In the

Supreme Court of the United States

JULIA ROGERS,

Petitioner

v.

LEROY LOETHER and MARLANE LOETHER, his wife, and MRS. ANTHONY PEREZ,

Respondents.

No. 72-1035

Washington, D.C.
December 4, 1973

Pages 1 thru 42

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LEROY LOETHER and MARLANE LOETHER, his wife, and MRS. ANTHONY PEREZ,

Respondents.

Washington, D. C.

Tuesday, December 4, 1973

The above-entitled matter came on for argument at 2:31 p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

JACK GREENBERG, ESQ., 10 Columbus Circle, New York, New York 10019, for the Petitioner.

ROBERT D. SCOTT, ESQ., 780 North Weater Street, Milwaukee, Wisconsin 53202, for the Respondents.

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Next we will hear argument No. 72-1035, Rogers against Loether.

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

ORAL ARGUMENT OF JACK GREENBERG, ON BEHALF OF THE PETITIONER

MR. GREENBERG: Mr. Chief Justice, and may it please the Court, this case is here on petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

What is involved is the effectiveness of Title VIII of the Civil Rights Act of 1968 which assures fair housing to all Americans without regard to race, color, national origin, or religion.

The effectiveness of the Act is threatened in this case by a claim that the 7th Amendment to the United States Constitution prohibits Congress from providing that civil actions under the Act be tried by the court and not by a jury. We submit that the court trial and remedy provisions of Title VIII are constitutional as within the power of Congress granted by section 2 of the 13th amendment and section 5 of the 14th Amendment and that the 7th Amendment preserving jury trials in suits at common law is not applicable to litigation under Title VIII.

Briefly, the facts of the case are that petitioner,

who is black, while a patient in a hospital in November 1969 asked a white friend to find an apartment for her. The friend found an apartment owned by respondents and it appeared that a lease would be or perhaps even was consummated with respondents' agent, but when it was discovered that petitioner was black, they refused to go through with the deal.

The district court found, and it is supported in the record, that petitioner was denied the apartment because of her race. The court entered a temporary restraining order on November 17, 1969, ordering respondents not to rent the apartment to anyone else pending resolution of the dispute and entered a preliminary injunction on December 19th to the same general effect.

The court ordered both parties to try to settle the dispute, but this turned out to be impossible and efforts to conciliate went on over a period of six months, and more than six months after the action had commenced, petitioner could no longer wait for the case to be concluded and took another apartment. Her counsel withdrew the application for an order directing the apartment be rented to her but went on with other aspects of the case and asked for punitive damages and costs and counsel fees.

Following trial, the court made an award of $250 in punitive damages, but denied counsel fees and costs, weighing on the one hand the importance of petitioner's rights and on

the other hand the fact that the respondent had been denied rent for the apartment during the period the case was before the court.

The respondents urged in the district court that the case should have been heard by a jury, but the district court rejected this contention. Respondents renewed this claim in the Seventh Circuit, and the Court of Appeals agreed.

We submit that this decision of the Court of Appeals is wrong, that it would seriously impair the effectiveness of Title VIII, that it involves a misreading of the plain unequivocal language of Title VIII, and of the intention of Congress in enacting the Fair Housing Act under the 13th and 14th Amendments, and is wrong concerning the requirements of the 7th Amendment.

At this point in the litigation, there no longer seems to be any serious dispute between the parties concerning the language of Title VIII. Respondents in their brief offer at best a cursory argument that the statute is unclear and put to this Court as the only question presented whether the 7th Amendment requires jury trial in Title VIII cases.

In resolving the issues before the Court, we submit that we should first look at the statutory language. The provisions which we are construing, section 812(c) provides that the "court" shall grant relief. And it uses the word "court" in that subsection as well as elsewhere in the statute

in a variety of ways which can only mean judge and judge acting without a jury. For example, the statute speaks of the court granting permanent or temporary injunction or temporary restraining orders and of awarding costs.

QUESTION: How can that help you very much, Mr. Greenberg, when of course a jury doesn't engage in granting injunctions ever?

