

120/68

Supreme Court of the United States

Office-Supreme Court, U.S.
FILED

NOV 18 1968

JOHN F. DAVIS, CLERK

In the Matter of:

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THE STATE OF OHIO, ex rel, NELLIE HUNTER, :
on behalf of the City of Akron :

Appellant; :

VS. :

EDWARD O. ERICKSON, MAYOR OF THE :
CITY OF AKRON, et al. :Appellee. :
-----X

Docket No. 63

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Place Washington, D. C.

Date November 13, 1968

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C O N T E N T S

ORAL ARGUMENT OF:

P A G E

Robert L. Carter, on behalf
of the Appellant

3

Louis F. Claiborne, on behalf of the
Office of the Solicitor General

19

Alvin C. Vinopal, on behalf of Appellees

30

Robert L. Carter, on behalf of
the Appellant

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- - -

1 IN THE SUPREME COURT OF THE UNITED STATES

2 October

Term, 1968

3 - - - - -X
4 THE STATE OF OHIO, ex rel, NELLIE HUNTER, :
on behalf of the City of Akron :
5 :
Appellant; :
6 :
vs. : No. 63
7 :
EDWARD O. ERICKSON, MAYOR OF THE :
8 CITY OF AKRON, et al. :
9 :
Appellee. :
10 - - - - -X

11 Washington, D. C.

12 Wednesday, November 13, 1968

13 The above-entitled matter came on for argument at

14 10:20 a.m.

15 BEFORE:

16 EARL WARREN, Chief Justice
17 HUGO L. BLACK, Associate Justice
18 WILLIAM O. DOUGLAS, Associate Justice
19 JOHN M. HARLAN, Associate Justice
20 WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
ABE FORTAS, Associate Justice
THURGOOD MARSHALL, Associate Justice

21 APPEARANCES:

22 ROBERT L. CARTER, Esq.
23 1790 Broadway
New York, New York 10019
Counsel for appellant

24 LOUIS F. CLAIBORNE
Office of the Solicitor General
25

1 APPEARANCES (cont.)

2 ALVIN C. VINOPAL, Esq.
3 Assistant Director of Law
4 Municipal Building
Akron, Ohio
Counsel for appellees

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1 P R O C E E D I N G S

2 MR. CHIEF JUSTICE WARREN: No. 63, the State of Ohio
3 ex rel., Nellie Hunter, on behalf of the City of Akron, versus
4 Edward O. Erickson, Mayor of the City of Akron, et al.

5 THE CLERK: Counsel are present.

6 ORAL ARGUMENT OF ROBERT L. CARTER, ESQ.

7 ON BEHALF OF APPELLANT

8 MR. CARTER: This case is here on appeal from a
9 judgment of the Supreme Court of Ohio, which construed as
10 consistent with the Constitution of the United States a charter
11 amendment to the City of Akron, amending its No. 137 as set out
12 at page 37 of our record.

13 This charter amendment requires that before any
14 legislation designed to regulate housing or real property on
15 the basis of race is enacted, it has to be approved by a
16 majority of the electorate.

17 Moreover, it states that any legislation which has
18 been adopted making this regulation will cease to be effective
19 until approved by the majority of the electorate.

20 We contend that Section 137 is inconsistent with the
21 14th Amendment requirements. The facts are not in dispute and
22 are reasonably uncomplicated.

23 In July of 1964, the City Council of Akron enacted a
24 Fair Housing Ordinance. It made findings of fact that certain
25 citizens were required to live in segregated conditions and

1 under unhealthy conditions because of housing discrimination,
2 and that this kind of discrimination produced various social
3 evils which were adverse to the health and well being of the
4 city.

5 It therefore established a commission with power to
6 investigate complaints of housing discrimination, and to make
7 findings and to order compliance. It also directed the Law
8 Director of the city to take appropriate action when the order
9 of the commission was not followed. All housing was covered by
10 this ordinance.

11 On August 25 there was filed pursuant to the initia-
12 tion process which is provided by the City Charter and pursuant
13 to that a sufficient number of signatures were secured and the
14 Petition 137 went to the ballot.

15 It was voted upon in the November 3, 1964 election.

16 Q What number of signatures were required to
17 initiate it?

18 A It is 7 percent of the electorate, so that it
19 varies from time to time. In any event the City Council
20 indicated that the requisite number of signatures had been
21 secured and it was placed on the ballot.

22 As to the election itself, I think there were about
23 100,000 votes. I know that the Charter was adopted by a vote
24 of something like 69,000 to 44,000.

25 In January of 1965, the appellant filed a complaint

1 or made a complaint of housing discrimination and requested the
2 commission which had been set up pursuant to this ordinance to
3 act. The commission refused to act and she then went to the
4 Law Director, and he refused to act and the proceedings were
5 commenced.

6 After there were some various procedural problems
7 involved, and they were cleared away which I don't think is
8 germane to the argument of this appeal. Then the matter was
9 defended and pressed on the merits.

10 On the merits, the city defended and said that the
11 ordinance was no longer operative because of Section 137 which
12 I have indicated.

13 The Ohio Supreme Court held that 137 was a classifi-
14 cation, but it contended it was reasonable because it said that
15 a city in singling out regulation of housing on racial grounds
16 was for special treatment and was not acting arbitrarily because
17 of the fact this is a little emotional field and therefore
18 it indicated this was a reasonable judgment.

19 We contend that under the decisions of this court
20 that opinion of the Supreme Court of Ohio cannot stand and it
21 is inconsistent with the opinions of this court.

22 Q Mr. Carter, the law was suspended by the
23 charter provision, I gather?

24 A Yes, sir.

25 Q How would it have been if it were approved?

1 Would the City Council have to have passed it again and sub-
2 mitted it, or could it have been done by initiative?

3 A It could have been done either way. As I
4 understand, the law was suspended and the City Council could
5 have either by initiative, or it could have gotten on the ballot,
6 or the City Council could have resurrected it and put it on the
7 ballot again, at which point it would have been voted upon.

8 Q In the charter amendment there was no automatic
9 provision for getting it on the ballot?

10 A No, sir, and not only was there no automatic pro-
11 vision, but the provision was that it had to be put on the
12 ballot at a general or regular election.

13 Q Has it ever been put on the ballot?

14 A This past election it was put on the ballot.

15 Q How was it put on?

16 A It was put on by the City Council.

17 Q Did it pass?

18 A No, it did not.

19 Q What was the vote on it?

20 A It was a close vote. The vote was 44,000, I
21 think. What was put on the ballot was asking the city whether
22 or not it would keep or repeal 137.

23 Q To keep or repeal?

24 A Yes.

25 Q Then the open housing ordinance itself was not

1 put on the ballot?

2 A The open housing ordinance -- the effect of
3 repealing of 137 would be to resurrect it.

4 Q What I am trying to get at is this: I gather
5 if 137 was unconstitutional, then the only way the open housing
6 ordinance can become operative is that it go on the ballot.
7 That is not what was submitted at the past election?

8 A That is right.

9 Q Has it ever been submitted?

10 A It has not been submitted to the voters, but the
11 issue that we have here was submitted.

12 Q The repeal of 137?

13 A Yes, sir.

14 Q May I get back to what Justice White asked you
15 earlier? How do you get under 137, the open housing provision
16 to a vote?

17 A You get the open housing ordinance to a vote by
18 having the City Council repass the law and then it is sub-
19 mitted within 30 days by referendum and it is placed on the
20 ballot in a general or regular election, and this process
21 requires 10 percent of the voters to act.

22 Or the voters may initiate a fair housing ordinance
23 with 7 percent and they would be able to put a petition to the
24 fair housing ordinance by initiation of 7 percent and it would
25 be voted upon.

1 Q Does the petitioner or appellant here have a
2 remedy under a State law that was passed subsequent to the
3 events of this litigation?

