

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: CARL T.C. GUTIERREZ AND MADELINE Z.
BORDALLO, Petitioners v. JOSEPH F. ADA AND FELIX
P. CAMACHO.

CASE NO: 99-51 02

PLACE: Washington, D.C.

DATE: Monday, December 6, 1999

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IN THE SUPREME COURT OF THE UNITED STATES

CARL T. C. GUTIERREZ AND

MADELINE Z. BORDALLO, :
:

Petitioners :

v. : No. 99-51

JOSEPH F. ADA AND FELIX P. :

CAMACHO . :

Washington, D.C.

Monday, December 6, 1999

The above-entitled matter came on for oral

13 argument before the Supreme Court of the United States at
14 11:05 a.m.

15 APPEARANCES:

16 SETH M. HUFSTEDLER, ESQ., Los Angeles, California; on
17 behalf of the Petitioners.

18 DENNIS P. RIORDAN, ESQ., San Francisco, California; on
19 behalf of the Respondents.

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PROCEEDINGS

(11:05 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 99-51, Carl C. Gutierrez, Bordello -- Bordallo
5 -- pardon me -- v. Ada/Camacho.

6 Spectators are admonished. Do not talk until
7 you get out of the courtroom. We've still got a Court
8 going here. Wait till you get outside to talk.

9 Mr. Hufstedler.

10 ORAL ARGUMENT OF SETH M. HUFSTEDLER

11 ON BEHALF OF THE PETITIONERS

12 MR. HUFSTEDLER: Mr. Chief Justice -- excuse me
13 -- and may it please the Court:

14 The issue before us this morning is whether Guam
15 has already elected its current Governor or whether there
16 must be a runoff election, and that depends, as you well
17 know, on whether a majority is determined by counting the
18 votes which have been cast in the gubernatorial race or
19 whether, according to the respondents in the Ninth
20 Circuit, we should could all of the ballots which were, in
21 fact, issued in the general election, along at the same
22 time, and then determine whether or not there was a
23 majority.

24 The net result of going along with what the
25 Ninth Circuit has decided and what the respondents contend

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1 is that there are three suspect categories of votes which
2 would be included in determining what constitutes a
3 majority that were not votes cast in the gubernatorial
4 race for one candidate.

5 The first was 1,313 ballots on which there was
6 no vote for the Governor at all.

7 The second was 609 ballots which were invalid
8 because the voter voted for both slates, contrary to the
9 statutes of Guam, and it was impossible to determine their
10 choice.

11 And then there was a third category of 1,019
12 votes on which the voter checked the box saying that the
13 voter wanted to vote for a write-in candidate, but then
14 didn't write in a candidate. So, another 1,000 ballots
15 which were, in effect -- in effect, blank ballots in -- in
16 the race for Governor. But on those ballots presumably -
17 - the record doesn't show -- but presumably people turned
18 in ballots on which they had voted in other races, but not
19 the gubernatorial race at all.

20 The net result of all of those votes was that
21 the Gutierrez slate received some 24,250 votes and the Ada
22 slate received 21,200. So, there was a --

23 QUESTION: Where can we find the statute in the
24 materials before us, Mr. Hufstedler?

25 MR. HUFSTEDLER: The -- the governing statute

1 1422?

2 QUESTION: Yes.

3 MR. HUFSTEDLER: That's in -- the statute is
4 quoted in the blue brief, in the initial brief, on the
5 statutes involved, and it's also quoted in the initial
6 argument.

7 QUESTION: Thank you.

8 MR. HUFSTEDLER: The statute is first shown on
9 page 2, Your Honor.

10 QUESTION: Thank you.

11 MR. HUFSTEDLER: And that's the one in the
12 opening brief and that governs it.

13 So, the net result is there was something like a
14 3,000 vote margin, which is really quite a comfortable
15 margin in many elections which are so close these days.

16 Here, if the Ninth Circuit and the respondents
17 are correct, the result is going to change in determining
18 a -- it will change in this case, but can change in any
19 case depending upon how enthusiastic many people are about
20 coming in and voting for the school board members, grass
21 roots kind of campaigns which will bring in a lot of
22 people, or the legislature. And if that brings in a lot
23 of people to vote in those two races, then the -- the
24 barrier becomes much higher as to how many votes somebody
25 has to get to be elected Governor. And that's a

1 nonsensical kind of proposition.

2 QUESTION: And I take it you'd then have to have
3 a -- a second election under the Ninth Circuit's view even
4 though only two people were running in the first place and
5 it'd be among the same two people.

6 MR. HUFSTEDLER: Absolutely and specifically,
7 that's exactly what they said, Justice Kennedy.

8 QUESTION: Mr. Hufstedler, as a preliminary
9 matter, would you clarify for us the status of some case
10 pending now before the Guam Supreme Court that affects
11 this case?

12 MR. HUFSTEDLER: Be happy to, Your Honor. That
13 case was set, as I think the footnote indicates -- had
14 been set to be argued last week, or at least the last week
15 of November, and that was continued over to the next
16 session, which presumably will be in February in Guam,
17 awaiting apparently the decision of this Court.

18 QUESTION: And what -- what are the issues
19 before the court there?

20 MR. HUFSTEDLER: Two -- two basic sets of
21 issues. The first issue is precisely this issue, and the
22 court -- trial court in Guam decided, contrary to the
23 Ninth Circuit, that you looked at the votes cast in the
24 gubernatorial election.

25 The second set of issues were a bunch of issues

1 related to claimed fraud in connection with the election.
2 And that took many days of trial, and with very extensive
3 opinion by the trial judge, the trial judge found no proof
4 whatsoever of any kind of misconduct.

5 And those are the issues on appeal in the
6 Supreme Court in Guam.

7 Now, there's nothing in this statute at all to
8 suggest that the determination of the -- of the majority
9 should depend upon what happens in some other elections.
10 You all recall well that this argument is based primarily
11 on an assertion by the Ninth Circuit and now by the
12 respondents that if the phrase, in any election, really
13 means in any gubernatorial election, then it's -- it's
14 duplicitous. Surplus was the word. They used the word
15 twice. Surplus and nullity. And therefore, the
16 interesting proposition is that sub silentio the
17 respondent in the Ninth Circuit concedes that if the
18 phrase, in any election, was not in that statute, the
19 statute means in any gubernatorial election. It can't be
20 surplus unless the statute already says that.

21 Then the statute says, in any election. And
22 they say, well, that means any gubernatorial election.
23 The statute already means that and it can't mean that, and
24 so we have to throw all of this out, even though it said
25 it twice, and go find some different kind of election

1 that's going to determine this. And they determined now,
2 as you know, that it was the specific general election in
3 which the gubernatorial -- of which the gubernatorial
4 election was a part. It was that election.

5 QUESTION: But, Mr. Hufstedler, even if we
6 agreed that in any election means in any gubernatorial
7 election, why shouldn't the people who didn't vote for
8 Governor be counted the same way as someone who voted for
9 Donald Duck for Governor? In other words, why shouldn't
10 they be counted as people who said neither of the above,
11 no one for Governor?