MR. GREENBERG: Well, it helps me a great deal because the word "court" we submit is used consistently throughout the statute, and if the word "court" is used in connection with injunction and counsel fees and continuances and conciliation, and in several other contexts, we submit that within a single sentence, the word "court" when it refers to damages means the same as the word "court" in all those other connections. The word had to have been used consistently.

Indeed, the word "court" not only in this statute, throughout the entire Federal Code and the Federal Rules of Civil Procedure, as we put forth in our brief, consistently and invariably means court and judge acting without a jury. When Congress intends to use the term "jury", it knows how to do so. We set forth in our brief the citation of a large number of statutes in which Congress said that certain issues are to be tried by a jury and not by the court. And, indeed, --

QUESTION: Do you need to rest on that so firmly, Mr. Greenberg? Isn't it more important, the question whether this

is or is not a common law action?

MR. GREENBERG: Well, that is the next question.

QUESTION: I didn't mean to disrupt the order of your argument, then. You just do it your own way.

MR. GREENBERG: The first point in our argument is that this is a mode of procedure which has been prescribed by Congress and that the prescription by Congress of this mode of procedure under the 13th or 14th Amendments is entitled to great weight, indeed is even controlling in this case. And I first want to make absolutely and unequivocally clear that this indeed is what Congress has done.

QUESTION: Well, that's the argument, I gather.

MR. GREENBERG: I didn't hear you.

QUESTION: That's the argument, I gather, that this statute should be read as if Congress had said, and these cases shall be tried by a judge without a jury.

MR. GREENBERG: Yes.

QUESTION: Even if this is a common law action, even if it is, that since that provision was enacted by the Congress under section 2 of the 13th Amendment, as you suggest, or 5 of the 14th Amendment, that necessarily that overrides any requirement of the 7th Amendment for a jury trial.

MR. GREENBERG: I am not quite certain I carry that argument that far, and I don't have to carry my argument that far, because our next point is that this is not a common law

action.

QUESTION: Suppose it is.

MR. GREENBERG: If it is a common law action, I think we would have a much more difficult case. We would have to then look at the --

QUESTION: You would not argue in that instance if it is a common law action that the authority of the Congress under section 2 of the 13th and section 5 of the 14th can override the 7th Amendment?

MR. GREENBERG: I am not certain that I would, Mr. Justice Brennan, but I certainly don't have to in this case. I would look at the equitable quality of the action, what the role of the jury would be, or how difficult it is for the jury to decide a case, and so forth. I might argue it, but I certainly don't have to and I am not going to.

QUESTION: Mr. Greenberg, supposing that Congress had enacted a statute, the Housing Act, pursuant to its authority under the commerce power rather than its authority under the 13th and 14th Amendments, would that at all weaken or strengthen your jury trial argument?

MR. GREENBERG: Well, in fact, I think probably the commerce power was invoked and the statute does in part rest upon it. In fact, I am certain the statute does in part rest upon the commerce power, that it rests upon specific constitutional directives to implement two particular amendments

regarding a very important factor in American life to which the Congress was directing itself. The commerce power is more diffuse. But I would say the commerce power would be adequate and it is involved here.

Just going beyond my effort to establish that they meant court and court acting without a jury, the Fair Housing Act originally was part of a 1966 civil rights bill and in that bill there was a Fair Housing Act and there was a Jury Selection Act, jury selection bill which later became the Jury Selection Act of 1968. In that single piece of legislation, Congress used the words "court" and "jury" in juxtaposition dealing with jury selection and then used the word "court" in dealing with fair housing. It would be quite strange whether in a single piece of legislation, two parts of which were enacted two weeks apart in 1968 that terms could have been used differently.

I will go beyond that point in the argument. I will submit that the Congress meant court and it meant court acting without a jury.

QUESTION: Let's assume, Mr. Greenberg, that it is a common law action. Let's assume that hypothetically for the moment. Could Congress deny jury trial?

MR. GREENBERG: I would say it would be very difficult. One would then have to look at some of the other attributes of the action and see whether or not, for example,

as was mentioned in the footnote of Ross v. Bernhard, this is an action in which juries might have particular difficulty in coming to a decision. Or whether as in the Katchen case for example, where there was some need for particular expedition in the action, and so forth.