4 A No, sir. There is a state law.

5 Q When was that enacted?

6 A It was enacted subsequent to the institution of
7 this case. I think it was passed in 1965.

8 Q There was a State law enacted and it was some
9 time after the institution of this litigation. Would you mind
10 telling us your view as to the bearing of the State law on this
11 case?

12 A I can approach it from several angles. The
13 State law that was enacted deals chiefly with commercial houses.
14 In other words, the right to live in a house or residential
15 property is not specifically covered by the State law.

16 In some respects it is. In other words, that is as
17 to advertising and things of that kind. The State law also
18 is not as broad as this law. This is a broad provision. It
19 covers all residential housing. It has a commission with power
20 and the commission can order compliance. The State law is a
21 much weaker provision, and I think that as the court said in
22 Jones versus Mayer, the issue here, it seems to me, is that the
23 State law does not displace the local initiative or the fair
24 housing legislation.

25 Q Excuse me, Mr. Carter, but your adversaries say

1 on page 2 of their brief that it is amended to make it unlawful
2 to commit certain discriminatory practices in both commercial
3 and residential property and to provide the Ohio Civil Rights
4 Commission with enforcement powers.

5 My specific question to you has to be this: Does this
6 State law enacted after the commencement of the litigation
7 provide a remedy for the specific complaint of your client?

8 A My contention is that it does not. The State
9 law is set out in the appellant's brief on the merits at page 10
10 and it covers the refusal to sell and the unlawful practices,
11 the refusal to sell, transfer, lease, and so forth goes only
12 to commercial houses.

13 There are some provisions in the law that the statute
14 has that covers personal residence but it does not cover the
15 fact of renting or moving into residences. There is some issue
16 here about refusal to lend money, the advertising and so forth.

17 But it does not create any right to actually occupy
18 personal residences.

19 The appellant would have a remedy under Jones versus
20 Mayer, but they would not have the remedy of the Government
21 administrative machinery which is provided by this ordinance,
22 plus the fact ---

23 Q The 1868 statute does not apply?

24 A No, to this kind of housing at this time.

25 Q But she would have a general remedy?

1 A A general remedy, but the court indicated that
2 even though the 1869 Act provided administrative machinery,
3 as a matter of fact the agency law did not displace it, and
4 what this provided was administrative machinery to effectuate
5 the right.

6 We think that this case is more of a violation as a
7 matter of fact than Reitman versus Mulkey, because of the fact
8 that what occurred here in Reitman versus Mulkey could have
9 been seen as being neutral, because it had nothing on the face
10 of it which would indicate that this was a racial matter.

11 In this case, on the face of the statute, and ex-
12 plicitly on the face of the statute, it is said that no race
13 regulations can be passed without the vote of the people. We
14 think that this is an explicit race regulation which makes it
15 even a stronger case than in Reitman versus Mulkey, because
16 of the fact it does involve and explicitly involves the
17 Government in the process of maintaining and supporting racial
18 discrimination.

19 We also contend that this can't be looked upon as a
20 mere repeal of the law, as if the State were being neutral.
21 What has happened here is that Negroes, those for whom this
22 kind of legislation is needed and intended, are now put to a
23 greater test, are now put to greater burdens to get legis-
24 lation enacted.

25 They are not in the same position as they were before

1 a fair housing law was passed. What they must do now, they must
2 not only convince the City Council which they had to do in the
3 first instance, to enact a new law, but they also have to go
4 out and get signatures and they have to get 7 percent or 10
5 percent of the population to sign, and what they also must do
6 is convince the majority of the electorate that this kind of
7 legislation should be enacted.

8 Q Mr. Carter. if I understood your argument, you
9 would be making substantially the same attack on Section 137
10 whether or not there had previously been any fair housing
11 legislation enacted, would you not?

12 A I think so, yes.

13 Q I understand your argument.

14 A I think I would be because I think essentially
15 what would be occurring is that if 137 were enacted without a
16 fair housing law, all it would mean would be of course that
17 under the circumstances I would not be able to show that the
18 group had succeeded in getting fair housing legislation through
19 the City Council.

20 Q That really doesn't affect your basic consti-
21 tutional attack on 137, does it?

22 A The only thing I do say is that it seems to me
23 that it may sharpen the issue somewhat, because what was in-
24 volved in Reitman versus Mulkey was whether or not this was a
25 repeal of a law, and the issue before the court, that the

1 court felt was an issue that they had to ponder, was whether
2 once you had legislation of this kind, the Constitution pre-
3 vented its repeal.

4 Now, in this particular instance, it seems to me that
5 the issue is presented even more sharply.

6 Q I understand your argument. It is really a
7 different issue and it isn't Reitman against Mulkey?

8 A I think Reitman versus Mulkey covers this case.
9 I think Reitman-Mulkey covers this case and I think Justice
10 Stewart, I think it is an even stronger case than Reitman
11 versus Mulkey.

12 Q Well it may be that if your argument would
13 address itself to the fact that this may be a different case
14 it might help you.

15 You would like to have five members of this court
16 anyway?

17 A I certainly would, under any combination.

18 Q Mr. Carter, do I understand correctly that the
19 Akron Charter also provides that before any tax ordinance can
20 be enacted, there has to be a vote of the people?

21 A Yes. The respondent raises that.

22 Q You raise it in your brief by saying that there
23 is no other kind of legislation that requires this sort of a
24 vote, and they respond by saying that you are mistaken, that
25 the tax legislation does require it.

1 A I agree.

2 Q But that is all?

3 A No, I don't believe that you can make that
4 exception. Let me tell you what the tax legislation is.

5 The tax legislation, 86-A to the Charter, says that
6 the aggregate amount that may be levied on real property in
7 any year has to be at a certain specified limitation, and if
8 that limitation can be exceeded, it can only be exceeded with a
9 vote of the people.

10 There also is a provision in 86-B which states that
11 income taxes that are levied, the income taxes being levied
12 will only last until 1968, and that if it is to be extended
13 it has to be by a vote of the people.

14 Now it is my contention that the property tax does
15 not meet this question because what the property tax limitation
16 is, is the tax is in favor of property owners. It is not an
17 invidious discrimination.

18 What it says is that the City Council says you may
19 not tax property owners beyond a certain limitation without
20 the full approval of the people. So that what we have here is
21 a beneficial law for a certain class of citizens which they
22 have been able because of their strength to keep the City
23 Council from moving along.

24 The income tax provision on the other hand is a pro-
25 vision which is general and neutral, and all that the people of

1 the city said was that they are experimenting with it and they
2 indicate that we are not going to allow you to extend it
3 without our approval.

4 We don't believe that helps the response as an answer
5 to our case. In our case and our argument, we still contend
6 that 137 is invidious in view of the fact that what it says
7 to the City Council is that you may not pass any law for the
8 benefit of housing discrimination for the class of people that
9 need it without the approval of the entire electorate.

10 Q Am I also right in my understanding that any
11 ordinance passed by the City Council of Akron, unless it is
12 an emergency order which requires more than a simple majority,
13 but any ordinance passed is subject to a referendum?

14 A Any ordinance that is passed is subject to a
15 referendum.

16 Q It has to be put to referendum by initiative?

17 A Yes, but this also does not meet the problem
18 because of the fact that the initiative and referendum of an
19 ordinance need not be at a general or regular election, which
20 is required by 137.

21 If an act is passed, the initiative referendum may be
22 in any kind of election and it may be initiated at a special
23 election, so that what you have here is that even to that
24 extent what 137 has done is to freeze and clog the political
25 process against the enactment of law.

1 Now we think that this law is bad because as we have
2 indicated in our brief, because what it does is discriminates
3 clearly. It is racial classification and it discriminates
4 clearly against people who need the legislation the most.