12 MR. HUFSTEDLER: The first proposition I think,
13 Your Honor, is that there is no authority whatsoever for
14 the proposition that a non-vote is something that should
15 be counted in an election. I find no authority anyplace.
16 There's none in any brief. There's none in any opinion.
17 It's true that you can argue that --

18 QUESTION: The terms is votes cast. I guess
19 that -- that would be the critical term, whether --

20 MR. HUFSTEDLER: Precisely.

21 QUESTION: -- whether if you vote for nobody, as
22 opposed to voting for Donald Duck, you have cast a vote.

23 MR. HUFSTEDLER: That's precisely correct,
24 Justice Scalia. The term vote cast is used several times
25 in the statute. There's never any mention of the word

1 ballot in the statute.

2 QUESTION: It would -- your case is stronger, is
3 it not, by virtue of the use of the word votes rather than
4 ballots?

5 MR. HUFSTEDLER: I think it clearly is. I would
6 certainly insist so, Mr. Chief Justice. And of course, as
7 I said, there's no place where they talk about ballots,
8 only about votes cast.

9 But with respect to the question that Justice
10 Ginsburg asked about voting for Donald Duck, I'd call to
11 your attention the -- the opinion of this Court in 1997,
12 the Foster case, in which the Court was obligated to
13 define what an election is. It involved a Louisiana
14 primary and the question was whether the Federal statutes
15 fixing a date had fixed it so that you couldn't have a,
16 quote, election really prior to that in the primary that
17 determined the result.

18 And here's what Justice Souter said in that
19 case, quoting from page 71. When the Federal statutes
20 speak of, quote, the election, unquote, of a Senator or
21 Representative, they plainly referred to the continued
22 actions of the voters and the officials meant to make a
23 final selection of an officeholder.

24 Now, that's a key question. We're -- when we
25 say election, we're talking about a single election in a

1 contest to determine who is going to be that officeholder.
2 It isn't -- we're not talking about a general election
3 someplace. We're talking about that specific election.

4 And then it goes on to say -- well, I think it
5 doesn't add further. It quotes the American Dictionary
6 defining election as, quote, the act of choosing a person
7 to fill an office. And that's entirely correct.

8 QUESTION: Mr. Hufstedler, I guess the Ninth
9 Circuit was persuaded by what it read into the words, in
10 any election --

11 MR. HUFSTEDLER: Absolutely.

12 QUESTION: -- that phrase in section 1422.

13 MR. HUFSTEDLER: Absolutely.

14 QUESTION: Now, if that phrase were entirely
15 omitted from the statute, would it make any difference in
16 your view? I mean, or would the results still be the
17 same?

18 MR. HUFSTEDLER: Perfectly appropriate question,
19 and it might very well be the same. I would certainly
20 argue that if the phrase, in any election, weren't there,
21 the only logical answer is that it means that you count
22 those votes in the gubernatorial election.

23 And, of course, that's precisely what the Ninth
24 Circuit assumed. It would never be surplus if that
25 weren't the case, but --

1 QUESTION: Well, I thought that they were --
2 sorry. Finish it. I -- I didn't mean to --

3 MR. HUFSTEDLER: Thank you.

4 But it isn't -- it isn't entirely surplus. It
5 does add something. What it says, and it says very
6 clearly, is in any gubernatorial election, you will use
7 this standard, that there must be a majority of the votes
8 cast in that election.

9 And what it adds is this. The Ninth Circuit
10 argued that we were really looking only at a single
11 election. We were looking at that one election at which
12 everything was included, and therefore that specific
13 election was the one. That reads out the word any. What
14 this says in any is, in any election, the first one in
15 1970, which is included in the statute, or any election
16 quadrennially, 4 years after, in any one of those
17 elections -- there have now been eight, and presumably
18 they will go on indefinitely. In any one of those
19 elections every 4 years, you apply this standard.

20 Now, that's not said in the statute anywhere
21 else, and that's what this statute adds. Therefore, it's
22 not a nullity. It says clearly there's something else
23 here. In any election refers to those future elections.
24 So, there's a universe of them.

25 Now, any requires a universe, but the argument

1 of the Ninth Circuit ruled out any argument of a universe.
2 They said, we have to look at all of the ballots returned
3 in that specific general election of which the
4 gubernatorial election is a part. Now, there's no
5 universe there. The word any is read out by the Ninth
6 Circuit decision.

7 QUESTION: Does it mean -- probably not, but I'm
8 just -- but the -- imagine on a particular day we get our
9 ballot and there are 14 different offices. And they're
10 thinking that any election -- they're calling Governor one
11 election; Lieutenant Governor, another election; Secretary
12 of State, a third election, whatever. And so, there are
13 14 different elections being hold on that one day, and
14 they're thinking in any election means you look at all the
15 ones. You see, you look at all 14, and that's why they
16 look to the whole ballot.

17 MR. HUFSTEDLER: Well, that would be 14
18 elections I think --

19 QUESTION: Yes. And so, in any -- so, it has to
20 be a majority of them cast in any election.

21 MR. HUFSTEDLER: Sure.

22 QUESTION: So -- so, we look and see how many
23 people filled out ballots because that's the number cast
24 in any election. There were 14 on that day, and the total
25 number -- I don't want to be too clever about it, but I

1 want to --

2 MR. HUFSTEDLER: I understand that. Precisely.
3 But I would say nobody knows from this record. All we
4 know is that the total number of ballots issued were
5 46,666. We don't know how many people voted for each of
6 the people in the school board. You know, there were a
7 whole bunch of candidates for the school board. We don't
8 know how many people voted in each of the elections for
9 the legislature. None of that's in the record. Never --
10 never appeared, never argued, never made a point.

11 QUESTION: But I --

12 MR. HUFSTEDLER: The only point was that there
13 was a total of 46,666 ballots issued and whether people
14 voted on them or not, they were returned, and therefore we
15 ought to use that for a majority.

16 QUESTION: I suppose under the respondents'
17 theory -- well, I can ask respondent -- but it seemed to
18 me that it -- it could be that 1,000 people were very
19 interested in the school board, and a different 1,000 were
20 very interested in the water bonds. So, you'd have to, I
21 take it, count those people -- multiply the sum of those
22 people, to get the number of ballots cast in the election
23 as the respondents --

24 MR. HUFSTEDLER: Precisely what happened.
25 Precisely what happened. They took the total.

1 And -- and it illustrates the point, Justice
2 Kennedy, that how many people voted in this election
3 depended on their enthusiasm about a whole bunch of other
4 things. They could have gotten involved in a grass roots
5 campaign about who was going to be on the school board,
6 and so they came in and voted for that race and they
7 didn't care who was Governor. We know 1,313 didn't care
8 who was Governor.

9 QUESTION: Are there any cases you've found
10 where if -- if there's fraud in one contest, Governor --
11 for the Governor, that the -- the entire ballot is thrown
12 out for all other issues?

13 MR. HUFSTEDLER: No. The only thing I guess I
14 have to bear on that is there is a statute in Guam, which
15 is in the materials, which points out that if -- if a
16 ballot is invalid because it's voted improperly, the -- in
17 that race you don't count it, but you still count the
18 ballot for other purposes. But I -- I don't know of any
19 case that dealt with that problem, Justice Kennedy.

20 So, let me go back one last shot at the question
21 Justice Ginsburg asked me a few minutes ago because there
22 is another case dealing with somebody who wanted to vote
23 for Donald Duck as a write-in, and that was the Hawaii
24 case you will remember, the Burdick case. And here, the
25 question was what is the vote about. And the Court said

1 -- and I'm now at page -- whatever -- 436 of the U.S.
2 Reports -- the function of the election process is to
3 winnow out and finally reject all but the chosen
4 candidates. Now, that's what the Foster case says.
5 That's what the other cases say. We're really trying to
6 select a candidate for the officeholder in a particular
7 race. Not to provide a means and giving vent to, quote,
8 short-range political goals, pique, or personal quarrels.