But we don't have any of that here. In fact this case -- the only cases we are aware of, in fact, in which this Court has passed upon the power of Congress to require enforcement of statutes which it had enacted by courts sitting without juries are N.L.R.B. v. Jones & Laughlin Steel and Katchen v. Landy. In N.L.R.B. v. Jones & Laughlin Steel, this Court held that back pay and other monetary awards might be made by the N.L.R.B. and enforced by the court of appeals without intervention by a jury, because the right involved did not exist at common law. In Katchen the Court held that adjudication of the validity of a preference in summary proceedings under the Bankruptcy Act also might be made sitting by a court without a jury, and the decision in that case, as I understand it, rested upon the fact that Congress had determined the need for speed and efficiency in the essentially equitable nature of bankruptcy.

This case is like N.L.R.B.v. Jones & Laughlin and Katchen v. Landy in that we have a congressional determination that the case shall be heard by the court and not by a jury. It is further like the N.L.R.B. v. Jones & Laughlin case in

that it involves a new congressionally created right and it's like Katchen in that there is a special need for speed and effectiveness of relief which would be impaired by jury trial.

The 7th Amendment is applicable only to suits at common law. This is not a suit at common law. Neither in 1791 nor for a century and a half thereafter could a plaintiff such as petitioner have brought an action in England or in any State in the Union to compel a landlord not to discriminate against her on the basis of race. Indeed, throughout most of this period, the common law set the full force of its power against people like petitioner and behind landlords and sellers of real property who discriminated on the basis of race.

Now, against this congressional decision and the fact that the cause of action in this case was unknown at common law, respondents cite the three cases, and the Court of Appeals does, too, of Beacon Theatres, Dairy Queen, and Ross v. Bernhard. But these cases first did not involve congressional statute; they involved mixed legal and equitable claims concerning which some judicial rule was necessary as to whether the case should be heard by a judge or a jury without regard to the adventitiousness of who first commenced the action or what it was characterized as.

In Beacon if the defendant had filed before the plaintiff, a jury clearly would have been required. In Dairy Queen, if the form of action had been characterized as

one for damages rather than accounting, a jury trial would have not been disputed. In Ross v. Bernhard, if the corporation itself had brought the action instead of the action being brought in the form of stockholders derivative suit, there would have been no question that a jury would have been appropriate.

We submit that while there is 7th Amendment language in these decisions, all they really stand for is that the substance of the action not the form are determinative of whether the case should be heard by the court alone or with a jury.

The statutory right claimed by petitioner in this case is one which never could have been enforced in common law at any time in any place in any way. Moreoever --

QUESTION: Well, that's true of a great many statutory rights, I suppose.

MR. GREENBERG: Yes.

QUESTION: And still jury trials are required constitutionally.

MR. GREENBERG: Well, it may be that there is some analogy or it is a statutory counterpart of some sort of a common law right, but this is something which even today apart from the factor of race, there is no such right as this. If a would-be buyer goes to a seller and the seller says, "I just don't want to sell to you," there is nothing anyone can do about it unless he says, "I don't want to sell it to you because

of your race."

QUESTION: You don't think this is an action sounding in, say, tort and it's an action for damages. Aren't those two things enough to get a jury trial?

MR. GREENBERG: I think it's a whole new kind of right which indeed was enacted after a very considerable congressional struggle in which the debate was that this is overturning rights of sellers and owners as known by the common law.

In any event, Mr. Justice White, if one were to apply the 7th Amendment to this case, it would be because there is some anlogical extension of some sort of a common law right which it is held ought to be protected or enforced by means of the 7th Amendment. On the other hand, as compared to that analogical extension, we have the direct decision of Congress that the rights secured by the 13th and 14th Amendments are best enforced by trial conducted in this kind of way because they are more expeditious, it removes community prejudice from the proceedings and so forth.

QUESTION: I really don't understand why you are so hesitant about urging on us that to the extent this statute rests on the 13th and 14th Amendments, that the congressional power under sections 2 and 5 respectively can even go so far as to override the 7th --

MR. GREENBERG: I would say it certainly goes so

far as to override any common law right that is created by analogic extension, and that's all I have to say.