5 Q What part of the 14th Amendment are you relying
6 on? Is that the equal protection clause?

7 A Yes, the equal protection clause. It is our
8 contention that the legislation such as this, which discrimi-
9 nates against groups of citizens, as it does, that under the
10 decisions of this court as this statute has been construed as
11 being a reasonable classification, it has to have a heavier
12 burden.

13 What the State would have to show in order to sustain
14 this under the 14th Amendment would be that this would be a
15 regulation which was absolutely necessary for the City of Akron
16 to meet various of its valid objections that it had a right to
17 pursue.

18 Q If the legislation were neutral on its face,
19 what would you say?

20 A I would have to show then, Mr. Justice Harlan,
21 that it is a fact. If I could show that it discriminated as a
22 matter of fact against classes of citizens, I think I would
23 have the same argument.

24 The point here, however, is that the voters have kept
25 us from being concerned about an interpretation. They

1 specifically and expressly indicated precisely what the statute
2 meant to accomplish.

3 Q Are you saying that the legislation is bad on its
4 face because it has a racial classification in it. Is that the
5 end of your argument?

6 A I say it is bad on its face because it has a
7 racial classification, and therefore it is subject to stricter
8 standards. Secondly, of course, in effect it does discriminate.

9 Q When would a racial classification ever be per-
10 missible?

11 A A racial classification, as I understand it ---

12 Q Do you think it is ever justifiable?

13 A As I understand the decisions of the court,
14 McLaughlin and Loving have left open the possibility of the
15 court approving a racial classification.

16 Q What is your position on it?

17 A I didn't hear you.

18 Q What is your position on it? I suppose your
19 argument would be one way, and if any racial discrimination
20 is bad per se, you could stop there.

21 Do you think it is or not?

22 A An invidious racial classification, it seems to
23 me, is one of course which I would feel that the Constitution
24 would reach.

25 Q Is that a redundant statement?

1 A I think so, but I think this is why this court
2 has said, because of the fact that there might be racial
3 classifications for legislation to benefit groups of people,
4 under certain needs which they have, which this court left open
5 in both cases, the fact that they are not ---

6 Q So you do have to go beyond the face of the
7 statute?

8 A The first thing it seems to me is that you go
9 through the statute. If I have a race classification, what I
10 say about a race classifications is that reasonableness is not
11 enough. I think that once you take the statute from that
12 regard, as I understand, this court has applied that principle.

13 As to whether you will approve the race classifica-
14 tion, then you go to its effect, to determine as a matter of
15 fact whether the classification is necessary for the object that
16 the State is entitled to pursue.

17 Q Don't we also have to take into consideration
18 whether this is a specific housing ordinance?

19 A Yes, sir, and in fact it was aimed at a specific
20 fair housing ordinance and nullified it or at least set it
21 aside.

22 Q In this instance what is your standard, a com-
23 pelling state or simple rationale?

24 A It has to be a compelling thing and one that the
25 State can show is necessary.

1 Q You have said compelling. But have we said that?

2 A In the various classifications I think the term
3 used is "Necessary for the pursuit of a valid objective."

4 Q Is that different and does it put a greater
5 burden on the State to make it compelling?

6 A I wouldnot think so, but I am not in a position
7 to say.

8 Q But you think "necessary" or "compelling" are
9 different from your rationale?

10 A That is right.

11 Q Would you say the desire to aid or to further
12 the interests of a specific class of people would be necessary
13 or compelling enough for that classification?

14 A It would appear to me, Mr. Justice White, that
15 then in terms of its effect, of what the court would look to,
16 would be to see whether ornot what the State was aimed at was
17 an objective legitimate.

18 Q So it has to be a legitimate objective?

19 A Of the State.

20 Q To justify that, and it doesn't have to be
21 compelling?

22 A It has to be compelling and it has to be
23 necessary. I am not in a position to tell you.

24 MR. CHIEF JUSTICE WARREN: Mr. Claiborne.
25

1 ORAL ARGUMENT OF LOUIS F. CLAIBORNE

2 OFFICE OF THE SOLICITOR GENERAL

3 MR. CLAIBORNE: Mr. Chief Justice, and may it please
4 the court.

5 Perhaps I should say a word to explain the presence
6 of the United States in this case, which is perhaps another way
7 of addressing myself to the question of whether the case is moot
8 or whether it has lost its practical importance, because of the
9 intervening passage of the State law of Ohio, which Mr. Justice
10 Fortas referred to, or the Federal law or both the case recently
11 vindicated.

12 It is our view that these intervening events do not
13 in any technical sense make this case moot, because they do not
14 provide the remedy sought by this particular plaintiff in this
15 case.

16 As Mr. Carter pointed out, the Ohio law does not read
17 a refusal to sell or rent a private dwelling. It does reach
18 some discriminations by those engaged in lending or in adver-
19 tising or in furnishing commercial services with respect to the
20 sale of private housing.

21 But the fundamental complaint here, that certain
22 housing was unavailable to Mrs. Hunter is not a remedy which
23 she can obtain under the Ohio law.

24 As for the new Federal law, in 1968, it does not as
25 of now provide any remedy with respect to what I assume to be a

1 single family house which is what Mrs. Hunter was looking for.

2 Indeed, it is not clear whether the Federal law will
3 ever provide a remedy against the kind of legislation alleged
4 here by the realtor. Federal law does or will a year from now
5 provide a remedy against a realtor who misrepresents the avail-
6 ability of certain housing to a particular race or class, but
7 if it correctly represents the owner's desire not to sell it
8 may not be a violation of the Federal Act.

9 The 1866 Act does cover the fundamental complaint
10 here in that it reaches all housing, indeed all property dis-
11 criminations on the ground of race. But it does not furnish
12 any administrative remedy and that it seems to us is the
13 importance of this case and other cases like this.

14 No other law, neither the Ohio law nor either of the
15 Federal laws, can give Mrs. Hunter what she wants. What she
16 wants is that the Akron, Ohio Commission, the local commission,
17 easily accessible to her, on which sit local leaders, committed
18 by their local ordinance to eliminating racial discrimination
19 in housing in their community, shall act and shall investigate
20 and if necessary shall institute legal proceedings on her behalf
21 to vindicate her right which she has under Federal law as well
22 as under this local ordinance of Akron.

23 This is not an unimportant question. The availability
24 of a local remedy even today when there is a Federal remedy is
25 important.

1 Q Is that commission still in existence?

2 A The commission as I understand it was never
3 fully activated, because this amendment to the Charter was
4 passed relatively rapidly after the original housing ordinance.

5 Q There is no commission then?

6 A I think that there is no commission, certainly
7 by now there wouldn't be one. However, the commission is to be
8 appointed by the Mayor of the city, and I assume that it could
9 be brought back into existence without delay. I don't think it
10 is a problem about reactivating a commission should this case
11 return for a remedy in that respect.

12 There has been a lot of talk about local handling of
13 local problems, and of course everyone would agree that that is
14 the most desirable and the most salutary way of handling this
15 and other problems in this area.

16 No Federal law from Washington, not even the Federal
17 courts sitting in the State of Ohio can afford the same effective
18 relief as can a local commission administering this local
19 ordinance.

20 There is the involvement of local leaders, and the
21 local commitment of the inhabitants who have themselves passed
22 a supplementary law. This is what the Federal Civil Rights Act
23 of 1968 envisaged, that there would be local laws, and local
24 remedies to supplement the Federal statute.

25 Also, a local commission is more readily accessible

1 to those who are injured.

2 It is also important that the local communities not
3 seem to be in conflict with the overriding Federal law, which is
4 applied everywhere else, but the appearance of conflict which
5 results from Akron's having a charter provision which says to
6 its City Council, "You may pass no law providing for fair
7 housing on the elimination of discrimination, when the Federal
8 law forbids such discrimination," it creates a confusion.

9 It seems to tell the citizens of that city that
10 whereas Washington is telling them they may not discriminate,
11 their own electorate is condoning it and I am only saying that
12 this makes it important and not moot.

