 the other point, that we should also say only as to the election
23 after the date of this --

24 A Of this Court's decision.

25 Q And that is only for what, for the State of Arizona?

1 A No, I would hope for all the states.

2 Q Well, how would this affect what we said in Cipriano?

3 A It wouldn't. It would simply say that in those
4 states such as Cipriano was, where you have an identifiable time
5 period, then that is the cutoff point. Where you don't have it,
6 then we have two rules.

7 Q You have two rules?

8 Q You don't have it if you have the date of the elec-
9 tion.

10 A The date of the election. Now here is the reason
11 I feel that it should be the date of the election. It is, after
12 all, the election that raises the constitutional question. That
13 is where people either do vote or don't vote.

14 Now here is another reason, Mr. Justice White, why I
15 feel it should be the election, in answer to your earlier question.

16 The City of Phoenix held this election on June the 10th.
17 Cipriano came down on June 16th. Now subsequent to that time
18 the City of Phoenix, acting in perfectly good faith, took steps
19 to have the question determined as to whether its bonds were good
20 or not, and that is why we are here and we are here first.

21 Subsequent to that time there were a number of elections
22 held and as you look in the amicii briefs that have been filed
23 -- Colorado, Louisiana, Utah didn't have one, Tulsa, Oklahoma,
24 Florida, Idaho and Texas. All of those have held elections
25 subsequent to Cipriano.

1 The reason was, of course, that especially for schools
2 and that is one reason why it is more important to hold it
3 prospective in general obligation bond context than it is in
4 the revenue bond context, and that is the only way schools can
5 finance, and schools simply cannot wait. That is why you find
6 so many school elections. They had to be held.

7 So under -- and that case is not here -- many of those
8 elections would be approved under any rule, under the Cipriano
9 rule if it were applied here, simply because they went ahead and
10 held their election and in the State of Texas they actually sold
11 their bonds.

12 We submit that there is no reason why the City of Phoe-
13 nix should be in any lesser position, having proceeded in good
14 faith, as the City of Phoenix did, in an orderly way to get the
15 question resolved, and really frankly doing a service to the other
16 13 states in this country, and Cipriano, I know very candidly,
17 has thrown the municipal financing community of the 13 states
18 into chaos. Why we should be in a lesser position, having per-
19 formed that service ---

20 Q How much of this issue -- how much of the total
21 have you sold?

22 A None, Mr. Justice.

23 Q None of it?

24 A None.

25 Q I suppose any purchaser would demand a pretty big

1 discount.

2 A Well, the problem is we can't get any of these
3 gentlemen here to give us an approving opinion.

4 Q That is why you want one from us.

5 A That's right.

6 Q You can see the invalidity of the revenue bonds.

7 A Well, I am keeping my one little foot in the door
8 on that.

9 Here is the kicker on the revenue bonds. If I am
10 right, that in non-Louisiana-type states the cutoff date should
11 be the election, then this revenue bond election was held before
12 the Cipriano decision, six days before.

13 Q So -- I see, you save your position with respect
14 to the prospective-retroactive.

15 A Only. Other than that, we agree with Cipriano.

16 Q That makes it invalid as to future.

17 A Yes, sir.

18 Q Well, what about in other states that have held
19 elections since Cipriano? Cipriano has at least told them it
20 wouldn't have been any more retroactive if Cipriano said special
21 revenue obligations somewhere, so the pendency of this case really
22 doesn't seem to worry anybody. They know it wouldn't be any more
23 retroactive than in Cipriano.

24 A Well, Mr. Justice White, I hate to use up my time
25 arguing for the other fellow, but I do feel -- you see, in

1 Cipriano you said you specifically held open the question of
2 Cipriano's applicability here.

3 You also said that Cipriano itself would be prospective
4 only. I simply submit, and I can do nothing more than that,
5 these states acted reasonably in light of both of those.

6 Q Well, I would think they would in holding an
7 election and I don't know why they worry about the consequences
8 of a decision in this case.

9 A I would like to reserve my remaining time.

10 MR. CHIEF JUSTICE BURGER: Mr. Rosenfeld.

11 ARGUMENT OF FRED H. ROSENFELD, ESQ.

12 ON BEHALF OF APPELLEE

13 MR. ROSENFELD: Mr. Chief Justice, and may it please
14 the Court:

15 On behalf of Miss Kolodziejcki we suggest that the
16 Court reject the city's argument and affirm the decision of the
17 lower Court.