9 In other words, if a vote for Donald Duck is
10 intended to say, gee, I don't like anything that's going
11 on here, the voter can go out and say that, but that's not
12 a vote cast and that's not what the election is about.
13 The election is about electing a candidate, and a vote for
14 Donald Duck doesn't do that and it doesn't constitute
15 effectively a vote cast.

16 So, it seems to me that we really must come
17 back, as Justice Scalia indicated a moment ago, to deal
18 with the phrase what is a vote cast.

19 And I would like to -- to deal specifically with
20 the response that -- that the respondents have come up
21 with about that because you remember they said, which to
22 me is quite an amazing thing, without any kind of an
23 authority, and that is ballots and votes are fungible.
24 That's their word. Fungible. There's no difference
25 between a ballot and a vote.

1 Now, I don't think that proposition has to be
2 argued at all. We all know what a ballot is. We all know
3 what a vote is. And we all know they are very different.

4 And to illustrate in this case, the number of
5 ballots returned was clearly 48,666. The number of votes
6 cast in that general election was over a million. And
7 therefore, if we count all the votes cast in that general
8 election, that reaches the absurdity that everybody has
9 agreed nobody could have. It would take 500,000 votes to
10 be a majority in a race in which the only number of votes
11 cast was less than 50,000. So, it can't mean that.

12 And clearly also, the votes cast in the
13 gubernatorial election were 45,535. The votes cast for
14 the two candidate slates and the 275 votes cast for
15 legitimate write-in candidates. Those were the total
16 votes cast. And clearly there was a majority, a 53
17 percent majority, that the Gutierrez slate obtained.

18 Now, let me point out a couple things which
19 illustrates Congress knows the difference between a vote
20 and a ballot. If a Congressman or a Congresswoman didn't
21 know the difference between a ballot and a vote, I suspect
22 they wouldn't be in Congress because they know that as
23 well as anybody.

24 But let me illustrate it by looking, for
25 example, at section 1722, which is quoted in the text. It

1 -- the text also appears on page 19 of -- of our opening
2 brief and the preceding statute on the same subject, 1719,
3 appears on page 18 of our brief.

4 But there what -- this was a statute reenacted
5 in 1998. I'll tell you what it said before that in a
6 moment.

7 But it says, the delegate -- now, we're talking
8 about delegates now, not -- not the gubernatorial race
9 because, you remember, the delegates was one of the other
10 races that was involved in this general election.

11 The delegate from the Virgin Islands shall be
12 elected at large by separate ballot by a majority of
13 votes. Any question that Congress knows what a ballot and
14 a separate ballot is and what a vote is? I mean, they're
15 using them there in the same sentence to mean obviously
16 different things.

17 QUESTION: Yes, but they -- they did go on to
18 say by a majority of the votes cast for the office of
19 delegate.

20 MR. HUFSTEDLER: Well, you're quite right. They
21 certainly did.

22 QUESTION: That -- that is one of the points
23 against your case --

24 MR. HUFSTEDLER: Well --

25 QUESTION: -- that -- that in this statute where

1 they intend to limit the vote cast to those cast for that
2 office, they say so.

3 MR. HUFSTEDLER: Yes.

4 QUESTION: And the implication is that where
5 they don't say that, they -- they don't mean to limit it
6 to -- to the votes cast for that office.

7 MR. HUFSTEDLER: And I think that's quite right.
8 I think that's quite right, Justice Scalia. And they do
9 say the votes cast for the office.

10 But let me go back to my point and I'll come
11 back to this point. They know the difference between a
12 ballot and a vote, and to say they're fungible, it just
13 seems to me to be an argument that can make no sense.

14 QUESTION: Yes, it does -- does seem to
15 indicate --

16 MR. HUFSTEDLER: Now, the question about this
17 statute also saying, well, we talked about the majority of
18 votes cast for the office of the delegate. Sure, it says
19 that. But can't you draw the inference just as easily
20 that when they're talking about counting a majority, in
21 general they're talking about a majority of votes for that
22 office? They say it in one case and they don't say it in
23 another, but they don't give you a different view either
24 and that they -- they really are looking at what the votes
25 were in connection with that office.

1 QUESTION: Doesn't -- doesn't your view, which
2 makes sense of every word, make still the words, in any
3 election, surplus? Because -- because if you -- if you
4 didn't have those words there in your view of the statute,
5 the statute would obviously apply to the 1970 election,
6 the 1974, the 19 -- that's what they're talking about.

7 MR. HUFSTEDLER: Well, I think -- I think you're
8 right about that, Justice Breyer, but it doesn't say it
9 applies to all of those elections until you put in the in
10 any election.

11 QUESTION: Did anyone doubt it?

12 MR. HUFSTEDLER: I don't doubt it.

13 QUESTION: Even without those words?

14 MR. HUFSTEDLER: I don't doubt it, that that's
15 what it means. But it makes it clear -- and it says it
16 clearly.

17 And let me go to the next step. So, we have a
18 statute which we all think -- we thought applies directly
19 to this question of counting the votes in the
20 gubernatorial election, and then we have a sentence that
21 says it's going to be in all of the elections. And you
22 can argue a little bit about whether that's really
23 surplusage or not.

24 But is there a principle that says when you look
25 at the context of the statute and it means X, and then you

1 have a sentence, which is different from the rest of the
2 statute, which also means X, that therefore the statute
3 can't mean X, that therefore we have to go find something
4 entirely different? It says it twice. It ought to mean
5 it when it says it twice. It isn't a question of, well,
6 there's nothing in here about counting the votes in the
7 general election. But let's go back and find out what we
8 can and, boy, let's try the general election because
9 that's different. There's nothing in the statute that
10 says you use the votes in the general election, and that's
11 something that's just -- just dreamed up.

12 So, the fungibility argument I think will not
13 stand, and the result is, it seems to me, that this
14 argument falls whether you approach from the beginning or
15 the end. If you approach the beginnings, the words in any
16 election are a nullity and surplus. It seems to me that
17 can't read whether -- whether you follow the -- the point
18 that it really is a repetition or it isn't, it can't mean
19 that you come up with an entirely different answer. So,
20 the nullity position won't stand.

21 Secondly, with regard to the question of
22 fungibility, there's nothing in here that says you count
23 ballots returned. It says you count ballots -- votes
24 cast. And therefore, if you're counting ballots -- you're
25 counting votes cast in the general election -- and the

1 court says specifically you count all the votes in the
2 general election -- then you reach the absurdity. You
3 have to have 500,000 votes for your majority and you don't
4 have it. So, the result is that you can't reach it from
5 the back because it's not fungible and you don't get an
6 answer anybody could accept. And you can't reach it from
7 the front because, whether or not it's a nullity, the
8 statute still means this and even if it -- and we think it
9 isn't a nullity because it does add something and it says
10 it in a different way.

11 I guess the last thing I would say is -- and try
12 to reserve some little time, if there is any left -- that
13 -- and the statute I've given you, 1710 -- or 1712 -- it
14 used to provide that there had to be a separate ballot in
15 Guam and in the Virgin Islands for an election for
16 delegate. Then in 1998, it was changed to say that you
17 didn't have to have a separate ballot in Guam, but not the
18 Virgin Islands. The Virgin Islands still has to have two
19 ballots.