13 Q I don't understand this argument at all. The
14 Council has passed this legislation.

15 A I should perhaps not have referred to leaders in
16 the sense of political leaders, but they had passed this Act.

17 Q As an emergency ordinance?

18 A But now nevertheless, the city as its charter,
19 its most authentic law provides, has put itself on the side of
20 perpetuating the regime of laissez faire, whereby freedom to
21 discriminate on any grounds and specifically on the ground of
22 race appears to be condoned.

23 That is not effective because there is a Federal law
24 which forbids it.

25 Q I don't understand how you can say it appears to

1 be condoned. The charter merely provides that any legislation
2 shall be subject to the most democratic process of them all,
3 not representative democracy but pure democracy.

4 A It is not as though there were no law. Akron
5 has not been silent on the subject. It has today in its organic
6 Charter a provision, the only amendment to the City Charter of
7 Akron as far as I can tell from the record which provides that
8 on this one subject alone, that is discrimination in housing
9 with respect to race, religion or ethnic origin -- the City
10 Council is disabled from acting unless and until it obtains the
11 approval of the entire electorate.

12 Q I am having a little difficulty, too, Mr.
13 Claiborne. I take it that you would not challenge, or would you,
14 the constitutionality of a referendum by which the voters of
15 Akron repealed these specific ordinances and did no more.

16 Would you say that that presents a substantial ques-
17 tion under the 14th Amendment?

18 A Depending on the effect of such a referendum, I
19 think it would present a substantial question. I should say
20 that there is a case pending in this court involving that
21 exact question, and it may be questionable whether I should
22 speak to that case rather than this one.

23 Q What is that case?

24 A That involves the city of Toledo, Ohio.

25 Q As I understood Mr. Carter, he was presenting

1 this on a very different basis, and perhaps I misunderstand, but
2 I thought he was presenting this on the following basis, that
3 here is in substance an overriding law which says in Akron you
4 can pass any kind of housing legislation you want to by the
5 ordinary processes, but if it is housing legislation that re-
6 lates to the problem of racial discrimination you may not.

7 You must first submit that to the voters. It is my
8 understanding of his argument that he says that that is a dis-
9 crimination on racial grounds without a permissible object and
10 it therefore violates the 14th Amendment, specifically the
11 equal protection clause.

12 Is that your understanding of the argument?

13 A It is not only my understanding of the argument,
14 but I entirely adopt it and approve it. I was perhaps moving
15 too slowly and hadn't gotten that far.

16 Q That would have no effect whatever, as I see it,
17 on the validity of a specific referendum designed, or which has
18 the effect of repealing a specific ordinance passed by the City
19 Council of Akron. That argument it seems to me to be not
20 applicable because the referendum machinery is available with
21 respect to all ordinances.

22 Your case is being presented to us on a very
23 different basis, that is to say the basis of singling out a
24 particular kind of housing legislation, namely legislation
25 directed to racial discrimination and saying as to that specific

1 type of housing legislation there must be a special procedure,
2 i.e., submission to the voters.

3 A Perhaps I shouldn't take on the referendum case.
4 I simply, to be candid in answer to your question, didn't want
5 to suggest that there were no arguments available here which
6 wouldn't have some bearing on that case as well.

7 If the referendum has the effect, as a practical
8 matter, or as a legal matter, as is claimed in this other case,
9 of disabling the Council in the indefinite future from then
10 enacting any such fair housing ordinance, then the effect insofar
11 as placing a burden on the victims of discrimination in obtain-
12 ing an effective remedy through the political process is exactly
13 the same whether it is done by a referendum disapproval of an
14 existing ordinance or whether it is done as here by an amendment
15 to the City Charter.

16 It is debated in the other case whether the referendum
17 has this effect, and it does not appear in the case of Akron the
18 referendum, the disapproval of their ordinance by a referendum,
19 would have inhibited the Council from passing the ordinance at
20 a later time.

21 But there is also the other evidence which is that
22 disapproval of an ordinance by referendum merely erases, and it
23 does not put into the organic law what seems to be or what is
24 on its face a discriminatory provision, explicitly grounding in
25 race, and, of course, resort to the referendum as available with

1 respect to all ordinances, and not quite all ordinances, in
2 the case of Akron, whereas here we have a tailor-made provision
3 dealing with only the subject of fair housing which is a plain
4 discrimination against the beneficiaries of such laws.

5 Q I understand that instead of putting 137 to
6 initiative as they did, if they had put a repealer of the open
7 housing law by initiative, you are suggesting that you might
8 still be here under the equal protection clause, but you don't
9 have to reach that question in this case, is that right?

10 A That is right, Mr. Justice Brennan, although I
11 think the recourse to this procedure, which is available in any
12 case, might have had an injurious effect, but that might be
13 just as bad because we cannot control the political process to
14 that extent.

15 Whereas here an instrument was fashioned with the
16 purpose of placing at a very substantial disadvantage or as
17 Professor Black has put it in his article, putting the life
18 preserver out of convenient reach. That was the effect of this
19 amendment.

20 Q Is that Toledo case raising the issue of putting
21 the original open housing ordinance to a referendum?

22 A Yes.

23 Q So this case would not decide that, necessarily?

24 A Not necessarily. Now, I should point out and
25 the answer given was that any ordinance is subject to referendum.

1 That is not quite true. The Akron Charter expressly forbids
2 referendum on two important matters where the people are not
3 to be trusted. One is the question of current appropriations
4 for the running of the city, and the other is the appointment
5 and removal of those whose jobs had been secured by the City
6 Council.

7 It is interesting that when it comes to those matters,
8 referendum is not permitted.

9 Q I don't think it is fair to say that the moti-
10 vation behind that is that the people are not to be trusted,
11 and I don't think that you do, Mr. Claiborne, either.

12 A I wasn't being entirely serious but there are
13 some matters as to which vagaries of the referendum process ---

14 Q The first area you gave involved the necessity
15 for promptness, and the second is a nonlegislative act?

16 A Perhaps so. Let me just emphasize the thrust of
17 our argument here. It is that this amendment to the City
18 Charter has the undeniable effect of prejudizing the benefici-
19 aries of this type of legislation.

20 It also has the inevitable effect of encouraging or
21 at least permitting those who engage in this discrimination,
22 by assuring them that the likelihood of a passage of such an
23 ordinance is more remote than it was before, and that things
24 will remain as they are for a reasonable long time.

25 All of this might be beyond constitutional challenge

1 if it resulted from the normal political process. Here it
2 results on the contrary from an action which narrows, and not
3 enlarges the avenues of political relief.

4 We do have here a clogging of the political process.
5 Normally legislation can be passed either by the Council or by
6 the process of initiative or by a combination of both through
7 the submission of referendum.

8 With respect to this one area, the Council is not to
9 be trusted, especially since they have demonstrated their
10 willingness to pass the fair housing legislation by a vote,
11 and therefore the avenue of relief normally available through
12 the elected representatives is no longer available and that has
13 been shut off.

14 The only way in which housing legislation can now be
15 enacted in Akron is through the cumbersome and quite unusual
16 procedure of either initiative as a practical matter, or
17 theoretically repassing of this ordinance and an automatic
18 referendum thereafter.

19 Q You think or at least you suggest it is not a
20 sufficient reason to want the voice of the majority of the
21 people on something that they think is important?

22 A We do not challenge or in any way question the
23 desirability of obtaining the approval or voice of the elec-
24 torate on any matter. We do think that singling out this
25 particular matter indicates that this is not a feeling by the

1 citizenry of Akron that they ought to resort to pure democracy,
2 but rather a tailor-made device which happens to work very well
3 because those who are affected are a minority, and their voice
4 will be more effectively ground out when the unabated rule of
5 the majority will prevail.