18 In relation to the city's argument, which is in effect
19 to limit both Kramer and Cipriano to factual contents of each
20 case, we feel that this should be specifically rejected. The
21 Kramer case, we will admit, stated that the rule would apply and
22 in the first instance it seemed to say the rule would apply to
23 election officials.

24 However, it went on and there are portions of the Kramer
25 case that seem to imply to me, and to a great many people that I

1 know in this business, that it applied to all special elections.

2 In the Kramer case I cite as follows: "Thus, state
3 enforcement statutes which may dilute the effectiveness of some
4 citizens' votes, receive close scrutiny. No less rigid an exami-
5 nation is applicable to statutes denying the franchise to those
6 otherwise qualified by residents in age. Therefore, if a chal-
7 lenged state statute grants the right to vote to some bona fide
8 residents of requisite age and citizenship and denies the fran-
9 chise to others, the Court must determine whether the exclusion is
10 necessary to promote a compelling state interest."

11 Now Mr. Lee has stated that the Cipriano case was actually
12 decided on the basis of the rational basis doctrine. I must
13 admit to a great deal of confusion on this approach. The --
14 citing from the Cipriano case, and that as you know, gentlemen,
15 was a municipal bond election referring to revenue bonds, not
16 the general obligation bonds."

17 You stated in Cipriano, "When, as in this case, the sole
18 justification is rational basis for limiting the franchise to
19 those voters with a special interest, the statute clearly does
20 not meet the exacting standard of precision we require in statutes
21 which selectively distribute the franchise, citing the Kramer
22 case."

23 It appears to me that this is every indication that the
24 Court meant to apply this rule to all elections, not just to the
25 elections of officials.

1 Now, I ask what sense would it be to apply a special
2 rule to revenue bond elections and another rule to general obli-
3 gation bond elections, and yet another rule to special-purpose
4 elections that cities have to buy property, which school districts
5 often have, or need authority to build a new schoolhouse or sell
6 school property.

7 In Arizona many of these types of elections -- and we
8 have a lot of them -- are also limited to real property taxpayers.
9 Do we have a series of rules here or do we have one specific rule
10 that applies to all limited elections.

11 We feel that the Court should follow the teachings of
12 both Kramer and Cipriano, and should reaffirm the rules set forth
13 in those cases in the opinion in this case.

14 Now, I think another part --

15 Q When you say "reaffirm," do you possibly mean
16 extend the rules to reach this case?

17 A Yes, sir. It is our position that the rule applies
18 to all special elections, notwithstanding the type of election,
19 so in that context it would be reaffirming. It may be an exten-
20 sion. I guess it would be interchangeable almost in that situa-
21 tion.

22 Another thing to note in Cipriano, the Court appeared,
23 as I stated, to take the more rigid approach to that election.
24 The dissent -- Mr. Justice Black's dissent -- used what I believe
25 to be the rational basis doctrine or the general test for the

1 Fourteenth Amendment against the ---

2 Q In what case was that?

3 A In Cipriano.

4 Q There was no dissent in Cipriano.

5 A Excuse me, in the Kramer case. I'm sorry.

6 --- to the effect that the restriction was wholly
7 irrational. Now if it was wholly irrational, if this is the
8 opinion of the minority, it could also well have been the opinion
9 of the majority. But the majority opted for a more specific test,
10 so we feel that in the reading of Kramer and Cipriano there was
11 ample reason for us to believe that the Court meant to apply this
12 to all special elections.

13 Q Well, if it applies to all special elections and
14 Phoenix called an election to decide zoning rules for real
15 property owners and restricted that to real property owners, what
16 would you say?

17 S Well, then the test would have to be, are those
18 who are excluded substantially less interested and does the
19 exclusion promote a compelling state interest?

20 A Neither case held that the ---

21 Q I thought you said "any special election" had to
22 be open to everyone.

23 A Oh, no, that is not my statement at all. The
24 test applies. Excuse me. If I did, I didn't mean to.

25 Q I misunderstood you.

1 A I apologize.

2 My position is that the test is applicable, not that all
3 special elections must be thrown open. I do not espouse that
4 position and I don't think this case is a vehicle to espouse
5 that position.

6 The test set forth in the Kramer test, as I said, is
7 that of substantial interest and the exclusion must promote a
8 compelling state interest.