QUESTION: But then if you agreed with Mr. Justice Brennan, you would probably have to agree, then, that if Congress purported to be exercising its commerce power, no jury trials in any of those actions either.

MR. GREENBERG: Well, I think --

QUESTION: What about an action on a collective bargaining contract, is that a jury trial?

MR. GREENBERG: Well, if the N.L.R.B. is involved, it certainly --

QUESTION: No, no, this is --

MR. GREENBERG: It's a contract, it's a cause of action for breach of contract.

QUESTION: That the Labor Act is adopted strictly in pursuit of the commerce power.

MR. GREENBERG: Yes, but --

QUESTION: Let's assume Congress said, well, it's a statutory right in pursuit of the commerce power. Congress says no jury trials in suits on collective bargaining contracts.

MR. GREENBERG: Well, the commerce clause is a clause which gives the Congress power to enact legislation in a variety of directions. Under the commerce clause the Congress can enforce or refuse to enforce or deal in an infinite number of ways with a collective bargaining contract. The 13th and 14th

Amendments express very positive policies concerning racial equality which Congress is implementing. It's a rather different thing. One is enforcing the policies of the amendments, the other is merely acting under authority granted by the commerce clause. I think it is a rather different situation.

QUESTION: Both are grants of power to the Congress. Would you say that Congress in enforcing authority under the 14th and 15th Amendments could say that the privilege against self-incrimination shall have no application in this case?

MR. GREENBERG: No.

QUESTION: Well, then, why is the privilege against self-incrimination more important than the 7th Amendment trial by jury?

MR. GREENBERG: Because, first of all -- I want to make clear that we are in no way challenging --

QUESTION: You mean, that's an argument you didn't make.

(Laughter.)

(Simultaneous talking.)

MR. GREENBERG: I would like to make clear that we are in no way in this case questioning the right of trial by jury, criminal cases, we are in no way in this case questioning the right of trial by jury, in what one might call fundamental common law cases or their modern counterparts or reasonable analogies thereto, with regard to the last series of questions,

I would say that to the extent that one would seek to find some analogy in the common law to what is done in the Fair Housing Act and thereby advance the constitutional policies of the 7th Amendment, one must put that as against the very positive policies of the 13th and 14th Amendments which are quite different.

QUESTION: Deposited in the commerce clause.

MR. GREENBERG: They are entirely different in the commerce clause. The commerce clause is a power to enact legislation in a total -- under the commerce clause presumably but for the 13th and 14th Amendments, one might be able to enact a statute saying that whites don't have to sell to blacks.

QUESTION: That's broader admittedly, but you give an impression that there is some sort of gap or thrust to the 13th and 14th Amendment authorities that there isn't to the commerce authority.

MR. GREENBERG: I think without a doubt there is.

QUESTION: I suppose it's also true, Mr. Greenberg, isn't it, that the 13th and 14th Amendments came after the adoption of the 7th and the commerce clause preceded the adoption of the 7th.

MR. GREENBERG: I think if I started down that line, I might prove a little too much.

In summary, all we say is that where Congress is enforcing the cherished values of the 13th and 14th Amendments

by proceedings unknown to the common law and decides that the cause shall be determined by the court and not by a jury, the 7th Amendment does not require trial by jury.

I would like to reserve the remainder of my time.

MR. CHIEF JUSTICE BURGER: Mr. Scott.

ORAL ARGUMENT OF ROBERT D. SCOTT ON BEHALF OF THE RESPONDENTS

MR. SCOTT: Mr. Chief Justice, and may it please the Court, it is my honor to represent in this action the respondents who seek to have the unanimous decision of the Seventh Circuit affirmed. In this case we turn to the Eastern District of Wisconsin for trial by jury.

When I argued this appeal before the Seventh Circuit in Chicago in February 1972, most of the questions that came to me from the bench, at least at the start of the oral argument, related to what the actual posture of this case was before the trial court. I think my brethren in giving you the general outline of what the facts in this case are overlooked a very important factual aspect of the case, which was at issue in those oral arguments and which the Seventh Circuit drew a concession from the appellee at that level.