6 Q This is just something that you really can't do?

7 A I suggest that they can do it by initiative or
8 by referendum, but they cannot do it in this way. This way does
9 carry with it both some consequences and a flavor which has
10 practical impact, this being an area where neutrality is made
11 unless the city is to go forward with and eliminate discrimi-
12 nation.

13 It has but two choices, to combat discrimination or
14 remain scrupulously neutral with respect to it. That is very
15 difficult to do and yet speak on the subject, to remain scrupu-
16 lously neutral and not go in the other direction.

17 It seems to us here that Akron has said too much to
18 be properly characterized as neutral.

19 MR. CHIEF JUSTICE WARREN: Mr. Vinopal, you may
20 proceed.

21
22
23
24
25

1 ORAL ARGUMENT OF ALVIN C. VINOPAL, ESQ.

2 ON BEHALF OF APPELLEES

3 MR. VINOPAL: Mr. Chief Justice and may it please the
4 court, our position here has three phases.

5 I am briefly going to touch on the subject of moot-
6 ness, and then I am going to talk about where we stand with
7 respect to Reitman, and then I intend to talk some about
8 classification.

9 Now, with respect to mootness, it seems to me, to
10 start with, that unless my friends on the other side feel that
11 the people of Akron will refuse to obey the State or Federal
12 law, if that is their argument then perhaps we shouldn't be here
13 at all.

14 But I don't think Akron are that kind of people. They
15 will obey the State and Federal law.

16 Now, as to this particular specific complaint, both
17 the State and the Federal law do cover it, because if you will
18 observe my appendix B in my brief, this is a complaint relating
19 to the activities of a real estate agent, and that is covered
20 or that proposition is covered by both of the laws.

21 That was really the basic purpose, in a sense as I
22 see it, for the State and Federal law. Along that line I began
23 thinking about it and I looked in the Sunday classification ads,
24 just the Sunday before I came down here, as to advertisements
25 with respect to the sale and rental of real estate, and I was

1 amazed to find that of some close to 500 listings, 448 of them
2 were listings by real estate people and only 15 or 20 were
3 listings by individuals.

4 In my own observation, in my travels through the City
5 of Akron, I have yet to see a sign like it used to be, he wants
6 to sell his house.

7 This relates to the regulation of a vast business,
8 namely the real estate business as well as the banking business
9 in certain areas as I will come to them.

10 Now the other aspect of the question of the mootness
11 here is that Nellie Hunter anyway would hardly be involved in
12 this complaint because she is now living in Chicago. The other
13 aspect about the fact that we have the State and the Federal law
14 as well as the Jones doctrine, under the State and Federal Act
15 the ultimate complaint of a Commission, whatever it may be,
16 ultimately ends up in the Common Pleas Court of the county where
17 the individuals are located.

18 If they have the State law, the State will take over,
19 or the city can take over.

20 Q Does the record before us show that Mrs. Hunter
21 lives now in Chicago?

22 A I will grant you, it doesn't show that. I am
23 referring to a newspaper article about the subject in discussing
24 with counsel, it isn't in the record, I will say that. But a
25 recent newspaper article on this subject covers that.

1 Q I have problems about that, about going outside
2 of the record on something of that sort.

3 A I am sorry, I didn't mean ---

4 Q You are in distinguished company, including five
5 Justices of this court yesterday. In a very analogous situa-
6 tion, it was pointed out that the person had moved away from
7 Arkansas.

8 A I have no intention to offend the court or
9 counsel. I notice that in this area, courts have very little
10 record to come up here and there are a lot of assumptions made
11 about what was before the court.

12 Another aspect of mootness is, too, that Akron is
13 surrounded by what we would call five or six bedroom communities
14 which really have no law on the subject and these real estate
15 people, I suppose -- this court certainly, I would assume and I
16 hope the court would assume that these real estate dealers
17 involved in a vast metropolitan area like that have offices
18 and in fact they do in just those separate communities, and
19 their activities relate to properties only in those communities,
20 and the Akron law wouldn't cover that subject at all.

21 As a side issue as to why I think that really the
22 place for this type of law is with the State is that again
23 really, this is a real estate business. The activity is that.
24 If you will observe the ordinance and even the State Act, any
25 person to whom an application is made for financial assistance

1 for the acquisition, construction, rehabilitation, repair or
2 maintenance of any housing -- that certainly is a subject which
3 is a regulatory matter involving real estate people and banking
4 people and where real estate people and banking people are
5 regulated by State law I think that the State law is the place
6 for this particular type of regulatory law.

7 The State law does cover the activities of real
8 estate agents and in fact the matter I am coming to now deals
9 specifically with that.

10 I want to talk about the Reitman theory, and the
11 background in this particular case. Now again, Mr. Justice
12 Fortas, I want to be fair here in the record, talking about
13 background I am referring to a document which my adversaries
14 have quoted in both of their briefs, discrimination in housing
15 in Ohio, and I am sure the courts of the State of Ohio must have
16 had this before them, although there is nothing in any of the
17 opinions relating to it.

18 But discrimination in Ohio is a subject which got
19 State-wide because of this report of the Civil Rights Commission.
20 That was in January of 1963.

21 Then a bill was introduced about a month after that
22 in 1963, and that bill died as the saying goes in June of 1963.
23 It was indefinitely postponed. But all along, I feel the
24 environment was that the State was talking about fair housing
25 and discrimination in Ohio.

1 So the next thing that happened, we come along then
2 to July of 1964, and Akron then passed the Fair Housing
3 Ordinance. But prior to that there was in the courts of Ohio
4 commencing in 1963, the case of Porter versus Oberlin, which
5 is cited in one of the briefs here, wherein the City of Oberlin
6 had a fair housing ordinance and it was attacked as being
7 unconstitutional, and in fact the State Court of Ohio did
8 declare that particular ordinance to be unconstitutional, the
9 enforcement portion of it, stating that here was the attempt
10 of a municipality to set up in a sense a court, and that courts
11 only could be created, particularly municipal courts, by the
12 General Legislature of the State of Ohio.

13 Therefore, since this Commission was doing something
14 in the nature of the judicial function it was unconstitutional.
15 I do want to say in fairness that when the matter came up in
16 our case, the Akron case, the status of it was raised again,
17 and in the Akron case the Judge who wrote the opinion in one
18 of our cases which was before them, said that the Akron
19 officials had no standing to appeal that case, and then several
20 of the judges said, well, in view of the fact that this court
21 has formerly held that the enforcement section of the Fair
22 Housing Ordinance was unconstitutional, we would have to go
23 along with that.

24 But now that the constituency of the court had
25 changed we probably wouldn't do it. But the judgment in that

1 court only stood for the fact that the City of Akron's officials
2 could not challenge the constitutional question.

3 Q Was that when they decided to pass 137?

4 A That wasn't decided, your Honor, until March of
5 1965, so we passed 137 in August of 1964, within 25 days after
6 the Fair Housing Case went on.

7 Q Why was it passed?

8 A Well, my own judgment as to why I think it was
9 passed, is first of all, we start with the proposition that
10 we don't have to have fair housing ordinances in Akron; that is
11 No. 1.

12 Q Wasn't the subject to initiative and referendum,
13 the original fair housing ordinance?

14 A The Fair Housing Ordinance was passed as an
15 emergency ordinance. It had to be attacked by initiative.

16 Q You could attack it by initiative which would be
17 a little bit difficult, or you could amend the Charter, which
18 wouldn't be difficult, and so you took the easy way?

19 A Well, in a sense I think that we benefited the
20 proponents of fair housing, and I will come to that. Now the
21 initiative would be to start a new law or repeal the law.

22 Q Why is she here complaining, then?

23 A It benefited here in the political processes that
24 were involved in this particular activity, that is what I mean.
25 I will come to that.

1 Q Could I ask you before you go to another point,
2 is the affidavit referred to in the complaint which appellant
3 filed with the Commission, of the Mayor and members of the
4 Commission?