9 In the Cipriano case this was reaffirmed. In the Kramer
10 case and also in a footnote in the Cipriano case it appears to
11 us that the test is so rigid that no tolerances whatsoever are
12 allowed. In the Kramer case it is said that the statute must
13 be tailored so that all those -- and I underline "all" -- are
14 substantially less interested than those who are allowed to vote.

15 Now let us apply this rule to the facts of this case.

16 Miss Kolodziejki is a lessee. She does not pay real
17 property taxes, she owns no real property. She owns no personal
18 property subject to personal property taxes. She, however, it
19 is stipulated, that the rent that she pays takes in the amount
20 of the landlord's real property taxes into effect. Therefore,
21 she will be affected by any increase in the real property taxes.

22 She also pays sales taxes, which may be used to defray
23 the bonds, but it is not an absolute requirement that the city
24 continue to use the sales taxes for the purpose of defraying these
25 bonds.

1 The facts also show that she is interested in civic
2 affairs of the City of Phoenix and she wants to vote in all elec-
3 tions. The facts further show that the city has for the recent
4 years used taxes to pay only approximately two-fifths of the
5 annual debt service on its general obligation bonds.

6 Now, in applying the substantial interest test, it is
7 our position that appellee is as interested or is substantially
8 interested in the outcome of this election. There can be no
9 question that she is subjectively interested in the election.
10 The facts bear that out.

11 She is also pecunarily interested in the election inso-
12 far as her rent will be affected by any increase in the real
13 property taxes. She is also pecunarily affected insofar as the
14 money she pays in excise taxes will go if the city continues its
15 present to the payment of the debt service on general obligation
16 bonds.

17 All residents of the City of Phoenix are affected by the
18 increase in any tax, whether sales tax or real property tax,
19 because it will increase generally the cost of goods and services
20 within the city.

21 Besides being interested both subjectively and pecunarily,
22 we also feel that the appellee is interested and has an objective
23 stake in the outcome of this election. We wish to point out that
24 in all bond elections, the bond authorization is not the only
25 question before the voters.

1 There are other questions of political import in every
2 bond election, not just the debt. The location and type of the
3 improvements to be made is an important aspect of each bond
4 election.

5 Obviously I may be induced to vote for the bond issue
6 if they are going to place a school or library near my house.
7 Conversely, I may be induced to vote against the bond election
8 if the city intends to place a sewer plant or abbottoir in the
9 vicinity of my house.

10 This objective state is one that is shared by all resi-
11 dents of the city, not just by the real property taxpayers. In
12 fact, this subjective state is affected -- rather, affects those
13 people who are excluded from this election. For example, if you
14 have residents of slums or tenements which are almost universally
15 owned by absentee landlords, and if this is a dense population
16 of people, the political power of the ballot to induce the city
17 to place the municipal improvements desired by those voting is
18 completely wiped out.

19 I think one of the lessons of the election cases and
20 voting rights cases and voting rights legislation that we have
21 had over the past decade is the fact that the fruits of the
22 election gravitate toward the political power. Here we have a
23 situation which is basically unfair, a class of people are in a
24 position where they cannot exercise any power.

25 And I might say this, and I speak from my past experience

1 in this area. The general inclination on all bond elections is
2 to have a purpose which will carry ---

3 Q What was that?

4 A To carry, that the election will carry.

5 Nine times out of ten the purpose will be tailored
6 toward those with the voting power. Now if we exclude certain
7 citizens from the elective process and if we exclude certain
8 citizens who have a real stake in municipal improvements in the
9 area of schools, it might be said that renters in the slum areas
10 have an even greater stake in the improvement or the construction
11 of new schools in their area.

12 But when we take away this power to these -- this power
13 over the elective process, this power of the combined vote of
14 the tenant class to carry the election, then we have not only
15 affected the tenant class through rents, maybe through excise
16 taxes, but we have affected their objective state in the elec-
17 tion.

18 Q What you are really arguing now, though, is the
19 wisdom of the Arizona structure.

20 A Well, I am arguing -- I have to say that this. The
21 footnote in the Kramer case seemed to say that interest meant
22 the intent to vote. Mr. Justice Stewart's dissent said that it
23 was what the Court was intending to do, that the mere interest
24 is an interest sufficient to take the man to the polls to vote.

25 But I have tried to show that the interest of the tenant

1 generally goes much further than that. The interest of the
2 tenant is cumulative, subjective to pecuniary and objective.