20 Now, if you follow what the Ninth Circuit said
21 literally, that would be creating a whole new realm for
22 litigation, and you'll get one for certain from the Virgin
23 Islands next time because now you have -- assume the
24 numbers which are wrong, but assume you're dealing again
25 about -- with about 45,000 voters. You're going to have

1 45,000 ballots for the delegate, and you're going to have
2 45,000 ballots for the other races. So, you're going to
3 have 90,000 ballots returned. Now, you have 90,000
4 ballots returned. The majority is 45,000, and that's all
5 the voters you've got. Nobody will ever win an election
6 in the Virgin Islands if that's the rule that is applied.

7 If I may, I'd like to reserve the rest of my
8 time.

9 QUESTION: Very well, Mr. Hufstedler.

10 Mr. Riordan, we'll hear from you.

11 ORAL ARGUMENT OF DENNIS P. RIORDAN

12 ON BEHALF OF THE RESPONDENTS

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

15 Respondent Ada would be the first to concede
16 that Congress could have written a statute that required
17 only a majority of those who voted for Governor as opposed
18 to a majority of those who participated in the general
19 election. Had it intended to do so, it would have used
20 language that it has used, as Justice Scalia recognized,
21 in other statutes dealing with elections in Guam. I'll
22 return to that point in a minute.

23 But I want to begin, where we always must begin
24 in cases of statutory interpretation, with the statute
25 itself. And I want to begin with a critical subject about

1 which my opponent has said nothing, which is the first
2 sentence that defines a majority. That first sentence --
3

4 QUESTION: Where -- where are you?

5 MR. RIORDAN: Your Honor, I'm at -- I'm going to
6 refer to the second sentence of the statute. The statute
7 can be found at page 2 of the --

8 QUESTION: Blue brief?

9 MR. RIORDAN: -- cert petition or -- or of the
10 blue brief.

11 And the second sentence is -- of the statute is
12 the first that deals with the question of a majority. And
13 it reads, the Governor of Guam, together with the
14 Lieutenant Governor, shall be elected by a majority of --
15 of the votes cast -- and here's the critical language --
16 by the people who are qualified to vote for members of
17 the legislature of Guam. Let's stop right there. That is
18 our first definition of majority, and it compels the
19 question, how many people qualified to vote for members of
20 the legislature of Guam cast votes in the November 3rd,
21 1998 general election?

22 QUESTION: Well, can't that be read as just
23 saying that if you're entitled -- something like the
24 Federal Constitution -- says if you're entitled to vote
25 for the members of the lower -- of the legislature of

1 Guam, you're entitled to vote for Governor? I -- I think
2 you don't have to put all the weight on it that -- that
3 you're putting.

4 MR. RIORDAN: Your Honor, Mr. Chief Justice,
5 that is true, but it is the definition of a majority. And
6 we know this. The -- the number of people qualified to
7 vote for the legislature who voted in the general election
8 is easily ascertained. It is 48,666.

9 QUESTION: But it just repeats the same question
10 you have in the next sentence, that is to say, when --
11 when it says votes cast, does it mean votes cast for this
12 office, or does it mean votes cast in the election
13 generally? I mean, it's the same problem that arises in
14 the next sentence. I -- I don't think you advanced the
15 ball much by -- by saying that the same problem comes up
16 twice.

17 MR. RIORDAN: Well, Your Honor, I simply -- but
18 -- but my point would be this. Congress could have
19 resolved this question dispositively in favor of the
20 petition -- the position of petitioners by simply adding
21 the words, in the gubernatorial election.

22 QUESTION: Yes, but doesn't it obviously mean -
23 - I mean, doesn't it cut against you, that sentence?
24 Because as you read it, it says the Governor shall be
25 elected by the majority of the votes cast by the people

1 who are qualified to vote for legislature.

2 MR. RIORDAN: Right.

3 QUESTION: They don't mean -- they couldn't mean
4 -- votes cast by all the people on the island who are
5 qualified. So, therefore, they must mean votes cast for
6 Governor.

7 MR. RIORDAN: Your -- Your Honor --

8 QUESTION: I mean, isn't it somewhere between
9 obviously meaning votes cast for Governor or meaning just
10 what Justice Scalia said, repeating the ambiguity?

11 MR. RIORDAN: The -- the reason it is not is
12 that -- is that we agree that -- that after Cass and --
13 and there is no case in this country that, absent a very
14 specific statutory provision, says that -- that the
15 relevant universe is -- is eligible voters including those
16 who stay at home. But Congress made clear that it wasn't
17 talking about eligible voters, all the eligible voters.
18 It was talking about the eligible voters who cast votes.

19 But -- but had we had the term, for the office
20 of Governor, the ambiguity would be resolved, and we do
21 know that -- that Congress has resolved this very
22 ambiguity in two places related to this statute: one in
23 1422(a), which was passed on the same day. It dealt with
24 the question of how many votes you need to recall a
25 Governor. And it stated that you need --

1 QUESTION: Where -- where do we find that, Mr.
2 Riordan?

3 MR. RIORDAN: 1422(a), Your Honor, is found at
4 -- in the beginning of the respondents' brief on the
5 merits at page 2 I believe. At page -- in our -- yes, in
6 our -- 1 and 2 of -- of our statutes at issue.

7 And 1422(a) uses the language that, in order to
8 recall the Governor, you must have two-thirds of the
9 number of the people voting for Governor in the last
10 preceding election. So, Congress there very explicitly
11 resolved any ambiguity by -- by saying that when it was
12 talking about two-thirds, as opposed to a majority, it was
13 talking about two-thirds of the people voting for Governor
14 in the last preceding election.

15 Had it taken those words, voting for Governor,
16 which are found in 1422(a), and put them in 1422, it would
17 have resolved this matter in favor of petitioners'
18 petition.

19 QUESTION: Yes, but that doesn't explain this
20 question that arises in my mind. Why would they want the
21 people who voted for Governor to be the universe in the
22 recall situation and not be the universe in the direct
23 election situation?

24 MR. RIORDAN: Well, Your Honor, the reason --

25 QUESTION: And what is the policy reason behind

1 it, that congressional choice?

2 MR. RIORDAN: Well, a -- the policy that
3 suggests itself is that once a Governor is -- is elected,
4 the specific number of votes that -- that were involved in
5 electing him shall constitute the -- the frame of
6 reference if you're going to have to recall him. It's --
7 it's those -- you want to make sure that -- that you have
8 a -- a number that isn't simply a majority, but a super
9 majority, to recall a -- an official.

10 QUESTION: But that's not the -- maybe I'm -- I
11 don't have it in front of me. I thought that would give
12 you a -- a lesser number to recall than would be necessary
13 to elect.

14 MR. RIORDAN: Oh, no, Your Honor.

15 QUESTION: Where -- where is it? I didn't open
16 it up. I should have done that. What page are you on?

17 QUESTION: It's here. It's on --

18 QUESTION: Well, it would if -- if a third of
19 the -- if instead of just a couple thousand in this
20 election had a -- you had a third of the total votes cast
21 for blank and the Governor, then you could recall with the
22 lesser number than you could elect in the first instance.