5 A That is in the record. It is in the original
6 record.

7 Q I haven't yet been able to locate it.

8 A By the way, there are one or two sections of the
9 Charter which I intend to refer to which are not in the printed
10 record, but they are in the original record, copies of which
11 were furnished to the State court by your office.

12 Then we come along to 1964 when the Fair Housing
13 Ordinance was passed and the Charter Amendment. Immediately
14 right thereafter, of course the initiative at that time would
15 have required naturally 10 percent of the voters to initiate
16 repeal of Fair Housing but they chose the other.

17 Q And that took 7 percent to put it on the ballot?

18 A No. We have a procedure where the council put
19 it on the ballot, and it wasn't required to put this Charter
20 Amendment on the ballot at all.

21 Q The Council did?

22 A Yes. By Section 136, Council is permitted to
23 put all ordinances or any Charter Amendment which they desire
24 on the ballot themselves.

25 Q Just so that I may understand what happened here,

1 the Council enacted the Fair Housing Ordinance, and a few weeks
2 later an amendment thereto, and then you are telling us that
3 they passed it as an emergency ordinance, and then you are
4 saying that the Council thereafter submitted to the voters
5 Section 137 as an amendment to the Akron City Charter?

6 A I am sorry, no. There was this petition to
7 amend the Charter as an initiative petition.

8 Q And what percentage of the registered voters
9 were required?

10 A Seven percent.

11 Q Was the population of Akron, and what is the
12 average number of registered voters in an election?

13 A The county vote is 200,000, and I think the
14 city vote is somewhere around 150,000 to 170,000.

15 Q The population is around 300,000?

16 A Yes, sir.

17 Q What percentage of the population is Negro,
18 approximately?

19 A I think that we have 11 percent.

20 Then we come along to January of 1965, at which
21 time Miss Hunter filed this complaint. Following that, there
22 had been again activity instituted in the State Legislature
23 where by March of 1965 the State Fair Housing Bill was enacted,
24 and I think just as a casual personal observation as to why it
25 didn't get enacted in '63 was that it was hastily done after

1 this report, and someone wanted to put it in with health,
2 welfare and morals, and that part of the code and it was all
3 botched up and it came back the next time the legislature met
4 and they passed it quite readily under the Civil Rights
5 Commission section.

6 So as I say, as to what environment was and the back-
7 ground was of Fair Housing, it was really around the time that
8 this took place, namely that it was already started in the
9 State and I would presume someone must have felt that after all
10 perhaps the place to regulate this thing would be State-wide,
11 and first we don't have to have one in Akron.

12 There must be someplace where you could maintain that
13 particular position, it would seem to me.

14 Now as to what the impact of this particular amend-
15 ment had for instance on Mrs. Hunter, it seems to me although
16 I don't want to be unfair in mentioning where she resides, but
17 as to others generally the only time that there would have been
18 any possibility that their rights were infringed would be
19 from the period of July of 1964 until October of 1965, when
20 we had the State law.

21 We then had a State law covering pretty much the
22 subject.

23 Q I am really troubled because there seems to be
24 a difference of opinion between you and Mr. Carter as to whether
25 the State law does cover this. I haven't yet been able to find

1 the affidavit setting forth the specific matters as to which
2 she complains. That is the affidavit that you filed with the
3 Commission.

4 I hastily looked through the full transcript and I
5 haven't found it yet. I am troubled by that difference.

6 A On page 13 of my brief I have it set out. I do
7 want to say that the State law does not cover the sale and
8 rental of private property between "A" and "B".

9 Q Does the State law cover this complaint?

10 A Yes, in my opinion it certainly does.

11 Q What section of the State law is that?

12 A That would be Section under 41, 1202, page 11 of
13 my brief. There is the Section 6, to circulate any statement
14 relating to the sale or transfer and so forth, of personal
15 residence. The whole tenor of that portion of the Act, it
16 seems to me, relates to the regulation of the activities of real
17 estate people, those dealing in this business.

18 Q I don't see anything about printing or circu-
19 lating such things.

20 A Well, the complaint, as I gathered, it was
21 circulated and implied that there were certain properties for
22 sale and when it came time to show them to this lady they were
23 not shown.

24 Q Would I be safe in saying that there is a
25 question as to whether or not the State law covers this?

1 A I am not doubtful about it. If it was a com-
2 plaint about someone who refused to sell their house, it would
3 be serious.

4 Q It is covered by the State law, you say?

5 A I think it is.

6 Q Do you think there is some question that it is
7 not covered by the State law? Do you recognize that?

8 A No, I do not. I think that these particular
9 paragraphs are sufficient to cover that particular complaint.

10 Q Did the State courts say it covered it?

11 A The State court only dealt with the problem of
12 whether or not this was a regulation, and the State court or
13 the people of Akron had the right to vote it.

14 Q Isn't it a matter of State law whether or not
15 this statute covers this problem?

16 A Yes. In this case the question of that problem
17 never was raised.

18 Q But there is no question that the complaint
19 could come before the Commission, if the Commission had been in
20 existence, and if 137 had not been adopted?

21 A That is right.

22 Q There is no question about that?

23 A That is right.

24 Q And the Commission, since you say there is such
25 a wonderful atmosphere in Akron, couldn't the Commission talk

1 to the realtor and explain that you shouldn't treat this woman
2 this way, and to be nice to her, than it could do all of those
3 things. But it couldn't be settled once 137 was passed?

4 A That is right.

5 Q And you say you still have the same situation,
6 by taking away one of the avenues to help her?

7 A Well, on the basis of the fact that we did not
8 have to have a fair housing ordinance, but we had remedies by
9 the State law and now the Federal law.

10 At the time, of course, that she filed a complaint
11 there was no Federal law, of course. But there was the Federal
12 law with respect to the private individuals and sale of the
13 property, and there was no remedy.

14 What I am coming to is that the situation was a benefit
15 in this respect as to the matter of the burdens that are placed
16 upon people in this particular situation.

17 Q Before you go on to that, may I see if I can
18 clear this up in my own mind anyway.

19 If Mr. Jones, a resident of Akron owns a one family
20 house and he has that on the market for sale and he refuses to
21 sell it to Mrs. Hunter because she is a Negro, that would not
22 violate the State law, would it? Section 4112.02, on page 10
23 in subparagraph 1 "Refuse to Sell," makes it an unlawful dis-
24 criminatory practice to refuse to sell on account of race and
25 so on.

1 That applies only to commercial housing, does it not?

2 A Yes, sir.

3 Q And it would not affect this situation?

4 A No.

5 Q Now, I fail to see anything else in the State
6 law, and I may be wrong, but I fail to see anything else in
7 the State law that reaches the case I just put to you.

8 A Yes, but that isn't the case that we have here.

9 Q Now then you turn to page 13 of your brief, and
10 you look at the affidavit that I have been searching for, and
11 in that affidavit, according to the affidavit, the agent stated
12 to Mrs. Hunter that she could not show me any of the houses on
13 the list because all of the owners had specified that they did
14 not wish their houses shown to Negroes.

15 So that it is at least arguable that Mrs. Hunter, the
16 gravamen of Mrs. Hunter's complaint here is that the owners of
17 individual houses, and not commercial property, but individual
18 houses, refused to sell to her. That would not be covered by
19 the State law?

20 A Merely on the basis of a statement from some
21 real estate agent, it would be arguable, but not in her specific
22 private dealing with any private individual.

23 Q I think that I have the line of reasoning
24 straightened out anyway; thank you.

25 A I had gotten to the question here of what barriers

1 are placed in the path of these people who want this particular
2 ordinance, and I have read a stack of cases this high, and
3 right now I would say that they are all piled on the floor of
4 my mind and I couldn't sort any of them out and tell which one
5 of them ought to be catalogued.

6 But I drafted a little statement here which I thought
7 was in a sense the rule that would apply here as to whether or
8 not there had been unreasonable barriers placed in the way for
9 these people to accomplish what they want.