First of all, this was a case, Justice White, for damages on the basis of a civil law. It was a tort action. There are analogs in the common law which the Seventh Circuit discovered. The important thing which the Seventh Circuit

sought to find out about this case when it was tried is what issues were before the trial court when the availability or nonavailability of a jury became critical. And those issues before the trial court on the day of trial, October 26, 1970, were simply the issues of discrimination and the issue of money damages, compensatory damages and punitive damages. And this is most clearly brought out, I think, on page 47a of the appendix where the trial court when it was summing up after all the trial summed up the evidence and said, "Therefore, the only issue remaining for this hearing today ... -- the final hearing on the question of discrimination snd the claim for compensatory and punitive damages." The issues of discrimination and the issue of damages is what was before the court. And I listened very carefully when my brother opened to see if there would be any discussion of the fact that this was after all just an action for damages, albeit a statutory cause of action. I think there is ample authority in the brief which I have cited to the effect that there is no cleavage with respect to the application of the 7th Amendment between cases which are brought on statutory actions and cases which are common law in their origin.

There are two main areas of legal dispute in this case. One is the statutory argument which my brother first got into and which depends on how you read the statute.

QUESTION: Going to the 7th Amendment itself

what do you think the 7th Amendment means when it says in all common law actions, if that's the language, I think it is, in all common law actions?

MR. SCOTT: It means that in all actions in which under three tests which this Court approved of in a recent case, Ross v. Bernhard, Footnote 10 to that case, there are three ways you decide what the 7th Amendment means in any given set of circumstances under which a case is brought.

First of all, you look at the pre-merger custom with respect to the issue.

Second of all, you look at the remedy requested.

And thirdly, you determine what the practical abilities and limitations of jurors are with respect to the issues that are going to be tried.

Now, Ross v. Bernhard was decided while our case was pending before the District Court before it ever got up to the Seventh Circuit. And I cited Ross v. Bernhard in our oral arguments on the jury issue before the District Court.

When the Seventh Circuit decided this case, it tracked, if you will, the three standards in Ross v. Bernhard, and I would like to track them again with you so that we can see how the 7th Amendment does apply to this particular cause of action bearing in mind how that action was postured when it reached the time in the course of its litigation when the availability of a jury became important.

I mention that just parenthetically because this case started out,of course, with claims for injunctive relief, and it is part of the argument by the petitioner in this case that the granting of 7th Amendment rights to this case, this type of case, would emasculate the statute because then you couldn't have the speedy relief that's necessary to handle discrimination in housing.

This case is an excellent example of how speedy relief is available consistent with the 7th Amendment, and the reason is all of the speedy type of relief, the injunctive relief, had been granted in this case well before the availability of the jury became important. It was decided,as Chief Justice Burger suggested, by the court. Injunctions were granted.

But to move to the tests in Ross v. Bernhard and how they apply to our circumstances. The first two tests are the pre-merger custom and the nature of the relief granted. To my way of thinking these two tests really embody the traditional historical analytic approach that this court has adopted in all of its cases determining the applicability of the 7th Amendment.

There are two ways of applying the first test, namely, the pre-merger custom. One is the literal approach which my brethren suggests. In other words, you look at the common law as it exists in 1791 in England and if this type of cause of

action didn't exist by that name at that time, then you have no 7th Amendment right.

There is another approach, and that is the approach suggested by Justice Story in Parsons v. Bedford. In that case, which was cited with approval in Ross v. Bernhard, Justice Story said that the 7th Amendment, the preservative power of the 7th Amendment reaches all lawsuits except those which are of equity or admiralty jurisdiction. In other words, you look at the dichotomy which existed in England between law and equity and you decide not necessarily whether this particular statutory cause of action existed by this name at that time, but really what jurisdiction will the cause of action ... this.

QUESTION: Is that the case where McLean dissented?

MR. GREENBERG: That's right. Justice Story, as I recall, wrote the opinion. But I think you're right about the dissent.

In other words, if you apply Story's analysis, you go beyond the literal approach and determine what the nature of this cause of action is, and again when it was tried it was an action for damages, compensatory and punitive, on the basis of a civil law. Our argument and the argument adopted by the Seventh Circuit was that that particular type of cause of action would certainly have belonged in the law side, and in 1971.