23 MR. RIORDAN: Well, the -- the reason that isn't
24 -- isn't -- well, the -- two-thirds -- I cannot
25 mathematically imagine a situation in which two-thirds of

1 the number who actually vote for Governor are a -- a
2 smaller number than a -- a majority of all of those --

3 QUESTION: Well, I just gave you a hypo with
4 that -- that example in it. Say there are 100,000 who
5 vote, and 40,000 don't vote for Governor. They're just
6 interested in the school board. So, 60,000 elected the
7 Governor -- or voted for the Governor. Two-thirds of that
8 60,000 could -- could recall him even though it only took
9 -- 40,000 could recall him then.

10 MR. RIORDAN: Right, but -- but if 60,000 vote
11 for Governor --

12 QUESTION: And it would have taken 51,000 to
13 elect him.

14 MR. RIORDAN: Your Honor, right. It takes
15 51,000 to -- to elect him.

16 But they have -- I mean, these two statutes were
17 passed as -- as part of a package, 1422 and 1422(a).

18 QUESTION: But Justice Stevens' initial question
19 was why should the universe be different in -- in the
20 recall and the number of people who have to vote to put
21 the Governor in office to begin with. What -- what would
22 be the sense of that?

23 MR. RIORDAN: Well, you're -- you're requiring a
24 super -- well, the universe isn't different, Your Honor,
25 in this sense. It's -- it's that you are going to require

1 a majority of all who -- who participate in the election.

2 Well, the two-thirds majority is going to be --

3 QUESTION: Well, the universe is different in
4 your view. It's the same in petitioners' view. Am I
5 right?

6 MR. RIORDAN: I'm sorry?

7 QUESTION: The universe is different in your
8 view, the same in petitioners' view. Right?

9 MR. RIORDAN: Yes. The -- the universe is
10 different. The universe is different because the
11 terminology is different.

12 But -- but the rule of this Court has been, as
13 in the Bates case, that -- we were dealing there with
14 statutes on student loans, and the defendant in that case
15 argued that an intent to defraud element can be found in
16 the -- in a particular statute, 1097. And the Court noted
17 that 1097(d) expressly included that intent to defraud
18 element. And it -- it said that you cannot have the
19 express inclusion by Congress of an element in one part,
20 its omission from a related part, and -- and assume that
21 Congress meant the same rule to apply or same language to
22 apply to both because, as -- as the Court said, where
23 Congress includes particular language in one section of a
24 statute, but omits it in another section of the statute,
25 it is generally presumed that Congress acts intentionally

1 and purposefully in the disparate inclusion or exclusion.

2 QUESTION: The key -- the key word there is
3 generally. The -- the problem I -- I have with -- with
4 your case, Mr. Riordan, is that ordinarily where you have
5 a choice, it seems to me you would interpret a runoff
6 provision in such a manner that it will produce a
7 conclusive runoff and not just a repeat of -- of another
8 stalemate in which nobody gets a majority. And as you
9 read this, this process could go on endlessly in which --

10 MR. RIORDAN: That's --

11 QUESTION: -- in which nobody gets a majority of
12 -- of all the votes cast.

13 MR. RIORDAN: That's -- that's absolutely not
14 the case, Your Honor, because the -- the rule of -- we
15 don't have the question of how you would run a runoff
16 before the Court. It's obviously of interest to it in
17 dealing with the question dealing with the general
18 election.

19 But a runoff is a special election, Your Honor,
20 and under the law that we've cited, a special election is
21 not subject --

22 QUESTION: Does it have to be a special
23 election? Don't you think the -- that -- that Guam, if
24 possible, would schedule it -- you know, with some other
25 elections that are -- that are coming up?

1 MR. RIORDAN: Absolutely not, Your Honor. By -
2 - by the statutory provision itself, the runoff is
3 supposed to be held within 2 weeks of the general
4 election. It is -- it is most assuredly a special
5 election. The --

6 QUESTION: Do they have runoffs for other
7 offices? Can you have a runoff for another office like
8 the school board under this law?

9 MR. RIORDAN: I don't know the answer to that
10 question, Your Honor.

11 QUESTION: Because if you could, presumably they
12 could have it at the same time.

13 MR. RIORDAN: I -- I don't believe that there's
14 any other election that is -- is subjected to the
15 provisions of 1422.

16 QUESTION: Where does it say that the runoff has
17 to be a special election? I mean, that -- that the ballot
18 -- the ballot can include nothing but -- but the -- the
19 candidates for Governor.

20 MR. RIORDAN: It -- it does not, Your Honor. I
21 think that, you know, the relevant language is the
22 language which says when the runoff will occur, and the
23 runoff will occur on the 14th day thereafter.

24 Now, the -- the election of the Governor has to
25 happen on the -- on the general election which by statute

1 is the first Tuesday after the first Monday in November.
2 So, any -- any election held in -- in mid-November is by
3 definition a -- a special election because a general
4 election is defined by Guam law as only that election
5 which takes place on the first Tuesday after the first
6 Monday in -- in November.

7 QUESTION: Well, and isn't the answer that in
8 that runoff election, the requirement is that the position
9 goes to the person who has the highest vote? There is no
10 majority requirement in the runoff election.

11 MR. RIORDAN: That's -- that's absolutely
12 correct, Your Honor. It's -- it's a race between two
13 people. Write-ins don't -- write-ins are meaningless in
14 -- in a runoff. There aren't -- write-ins aren't
15 permissible because a runoff is a runoff between two
16 candidates. So, if someone wrote in, it would not count.
17 A blank ballot --

18 QUESTION: It's really kind of ironic that they
19 have a majority requirement when there are lots of
20 candidates, and when there are only two, they don't call
21 it a majority, even though it has to be a majority, as --
22 as Justice Kennedy points out.

23 QUESTION: They could tie.

24 QUESTION: Well, obviously --

25 MR. RIORDAN: Well, I -- I suppose theoretically

1 they -- they could tie, but that -- that would happen --

2 QUESTION: They also used the word highest when

3 they meant higher because there are only two candidates.

4 MR. RIORDAN: But a --

5 (Laughter.)

6 MR. RIORDAN: Again, the English teacher

7 reappears.

8 (Laughter.)

9 MR. RIORDAN: Under -- under the statute --

10 under the WEMA rule, the -- the general American rule is

11 that this rule that we are proposing that certainly was

12 stated in many cases that you require a majority of all

13 those who participate in the general election, that is a

14 rule that does not apply to special elections.

15 QUESTION: Does -- does any of those American

16 cases that you cite involve an election for an office as

17 opposed to a proposition or -- see, it makes a lot of

18 sense to -- to interpret such a provision that is dealing

19 with an initiative or some proposition to say it -- it has

20 to get a certain percentage of all of those voting in the

21 election, whether they vote for the proposition or not,

22 because you have to show that it has sufficient public

23 support. But I -- you know, I -- I don't think that would

24 be the normal interpretation of the same language when

25 you're talking about two candidates.

1 MR. RIORDAN: Let me -- let me answer that
2 question very precisely. Does any of the cases that we
3 cite in our brief involve application of this rule to the
4 election of a candidate? No.

5 Are there cases that involve this rule --
6 applying this rule to the application of a -- to -- to a
7 race involving a candidate? The Arizona case of Maxwell
8 v. Fleming, 166 Pacific 2d, involves that at 831, which in
9 turn relied on a Hawaii case applying the same rule to a
10 primary election. So, the -- the cases are rare. It --
11 it is a far more common situation to have a proposition on
12 which you may get a majority, 5,000 to 2,000, but there's
13 10,000 people that don't understand the proposition. Many
14 time you have 20 complicated --

15 QUESTION: That's right. And -- and --

16 QUESTION: Do -- do --

17 QUESTION: -- if that statute read, you know, it
18 has to get a majority of the votes cast at the election, I
19 would have thought that doesn't necessarily mean the votes
20 cast with respect to the proposition.