10 I think that we go back basically to the proposition
11 that this really is a political duel or a political competition.
12 Someone wanted fair housing and someone didn't want fair
13 housing. As I see it, in a political duel between those who
14 want a certain regulation, and between those who oppose it, if
15 the State or the city in this particular case may not place in
16 the way of those who desire it, any barriers which within the
17 State or city's total political system taken as a whole, any
18 barriers which are especially difficult of surmounting by
19 comparison with those barriers that normally stand in the way
20 of those who wish to use the political process to get what they
21 want.

22 Now in coming to the answer ---

23 Q Would you amend your hypothesis there to the
24 extent of saying that this was a political combat between those
25 who wanted to protect their constitutional rights and those who

1 wanted to deny them to them, and could you proceed from that to
2 get the same result?

3 A Well, I would say that I would have to grant
4 certainly those people have the right to their constitutional
5 rights, and it would have to fit in whatever process the city
6 or the State evolved and there would have to be rights that
7 are allowed and permitted under the Federal Constitution.

8 Of course, that would be basic in this assumption
9 here. So I say that the fact about the way this particular
10 Charter Amendment ended up was that it is easier for those who
11 desire to get fair housing with it than it was before, because
12 I am sure that this court can conceive, and I certainly do have
13 city councils, right in my own area, who wouldn't pass fair
14 housing.

15 So, therefore, what are they going to have to do?
16 They are going to have to get it referred, those who would want
17 to have it eliminated, they would have to use the process of
18 referendum.

19 Q But we already had fair housing in Akron?

20 A No, we do not have.

21 Q I say at this time we already had it.

22 A No, because the Circuit Court of Ohio says we did
23 not, because it was suspended, and there was no fair housing law.

24 Q Up until it was suspended, you did have it, and
25 so you helped by taking it away. That is where you lose me.

1 A Well, until the ordinance became effective, it
2 seems to me that we wouldn't have it.

3 Q Well, I can also assume that the ordinance would
4 become effective.

5 A Getting back to the total procedures which are
6 necessary ---

7 Q What more was accomplished under your argument,
8 that Akron saved money with this Commission, and what else did
9 you save for Akron?

10 A Because I think that the State Commission is far
11 better equipped to handle a complaint.

12 Q Is it in operation now?

13 A Yes, it is in operation now, and real estate
14 people are regulated by the State.

15 Q And would it have handled this complaint?

16 A Oh, yes, it would be my assumption.

17 Q I would feel much better if I was an ordinary
18 citizen, if I had three protections than if I had two.

19 A Well, there are those who feel that we have too
20 many laws overlapping as they are, and my own judgment is that
21 since this is a total problem that we ought to regulate State-
22 wide, and it ought to be done that way, because as I have just
23 said, there are many of us, municipalities in Ohio who will
24 never have one, in my own humble judgment.

25 Q Is it your opinion that the State law pre-empts

1 this whole situation?

2 A Well, the State is now in there, and I am sure
3 if Akron tried to do anything that the State found offensive
4 to the way it was handling it, it would be held improper. I
5 think cities are allowed to have laws which are not in conflict
6 with general law, and so if it didn't disturb what the State
7 had, it would be no problem.

8 Q It is not your position that the State law re-
9 places it, because it is a matter of Ohio law that doesn't
10 happen. Any city, any home-rule city can have an ordinance so
11 long as it is not in conflict with State law, and then neither
12 one or the other supersedes or pre-empts the other. Each is
13 a viable and separate law, isn't that correct?

14 A Yes.

15 Q Is it your position that the relief provided in
16 this case is now provided by State law?

17 A There is a State law which provides relief that
18 she couldn't have. This was a mandamous case.

19 Q Even so, I still can't see how that enables this
20 court to escape the determination on the constitutional question
21 which has been presented. I gather that is the whole gist of
22 your argument, isn't it?

23 A Yes, that is the one point, the one phase of it,
24 but if this party had other remedies, it seems to me it would
25 be a moot question.

1 Of course, we now have the Federal law. To get back
2 to Justice Marshall, anyone starting from scratch, if I may use
3 that word, who would want fair housing, would have to take, if
4 they found an unfriendly council, they would have to take it to
5 referendum.

6 Now that is not necessary. Under the procedure now,
7 the council may at any time put this fair housing ordinance
8 before the people, and so therefore ---

9 Q These other communities are not before us, and
10 the only community is Akron. Akron had a fair housing ordinance,
11 and that is the case we are deciding.

12 Now, if you made it easier for Cleveland or any of
13 the other cities, that wouldn't affect Akron, as I see it.

14 A The Supreme Court of Ohio made this statement on
15 this subject, which is on page 50 of the record:

16 "It is obvious, therefore, that if Section 137 of
17 the Akron Charter is valid, its words require the conclusion
18 that the ordinance relied upon had ceased to be effective,
19 immediately that ordinance was in effect when the Charter
20 section was adopted and the ordinance has never been approved
21 by the electorate."

22 So in a sense, for the 25 days ---

23 Q As I read it, it states that Section 137 is out,
24 and that is the point that is before this court now, whether
25 it is valid or not. Isn't that the issue?

1 A Yes.

2 Of course, we contend it is valid because it sets up
3 no particular extra unusual burdens. The classification in
4 order to be obnoxious must be arbitrary and have no reasonable
5 basis.

6 Certainly, if the people want to refer or have re-
7 ferred to the question of fair housing, it would not seem to be
8 unreasonable, in view of the environment which existed at the
9 time.

10 Namely, that there was pending in the State the activity
11 of having a State law, that possibly the enforcement provisions
12 of a city ordinance may not have been effective anyway, and in
13 view of those things and in view of the fact that it is not
14 necessary to have one, this was the first opportunity there I
15 would say that the people could have to decide whether they
16 wanted one or not, since the council had elected to pass the
17 ordinance the way they did.

18 So, in view of all of those things I don't think it
19 is unreasonable at all that they should desire to do it this
20 way.

21 So really all that has to be done now is to have
22 council bring it to the voters, saving anyone who wanted to
23 have fair housing the obligation and the need for getting the
24 referendum and petition, granting as the Justice said that for
25 25 days there was a law but nothing had ever happened and the

1 commission never got organized. Everyone conceded at the time
2 that they were waiting to see what was going to start in rela-
3 tion to whether there would be a State law.

4 I will grant you that maybe one of the things, but
5 taking overall, the environment was favorable to those who
6 wanted to do it this way in my humble judgment.

7 As to other barriers, council has spoken of the tax
8 ordinance. That was one of their chief complaints, that these
9 people had heavier burdens and this ordinance was singled out.

10 It wasn't, as indicated here, and also there is
11 another one which is not in my brief and I regret in preparing
12 for this case, being my first trip over the road, I perhaps may
13 not have done what I should have, namely with respect to where
14 Mrs. Hunter now resides and with respect to another Charter
15 provision.

16 That is section 39 regarding franchises, and it says
17 this: "If anyone wants a franchise for a public utility, every
18 such proposed grant and every proposed renewal or extension of
19 such grant by ordinance passed by the council shall be subject
20 to referendum."

21 Is there anyone who wants to have some sort of fran-
22 chise stand the risk right off the bat of having the people vote
23 on the subject. If they want to circulate petitions for that
24 purpose, they can do so.

25 Q Wouldn't you assume that a utility is in better

1 shape financially to get a referendum than a property owner?

2 A Well, some of them are, but some I have dealt
3 with, a little fellow with a bus line who I helped get a fran-
4 chise from the city, was practically bankrupt. But I would say
5 even he would be better off. I agree.

6 Q Perhaps it is arguable that this case is being
7 more like the public utility charter provision if the latter
8 said that the utility charters may be issued to white people
9 without a referendum and it could be issued to Negroes and you
10 would have to have a referendum.