3 Now, it also is, I think, a basic tenet of our civiliza-
4 tion that the rent is going to be passed on to the tenant. The
5 appellants in their brief state that the appellee is unique in
6 this fashion. However, this Court in a very recent case of
7 Turner v. Fusch stated as follows:

8 "It cannot be seriously urged that a citizen in all
9 other respects qualified to sit on the school board must own
10 property if he is to participate responsibly in the educational
11 decisions without regard to whether he is, among other things,
12 a lessee who effectively pays property tax as part of his rent."

13 I think the Court has noted what to me is a fact, a
14 basic tenet of our capitalistic society, that the landlord, in
15 order to get a fair return, must pass on the real property tax
16 as a cost of doing business. If the real property taxes go up,
17 his rents are going to go up accordingly, so he can keep his
18 fair return.

19 Now another point in this argument turns on the fact
20 that there is no qualitative approach on the part of the State
21 of Arizona or the City of Phoenix to determine just how much real
22 property is necessary in order to allow the elector to vote.

23 It is clear in my mind that so long as the man actively
24 pays real property taxes, he may own one square inch of property,
25 he will be allowed to vote. A person leasing thousands of acres

1 of property has no standing to vote in the same election.

2 However, if we are talking about the mere tokenism of
3 owning property, then we are in the situation which this Court
4 condemned in Harper v. Virginia Board of Elections where it said
5 that, "The test of wealth is not germane to informative voting."

6 It is easy to draw an example where the owner of real
7 property who would be allowed to vote could have a very small
8 interest in the property that he owns. If, for example, we
9 have someone owning \$10 worth of taxable property at the assessed
10 level and we have B who owns or who leases a \$10,000 home, on
11 the assessed evaluation basis. We have a situation where in one
12 month B is going to pay a bigger share of this, of the debt
13 incurred for these bonds than A will pay for the entire term.
14 However, B will not be allowed to vote and A will.

15 It might also be pointed out that, as I said, one of
16 the tenets of our society is that the entrepreneur takes the
17 risk. The lessee of real property must live on property owned
18 by somebody. If it is a corporation, the corporation can't vote.
19 If it is a private source, the private source could vote if he
20 lived in the city.

21 However, one of the risks that this entrepreneur takes
22 is the risk that he will have tenant throughout the life of his
23 building. In the event that taxes are to increase, this is part
24 of the risk. So it is no grave imposition on the landed plan to
25 remove the restriction that only real property taxpayers may

1 vote.

2 In our brief we cited some examples and the only one
3 I wish to point out is a situation where, under this particular
4 type of statute one person could own the entire municipality.
5 No civic improvement could be made unless that one person agreed
6 to it.

7 Now this is not exactly too far-fetched. In my brief
8 I pointed out two examples, one where two people carried, where
9 the vote carried two to nothing; one where the vote was defeated
10 by a score of one to nothing.

11 We feel that the statute in the constitution of the
12 state merely requires a token ownership of property. And that
13 the interest effected is in no way relative to the fact that the
14 man owns property, because you can pay more in a lease in a month
15 than the owner of a small piece of property could pay throughout
16 the life of the bond.

17 Tokenism, we feel, should not be a constitutional dis-
18 tinction. Yet that is what we have here. However, in the event
19 it is shown that the appellee and her class are less interested
20 than those who are allowed to vote, this does not carry the day
21 for the appellant.

22 The appellant must also show that the interest the state
23 seeks to protect is compelling. I am at loss to know the appel-
24 lant's position on compelling state interest. I have yet to
25 learn the appellant's position on the goal the state articulates.

1 However, the amicii briefs are some help in this area. The
2 amicii briefs boil this down to the protection of the landowner
3 against the piling of indiscriminate debts by those who do not
4 own the land.

5 We feel that the basic tenet of this type of articulated
6 goal is mere protectionism against the way the population excluded
7 might vote. This same approach was denounced in Carrington v.
8 Rash where the Court said, "First the state says it has a legiti-
9 mate interest in immunizing its elections from concentrating
10 balloting of military personnel whose collective voice may over-
11 whelm a small community, fencing out from the franchise a sector
12 of the population because of the way they may vote is constitu-
13 tionally impermissible. The exercise of rights so vital to
14 maintenance of democratic institutions cannot constitutionally
15 be obliterated because of the fear of political views of the
16 group of residents."