21 MR. RIORDAN: Right. So, the rule is clear as
22 to propositions, but it is applied in Maxwell v. Fleming.
23 I do not know of any case that holds that this is a rule
24 that only applies to --

25 QUESTION: But do you agree that it makes much

1 more -- or there are certainly different and -- and
2 perhaps better reasons for applying that kind of rule in
3 the case of a proposition or a bond issue, that sort of
4 thing, different and better reasons from the reasons that
5 would apply in -- in an election of an official? We don't
6 have to have the bond issue. We do have to have a
7 Governor. Why make it tough as -- as tough to elect a
8 Governor as it would be to -- to issue bonds?

9 MR. RIORDAN: Well, Your Honor, we would both
10 agree that if the language of the statute reflects that
11 choice by Congress, it is not for us to say that the
12 policy inherently is wrong.

13 QUESTION: Absolutely, but if we're -- if we're
14 unclear about that, the philosophy of bond issues is
15 different from the philosophy of elections.

16 MR. RIORDAN: Here is why I would submit that it
17 is not. It is correct that propositions are more likely
18 to be baffling. There are likely to be more people
19 ignorant of it, and you could apply a rule that says we
20 want to make sure that there is an informed majority and
21 not simply an informed minority that votes on this, so
22 we're going to require a majority of those who come to the
23 election. But the same rule applies and the same policy
24 whether -- if it is the case that neither candidate
25 inspires enough interest or voters feel sufficiently

1 informed about either candidate, that there is some number
2 -- maybe it's 10, maybe it's 100,000 -- who don't feel
3 qualified to cast a vote there --

4 QUESTION: I can understand it if -- if the
5 consequence would be we're going to bring in two other
6 people --

7 QUESTION: Yes.

8 QUESTION: -- and see if these -- these other
9 two can attract. But all that happens is you bring in the
10 same -- the same two guys 2 weeks later.

11 MR. RIORDAN: Your -- Your Honor, I -- I am
12 reluctant to refer to the city in which I practice law as
13 an example for this Court, but the fact of the matter is
14 that 6 weeks ago a run-in candidate -- a write-in
15 candidate wound up forcing a -- a -- an election, a runoff
16 election, in that -- in San Francisco, and as a result of
17 that, there has been a heightened period of scrutiny,
18 there has been additional debates, there's been a -- a
19 much higher level of press and public attention to the
20 race than existed in the original race.

21 And Congress could say, we opt for that kind of
22 security. If you as a candidate can't get 50 percent of
23 the people who are clearly involved enough to show up and
24 vote, we're going to force this heightened period of
25 scrutiny that happens in runoff campaigning.

1 And -- and it is true -- it is true that it's
2 the same two candidates, but -- but it is very clear that
3 Congress made that choice because, as -- as petitioners
4 concede, if you had 100,000 votes and one candidate had -
5 - had, you know, 49,999 and the other had all the other
6 votes except for 10 and there were 10 write-in ballots,
7 there is no question -- and they concede -- that you'd
8 have to have a runoff between the two candidates. There
9 would not be a majority. Everyone agrees that write-in
10 candidate votes have to be counted in the relevant
11 universe.

12 QUESTION: Is -- I -- I should know this point,
13 but I'm -- but I'm not clear on it. Is it your position
14 that even spoiled ballots have to be counted for purposes
15 of this proposition, that is, one -- one that votes for
16 both parties or one that votes for neither or checks
17 write-in but never writes in? Are they to be counted too?

18 MR. RIORDAN: It is the position of the Guam
19 Election Commission that they are. The --

20 QUESTION: But may I ask if that is academic in
21 this case? Because isn't it true that even if you counted
22 all the overvotes, votes for both, and even if you cast
23 all the write-ins as though they were cast for your
24 client, that the opposing candidate would still win? So,
25 it's only the undervotes that have -- that are the basis

1 for your argument, that you would have to throw in the
2 undervotes in order to make the -- the winner 83 votes
3 short.

4 MR. RIORDAN: Right.

5 QUESTION: Is that right?

6 MR. RIORDAN: Right.

7 QUESTION: Well, it's academic for this case,
8 but it's not academic for the purpose for which I was
9 asking the question --

10 MR. RIORDAN: Absolutely not.

11 QUESTION: -- which is whether the runoff --

12 MR. RIORDAN: Right.

13 QUESTION: -- will necessarily come up with a
14 winner. And it won't if you're counting all of the
15 ballots cast because if you have -- you know, you say it
16 only takes 2 or 3 percent difference sometimes. If you
17 have 2 or 3 percent of spoiled ballots, you may have to
18 have a second runoff. And -- and, you know, this can go
19 on forever.

20 MR. RIORDAN: Your -- Your Honor, the -- the
21 Guam Election Commission -- let me be clear about the
22 history -- included -- there are 609 overvotes marked for
23 both candidates. They included all of those. There are
24 1,294 write-in ballots. They included all of those. And
25 there are 1,313 blank ballots for the Governor's race.

1 Justice Ginsburg is correct that you need to include all
2 three categories in order for petitioners' candidate to
3 not have a majority. If -- if you did not include blank
4 ballots, if you did not include spoiled ballots, if you
5 did not include write-in ballots, then -- then
6 petitioners' candidate would have a majority.

7 The Guam Election Commission included spoiled
8 ballots and they included all write-in ballots. There was
9 no challenge to that in the district court. They came up
10 with the number 47,353 as opposed to 48,666. So, the
11 only --

12 QUESTION: But those -- those ballots voted in
13 the election for Governor. They may have been --

14 MR. RIORDAN: Right.

15 QUESTION: -- whether 1,313 didn't vote in that
16 election.

17 And -- and on the question of what election
18 means, in any election is the first time election appears
19 in -- in the sentence if no candidate, but the next time
20 it is referring to a runoff election, which is an election
21 between the two sets of candidates. So, why would the
22 word election meaning -- mean two different things in the
23 same sentence? That is, in the second usage of it, it
24 clearly means just the runoff between the two sides.

25 MR. RIORDAN: But the -- the term majority is

1 not used to refer to the runoff election, and -- and I --
2 as I say, this question is not before the Court. There
3 is nothing in the statute that suggests that different
4 rules apply to this runoff than traditionally apply to
5 runoffs. In runoffs, only two candidates count. Write-
6 ins don't count in a -- in a runoff. You can write-in as
7 many people as you want. A write-in candidate could have
8 a majority. He would not win the runoff because a runoff
9 is limited to -- to a race between two candidates and the
10 person who gets the highest vote wins. It's a special
11 election, and the majority requirement just simply
12 wouldn't apply. So, there wouldn't be an infinite number.
13 A runoff always produces a winner except, as -- as the
14 Chief -- Mr. Chief Justice pointed out, you could have a
15 tie, but -- but that is -- that is a problem that is not
16 dealt with or resolved by any resolution of this case.

17 QUESTION: May I ask you sort of a question
18 which kind of underlies my thinking about this case? Is
19 there any sensible reason why Congress would want one rule
20 for the Virgin Islands and a different rule for Guam?