11 As I understand the adversary's argument, he is
12 pitching his case on that narrow point of alleged racial dis-
13 crimination. As I understand this case, if for example the
14 provision adopted here had said that all ordinances regulating
15 terms, conditions and manner and so on of sale of real estate
16 have to be submitted to the voters, then the same line of
17 argument would not apply.

18 That is my understanding of his argument. That is
19 why I put to you the alternative case with respect to utility
20 franchises.

21 A Well, of course, granting this is the element of
22 the racial discrimination, but in a sense this was an ordinance
23 dealing with the regulation of a subject, and, of course, one
24 of the subjects was the sale of housing, whether it was to
25 Negroes or whatever classification of people it was. It covered

1 namely the subject of the sale and the rental of property. In
2 that sense I think people definitely have had a right to
3 consider like they had done in other situations in their
4 Charter, and have it referred to them for the purpose of whether
5 they wanted it or not.

6 That is not merely because they ought to go slow in
7 this area, but because of the other issues, that it was still
8 going through the State courts and it was still being looked
9 into by the State Legislature, and also by virtue of the fact
10 that really if we are going to regulate this thing and do it
11 right, possibly it should be done with the State because really
12 in the area that we are dealing with here it is a subject in-
13 volving real estate people, the way they handle this business,
14 and as I pointed out that is the basis of it.

15 There are few transactions between private people
16 and I think that that is a nullity anyway.

17 Q Why do you assume that we have to go slow in
18 this area?

19 A My statement was that ---

20 Q I understood you to say just a moment ago, that
21 because it was necessary to go slow in this area.

22 A I didn't speak loudly enough. I said regardless
23 of that, I made that an exception to my statement.

24 My position is that the need to go slow is not an
25 element here as to why the people would want to have this. I

1 don't consider that really vital to the matter. I think the
2 basic interests that I have talked about are important. That
3 is that it is a big subject that we are going to get into, and,
4 of course, I can't go off the record but I had understood that
5 real estate people were really the ones who were in favor of
6 having the act in the State, and having it where it could be
7 regulated, and since we are getting into a vast subject of
8 dealings with transactions involving financing and sale and the
9 mortgaging interest and all of those things, and property.

10 I will conclude.

11 Q Could I ask you a question, please.

12 Didn't the ordinance do two things? It said that a
13 certain kind of ordinance can't be effective without the vote
14 of the people. That is one thing it did?

15 A Yes.

16 Q But then it also said that a particular ordinance
17 that is on the books is suspended?

18 A Yes.

19 Q Don't you think there is a separate question
20 involved here whether a city may just repeal an ordinance
21 because this Charter at least did that? It may have gone
22 farther and did something that is arguably impermissible. But
23 didn't it repeal an existing ordinance?

24 A Yes, it did that.

25 Q Don't we have to hold therefore that the city

1 may not -- for you to lose, don't we have to hold that a city
2 may not repeal an ordinance?

3 A Yes, but I think that a city can, because there
4 are procedures and machinery which has been adopted.

5 Q I am suggesting that that is an argument that you
6 might make.

7 A There are several arguments that I will think
8 about tonight.

9 I am going to close with this, that the iceberg under
10 this which I presented here is pretty large. It seems to me
11 that we don't need a hatchet operation here, that after all we
12 do have machinery that is taking care of this problem by virtue
13 of State and Federal law and the 1869 Act, and therefore we
14 ought to do something now which would amputate the whole
15 Governmental machinery, and the process of initiative and
16 referendum which is really structured for the local communities.

17 That is another argument I should have made. After
18 all, this is only local, and many did touch on that. This isn't
19 State-wide, and this doesn't cover everybody. This is just
20 Akron.

21 So my final word is that we shouldn't burn down the
22 barn to roast the pig. I think that I should close on that.

23 MR. CHIEF JUSTICE WARREN: I think that you have five
24 minutes.

25

1 ORAL ARGUMENT OF ROBERT L. CARTER, ESQ.

2 ON BEHALF OF APPELLANT

3 MR. CARTER: On the question of the repeal I think in
4 terms of answering it, it seems to me that Akron has done more
5 than repeal the ordinance. It has done that plus some other
6 things.

7 Q I think there are two sentences there. What you
8 are particularly concerned with is that second sentence, that
9 it shall cease to be effective until there is a referendum?

10 A That is right.

11 Q If I understood your argument, you have been
12 arguing about the first sentence, that you may not single out
13 a housing discrimination and ordinance stating that it must be
14 submitted to the electorate. That has been the import of the
15 argument, I thought.

16 A I think as a matter of fact, what we have here
17 are two bases. As you indicated, the ordinance did two things.
18 The amendment tried to do two things. It says that the Fair
19 Housing Ordinance which you have on the statute books is not
20 going to go into effect and it is suspended pending a vote of
21 the people.

22 It said secondly, that no Fair Housing can be passed
23 or Fair Housing Ordinance can be passed except by this process.
24 Now it seems to me ---

25 Q You are now arguing about the latter part of it?

1 A The latter aspect of it, I have been arguing
2 about both of them, because I think that is the question that
3 Mr. Justice Stewart asked.

4 Mr. Justice Stewart said to me, would I have to make
5 an argument about this if the statute had not been on the books
6 and couldn't I make the same argument here without any prior
7 history of fair housing, and I said, of course I could.

8 Q You couldn't have had quite the same lawsuit but
9 you would have exactly the same constitutional argument?

10 A I think so.

11 Q I agree that you would, and that is why I say
12 that is the burden of your argument, is the singling out of
13 this kind of an ordinance for special treatment, but you still
14 have to say that in the process of putting on this kind of
15 provision that the State may not repeal an existing ordinance.

16 Do we have to decide to hold for you that a State may
17 not repeal an existing ordinance?

18 A You don't have to decide that the State may not
19 repeal an existing ordinance.

20 Q I mean an existing Fair Housing Ordinance?

21 A I don't think that you have to.

22 Q Why not?

23 A Because I think that what you have to decide,
24 it seems to me ---

25 Q Because that is one thing the State did here?

1 A That is one thing the State did here, but the
2 State did more than that.

3 Q Why do we have to get to the more?

4 A Because of the fact that if the State would have
5 done more, it seems as far as my argument is concerned that it
6 is a simpler constitutional question to indicate that the State
7 cannot single out these people and bar any legislation.

8 Q Let me ask you this, Mr. Carter.

9 Suppose the Court decided that the first sentence of
10 this ordinance was unconstitutional and stopped. Or it said
11 the first sentence is unconstitutional, but it was perfectly
12 constitutional for the State to repeal this ordinance, so there
13 is no ordinance in effect in Akron.

14 But the provision singling out fair housing ordinances
15 as those which must go to a referendum or initiative is uncon-
16 stitutional. Would that satisfy you or not?

17 A Well, it would appear to me ---

18 Q In short, what is this case about?

19 A This case is about the fact that the ordinances
20 of this kind singled out a particular class of legislation and
21 said you may not do this without going to a referendum.

22 Q Let us assume the Court agreed with you on that.

23 A The State has done more, Mr. Justice White, and
24 it repealed the ordinance.

25 Q Do you want us to say that the repealer is also

1 unconstitutional?

2 A I want you to say that the repeal is unconsti-
3 tutional with the burden which has been put upon us at the
4 present time.

5 Q We can say the burdens are unconstitutional, but
6 why does that make your repealer unconstitutional?

7 A If you say the burdens are unconstitutional, it
8 seems to me that the issue as to whether a simple repeal is
9 unconstitutional is not my case.

10 Q You want us to reach the existing ordinance?

11 A That is right. As far as we are concerned, your
12 Honor, our view is that we are here feeling that this ordinance
13 ought to be struck down for the reasons that have been
14 indicated.

15 (Whereupon, at 11:50 a.m. the hearing in the above-
16 entitled matter was concluded.)
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