17 I might note that the fencing out section was also
18 cited in the Cipriano case.

19 That concludes my delivery insofar as the test of the
20 Kramer and Cipriano cases are concerned. I feel a few words
21 might be necessary in relation to the prospective application.
22 It is the statement of the city that the date of the election
23 should carry the day in this situation.

24 I feel that, one, there is very little question in my
25 own mind that we do have a cutoff date in Arizona. It is either

1 the canvass date or the five-day period thereafter.

2 Different attorneys, as Mr. Lee has stated, have read
3 the Morgan case to a different -- in a different way. It is my
4 feeling that there is a legitimate cutoff date.

5 Q If that is so, why are you still in Court here?

6 A Well, I think there is a cutoff date insofar as
7 attacking -- no, excuse me, there is a cutoff date insofar as
8 the application of the doctrine. But if the doctrine is a con-
9 stitutional -- a Federal constitutional doctrine, then there is
10 in my mind no legislative action that the state can take to
11 deprive the Federal Courts of jurisdiction.

12 Q Has that ever been held here?

13 A Excuse me.

14 Q Has that ever been held?

15 A I don't know.

16 Q You mean the states could set a time beyond which
17 you couldn't raise a constitutional challenge?

18 A A Federal constitutional challenge.

19 Q Is that your position?

20 A That is my position.

21 Q Well, I take it it would certainly have a statute
22 of limitations.

23 A Well, it could have a general statute of limitations.

24 Q And why wouldn't that apply to any attack, to any
25 lawsuit, whether it be based on the statutory or common law or

1 constitutional premise?

2 A You must note that the five-day election contest
3 period in question is a specific type of contest period. It goes
4 to the conduct of the election.

5 We have no quarrel with the conduct of the election, per
6 se. We say what went on afterward, before there was authority
7 to issue the bonds was sufficient to void the entire election.

8 Q You seem to be completely at odds with your opponent
9 on whether there is a cutoff date or not. YOU speak with great
10 assurance. Can you give us cases on it?

11 A Well, the only case that can be applied is Morgan
12 v. the Board of Supervisors.

13 Q I thought you said after you said that, that what-
14 ever cutoff date there might be for some purposes, you are per-
15 fectly clear in your mind there is none in Arizona on a case
16 like this.

17 A On a case like this. If the authority, if the
18 canvass is passed. When the canvass passes and the authority
19 to issue the bonds, or in the alternative, when the five-day
20 period passes, if that transpired before Cipriano, before the
21 Cipriano decision, then in my mind those elections are valid
22 and they would not be affected by the Cipriano decision.

23 On the contrary, if as in the City of Phoenix election,
24 the authorization was not complete -- those are the words used
25 in the last paragraph of Cipriano -- the authorization was not

1 complete, then Cipriano would apply. And if Cipriano did apply,
2 notwithstanding whatever cutoff date, whether it be the canvass
3 or five days after the canvass, would have no application because
4 we are not talking about a question pursuant to the election.

5 Thank you.

6 MR. CHIEF JUSTICE BURGER: I believe you have about one
7 minute left.

8 REBUTTAL ARGUMENT OF REX E. LEE, ESQ.

9 ON BEHALF OF APPELLANTS

10 MR. LEE: I don't really understand what Mr. Rosenfeld
11 just said about whether there is or is not a cutoff period, but
12 I submit my case is now made that there is confusion on this
13 point in the State of Arizona. And there certainly is at the
14 very least serious question as to whether there is, and we do not
15 have the type of situation that exists in the State of Louisiana.

16 Under those circumstances I simply reiterate my original
17 position, and that is that the election is the thing that raises
18 the constitutional question, should be the election, should
19 be the crucial date as of any prospective decision, any question
20 of prospectivity should be applied.

21 I simply reiterate that there is no question that this
22 does involve an extension of Kramer and Cipriano in any way,
23 whether you take the Kramer dictum or not. I suggest to the
24 Court that whether Kramer was a good decision or not in the first
25 place, when you extend that compelling state interest test to

1 real property owners in a general bond election. It involves
2 the same kind of judicial intrusion into the traditional legis-
3 lative field that this Court happily rejected in other fields
4 and it should again.

5 Thank you.

6 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Lee and Mr.
7 Rosenfeld. The case is submitted.

8 (Whereupon, at 3:05 p.m. the argument in the above-
9 entitled matter was concluded.)

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