21 MR. RIORDAN: I have no reason to believe that
22 -- the language of the two statutes is -- is the same. We
23 do, as -- as Mr. Hufstedler has pointed out, have a
24 different provision when you come to the race for
25 delegates because they have -- they -- for whatever

1 reasons, they have different ballot requirements now for
2 one or the other.

3 But 1712, to bring us to the delegate statute,
4 is critically important. I mean, that is a statute that
5 expressly says that you're to be elected by a majority of
6 the votes cast for delegate. I mean, it is language that
7 is clear. It is unambiguous. It is --

8 QUESTION: But isn't that tied to the original
9 separate ballot requirement, that you didn't vote for the
10 delegate in the general election? So, of course, it would
11 be only an election for the delegate, and it wasn't until
12 the change was made to allow the delegate to be placed on
13 the ballot of a general election that -- that this -- that
14 you could make this argument. That is, the original
15 purpose -- it seems to be tied to the separate ballot.

16 MR. RIORDAN: But I would simply submit, though,
17 Your Honor -- I -- I submit 1712 only as an example of the
18 fact that -- that when dealing with a related subject,
19 Congress clearly knows how to spell out a majority
20 requirement that deals only with a particular office, that
21 is, or votes cast for a particular office.

22 QUESTION: Is there -- is there -- suppose you
23 came to the conclusion hypothetically that the statutory
24 language and so forth brilliantly argued both sides. It's
25 hard to say, you know. But then think well, if you

1 interpreted the -- the blue brief way, you get conformity
2 with the delegate. You get the same group recalling as
3 would be electing. It's a little bit simpler. And the
4 Guam Election Commission is closer to it than we are.

5 Now -- now, I'm -- see, I put four things in
6 there, and I -- I wanted to see what your response was.

7 MR. RIORDAN: Let me deal with the last one
8 last. It's the easiest to remember, and then you can
9 remind me of the others.

10 As the district court opinion points out, blank
11 ballots have been included by the Guam Election Commission
12 in two prior elections. So, the truth of the matter is
13 that -- that what they did in this case and -- and I think
14 it's -- it's very clear that this was a highly politicized
15 battle in the Guam Election Commission. The documents
16 before the Court reflect that, that -- that the -- the
17 exclusion of blank ballots actually was a deviation from
18 their prior practice.

19 QUESTION: Do we -- do they get a little bit or
20 not of deference?

21 MR. RIORDAN: Well, I -- I think, given the
22 factual finding of -- of the district court, it's a little
23 hard to see what you would defer to. Do you defer to past
24 practice or to the deviation from it here?

25 Secondly, I mean, the problem with -- with -- I

1 would agree -- I would agree that there is a much more
2 appealing symmetry if the delegate statute and the
3 Governor statute are -- contain the same language and --
4 and the same principle and the same definition of a
5 majority. The problem is that we have to include language
6 in the -- in the Governor statute that doesn't exist,
7 which was very expressly put in the delegate statute. So,
8 it's -- it's symmetrical. It's appealing, but it would
9 be, I -- I would submit, a result of -- of judges deciding
10 that -- that it's a more attractive principle, although it
11 isn't the one that the legislature chose to embody in the
12 statutory language.

13 QUESTION: Do you know of any other -- any other
14 State or Federal or, for that matter, foreign statute in
15 which the chief executive must be elected by a majority of
16 the votes cast in -- in an election, including votes cast
17 for other offices? It's a very strange provision if
18 that's what it means.

19 MR. RIORDAN: I'm tempted to refer to Thailand
20 on the -- on the grounds that I'm unlikely to be
21 contradicted --

22 (Laughter.)

23 MR. RIORDAN: -- by -- by opposing counsel.

24 I can't say that -- that I do, Your Honor.

25 I want to -- I did want to make a point about -

1 - about the prior law, the law that existed at the time
2 that the statute was passed because that's obviously one
3 of the considerations. Congress is -- is assumed to -- to
4 know it.

5 Let's make a concession. We both say that the
6 law favors us, that there are more cases which say that -
7 - that you -- you require a majority of all those who
8 attend the general election. The petitioners have a
9 different view.

10 At a minimum, Congress, if we assume they knew
11 that law, knew that this was a hot issue. It -- it knew
12 that there had been a century of litigation about what a
13 majority means. And given that there's been a century of
14 litigation about what a majority means, petitioners are
15 saying if you just insert some language in there that
16 Congress must have inadvertently omitted, although it's in
17 other statutes -- it's in 1422, it's in 1712 -- if you
18 just stick it in there, it's clear and -- and it's
19 appealing. But given that Congress knew that this was a
20 delicate issue, we can't assume that it was omitted in any
21 way --

22 QUESTION: How do we know that Congress knew it
23 was a delicate issue? In my experience Congress doesn't
24 have a very detailed knowledge of what's going in the
25 courts, and probably a good thing too.

1 (Laughter.)

2 MR. RIORDAN: Your Honor, there are those who
3 say that this entire area of -- of rules of statutory
4 construction that we employ is -- is an engagement in a
5 fiction, and there are those who say, but it's a more
6 appealing fiction than attempting to divine statutory
7 history and legislative history.

8 (Laughter.)

9 QUESTION: So, I -- I will --

10 QUESTION: I can agree with that.

11 (Laughter.)

12 MR. RIORDAN: Perhaps the -- the final point
13 that I'll make is just one that -- that it is puzzling. I
14 -- I will admit that the toughest question that can be
15 asked to me is Congress did not write in the language that
16 makes it clear that petitioners should prevail. I think
17 that's clear. They could have. They used it in other
18 statutes. I would have to concede that they did not spell
19 out the statute in a way that makes it crystal clear that
20 a majority means a majority of all those who -- who
21 attended and participated in the general election.

22 I just think that we're closer to it. I think
23 that the first sentence, which says a majority of votes
24 cast by qualified citizens, standing alone comes closer to
25 our position than it does to petitioners'. I think that

1 the statement, in any election, comes closer to our
2 petition -- position because it doesn't say in any
3 gubernatorial election.

4 QUESTION: But if they're both plausible
5 readings, why shouldn't we pick the one that makes the
6 most sense?

7 MR. RIORDAN: Well, they -- they -- I -- I --
8 because one of them -- because the statutory language, I
9 submit, Justice Ginsburg, approaches and is much closer to
10 our definition than it is theirs. It does not require the
11 insertion of language that it isn't -- isn't there. It
12 does require in the context of the statute defining votes
13 and ballots interchangeably, but that is something that
14 perhaps, if they're not interchangeable in every context,
15 they are very, very frequently interchangeable, as -- as
16 resort to the -- the dictionary definition shows.

17 And we finally submit that if you are going to
18 say that the most popular baseball player in Chicago
19 should be elected by a vote of all of those who attend
20 major league baseball games, you would not use that
21 language if you intended the vote to be limited to those
22 who are fans of the Cubs.

23 QUESTION: Thank you, Mr. Riordan.

24 Mr. Hufstedler, you have 7 minutes remaining.

25 REBUTTAL ARGUMENT OF SETH M. HUFSTEDLER

1 ON BEHALF OF THE PETITIONERS

2 MR. HUFSTEDLER: Thank you, Mr. Chief Justice.

3 I would like to reply, as long as my time holds out, to
4 four or five specific points that were made.

5 First of all, in the discussion about the
6 eligible voters, I think the colloquy and Justice Scalia's
7 comments cleared that up.

8 But it does seem to me it's important to go back
9 and -- and deal with really the -- the grandfather case
10 that deals with this basic problem, and that's County of
11 Cass against Johnston. This Court which laid down a rule
12 which has been uniformly followed and that is for
13 qualified voters who absent themselves from an election
14 duly called, they are presumed to have gone along with the
15 majority who did, in fact, vote.

16 QUESTION: Of course, that involved no Federal
17 statute at all, did it? I suppose the way it can become
18 relevant is if you -- if you assume -- perhaps not a
19 terribly likely assumption -- that Congress was familiar
20 with it, though, when --

21 MR. HUFSTEDLER: No. You're correct. They were
22 dealing -- excuse me -- with Missouri law under those
23 circumstances. But they laid down that law and they
24 didn't do it with the limitation.

25 But the second sentence I think is very

1 important. This is Cass. And it not only stated that
2 general rule, but then it stated this. Any other rule
3 would be productive of the greatest inconvenience and
4 ought not to be adopted unless the legislative will to
5 that effect is clearly expressed. In other words, a very
6 strong presumption that the rule contended for by the
7 respondents should not be adopted unless it's clearly
8 expressed.

9 QUESTION: The case was a diversity case, was it
10 not? I mean, it wasn't laying down any Federal rule at
11 all.

12 MR. HUFSTEDLER: No. You're quite right, Your
13 Honor, it wasn't. But there was no limitation with
14 respect to laying down the rule, and it has been cited
15 many, many times in many other cases.

16 But nonetheless, it makes it quite clear that
17 you won't go along with the respondents' position unless
18 it is clearly expressed. And I thought it was most
19 interesting just a moment ago when counsel said that he
20 would concede -- and as I heard him say directly -- that
21 it doesn't make it -- if could read my handwriting --

22 QUESTION: He said it wasn't absolutely clear,
23 but this is by far the better reading.

24 MR. HUFSTEDLER: Doesn't make it absolutely --
25 absolutely was the word. Thank you.

1 Now, if it doesn't make it absolutely clear, it
2 doesn't comply with Cass. Now, you may decide not to
3 follow --

4 QUESTION: What if his -- what if the language
5 really is by far the better reading, his -- his way? What
6 if -- you know, yours -- yours is -- his isn't absolutely
7 positive, but it's -- it's --

8 MR. HUFSTEDLER: Well --

9 QUESTION: -- certainly the language tilts in
10 his --

11 MR. HUFSTEDLER: I could not argue, Justice
12 Stevens, if the statute said you take all of the votes
13 that were cast in the general election and determine the
14 majority, of course, we're bound by that. But that --
15 there's nothing in the statute that even infers that.
16 There's nothing in the legislative history. Using the
17 general election -- it's taken right out of the blue by
18 the imagination of the Ninth Circuit. There's nothing in
19 there that says you're going to lose -- use all those
20 votes. In any election does not say we're going to use
21 all those votes that were cast in all of the elections at
22 the general election on that date.

23 QUESTION: What happens in your opinion, to go
24 back to Justice Scalia's point? Suppose a runoff and in
25 the runoff A has 5,001, B has 5,000, and there are 3 blank

1 ballots.

2 MR. HUFSTEDLER: I think you don't have an
3 answer. And the reason is --

4 QUESTION: In any election. Because of the
5 sentence that says in any election. That would presumably
6 include the runoff election.

7 MR. HUFSTEDLER: Precisely.

8 QUESTION: No, not because -- not because of
9 that. But -- but -- maybe because of that. But even if
10 that sentence weren't there, it just says you have to have
11 a runoff, but it doesn't say what happens -- it says
12 nothing about what votes you count in the runoff.

13 MR. HUFSTEDLER: No, you're quite right. It
14 says nothing about it. But the phrase is still there. In
15 any election, they must have a majority. Now, how -- how
16 can you rule out the runoff when it says in any election
17 you must have a majority? And so you could go on and do
18 this forever.

19 Furthermore, there's a real question as to
20 whether or not you could even have a second runoff. This
21 provides that there -- if there isn't a majority, there
22 shall be an election 14 days later. You can't have a
23 second election 14 days later. The code does not provide
24 for a second runoff.

25 And I would recommend to the Court to take a

1 quick look at the amicus brief which makes a primary point
2 that if you adopt a rule such as this, you're going to
3 have a situation where you may never have a Governor
4 elected in an election where it's close. And certainly
5 the blank ballots would -- would rule that out.

6 In connection with the Cass doctrine, I would
7 also mention one other matter, which is a Federal case
8 dealing with the Railroad Labor Act, the Virginia railroad
9 case which is cited in the briefs. And there the act
10 provides that you have to have a majority of the people in
11 a particular trade in order to form a union. And the
12 Court there says specifically it means, just as Cass did,
13 only those voting and you've got to presume those who
14 didn't vote go along with it.

15 But it explains the reason, and it explains the
16 reason much as Cass did. And the reason is that a few
17 disaffected people, a small minority, by not voting or
18 voting some other peculiar way, could prevent the adoption
19 of a very important principle one way or another --

20 QUESTION: What about his countervailing policy
21 argument, which is where it's that close, think about it
22 twice?

23 MR. HUFSTEDLER: Well, that's right. I don't
24 know of anybody who says that, that you've got to -- once
25 you get a close election, you've got to have another

1 election. Because we have a lot of elections, some even
2 in small jurisdictions, where they're won by one vote, and
3 they're won when they're won by one vote after about three
4 recounts, or however it comes out.

5 With regard to the delegate statute having
6 different language, we've talked about that at some
7 length, and as I say, I think we get some help out of it.
8 They think it's good for them.

9 But the important point that hasn't been
10 developed that's in the briefs is that the delegate
11 statute is different from the organic act, but it was
12 passed 4 years subsequently. Now, this argument seems to
13 be that you adopt an organic act at one time and you don't
14 say we're going to specifically count the majority in the
15 gubernatorial election, although we now concede it says
16 that twice. That's the problem.

17 Then we come back to 4 years later Congress
18 adopts the act with respect to the delegate statute and
19 says it has to be with regard to the -- the votes for the
20 delegate's office.

21 Now, can you say when a Congress does something
22 in different language 4 years later, it has done something
23 to the original act? The one answer might be that the
24 Congress 4 years later had a better English teacher than
25 the ones 4 years before. But however that comes about,

1 you can't modify the statute 4 years before just because
2 somebody used different language in a statute 4 years
3 later.

4 With regard to the argument that in a runoff
5 election the one who has simply the -- got the most votes
6 is going to win is not established at all. If you look at
7 page 26 of the respondents' brief, they cite two cases.
8 They're of no help whatsoever. One of them is a Texas
9 case, one is a Georgia case. But in one of those cases -
10 -

11 QUESTION: Thank you. Thank you, Mr.
12 Hufstedler.

13 MR. HUFSTEDLER: Certainly, Your Honor.

14 CHIEF JUSTICE REHNQUIST: The case is submitted.
15 (Whereupon, at 12:05 p.m., the case in the
16 above-entitled matter was submitted.)

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CERTIFICATION

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The United States in the Matter of:

CARL T.C. GUTIERREZ AND MADELINE Z. BORDALLO, Petitioners v. JOSEPH F.
ADA AND FELIX P. CAMACHO.
CASE NO: 99-51

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BY: Diona M. May
(REPORTER)