To go on to the next test, which is probably the easiest of the three, the relief requested in this particular case. The only relief which was tried was damages, compensatory and punitive.

QUESTION: Did the original complaint seek injunctive relief initially?

MR. SCOTT: That's right. I'll clarify that because I wanted to do it at the very start and that was one of the questions that the Seventh Circuit asked.

When this complaint was filed, it did not have a request for compensatory damages in it. At the first pretrial conference, they interjected that they would like to include a claim for actual damages. By that time, if my recollection serves me, District Judge Reynolds had already granted his injunctive relief. So at the first pretrial conference this came up, and when I was explaining it to the Seventh Circuit, District Judge Campbell said, well, it can be brought up under rule 16 in that fashion, and I said, well, that's exactly how it did occur. And in the next pretrial order that issued out from that conference, the district judge directed that the trial would be on the issue of actual damages and discrimination and this was formalized --

QUESTION: Was there a formal amendment to the complaint?

MR. SCOTT: There was never a formal amendment to the

complaint.

QUESTION: Just Rule 16.

MR. CHIEF JUSTICE BURGER: We will resume there at 10 o'clock tomorrow morning.

MR. SCOTT: Thank you.

(Whereupon, at 3 p.m., the oral argument in the above-entitled matter was recessed until the following day, Wednesday, December 5, 1973, at 10 a.m.)

IN THE SUPREME COURT OF THE UNITED STATES

JULIA ROGERS, Petitioner,	:	
v.	:	No. 72-1035
LEROY LOETHER and MARLANE LOETHER, his wife, and MRS. ANTHONY PEREZ, Respondents.	:	

Washington, D.C.

Wednesday, December 5, 1973

The above-entitled matter came on for further argument at 10:07 a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

JACK GREENBERG, ESQ., 10 Columbus Circle, New York, New York 10019, for the Petitioner.

ROBERT D. SCOTT, ESQ., 780 North Weater Street, Milwaukee, Wisconsin 53202, for the Respondents.

WEDNESDAY, DECEMBER 5, 1973

(10:07 a.m.)

MR. CHIEF JUSTICE BURGER: We will resume arguments in Rogers against Loether.

Mr. Scott, you have 21 minutes left.

MR. SCOTT: Mr. Chief Justice, and may it please the Court, yesterday afternoon in the course of his discussion of this case, my distinguished opposing counsel in response to a question by the Chief Justice conceded that if this case is in fact in the nature of a common law action, then it cannot escape the reach of the preservative power of the 7th Amendment.

When court adjourned yesterday afternoon, in response to another question by the Chief Justice, I was responding to how the 7th Amendment test may be applied to the particular circumstances of this case, and I would like to pursue that further this morning.

When we adjourned yesterday I had concluded my discussion with regard to the first test announced by this Court in Ross v. Bernhard, namely, how the circumstances of this case compare, contrast with the pre-merger custom of the Federal courts with respect to like issues. I suggested to the Court the test proposed by Justice Story in Parsons v. Bedford to the effect that the 7th Amendment reaches all cases which are not of equity or admiralty jurisdiction. And I also suggested that the literal approach be rejected.

I would pass on now to the other two tests which were announced in Ross v. Bernhard, namely, what type of relief is requested, and thirdly, the third test being the practical abilities and limitations of juries.

The second test, I think, is particularly applicable to this case, and this goes back to a question that Justice Brennan asked me yesterday afternoon with respect to what type of relief was asked for. I recall the Justice asking whether or not actual damages had been asked for in the complaint, and the record shows, I believe, that they were not. However, they did enter the case by way of a pretrial order after the first pretrial conference, and in all subsequent pretrial orders issued by the District Court, this case was announced to be one on damages. And when it came time for this case to be decided after the trial had been concluded -- and I am referring specifically to page 51a of the appendix, at the top of that page the District Court said, "Now, we come to the questions of damages." Further down in that page, the District Court said, "I do not believe there have been any compensatory damages proven in this case or out-of-pocket expenses of that nature." So he rejected the claim for compensatory damages. There had been a trial on compensatory damages. All the evidence elicited by the plaintiff on direct testimony had related to actual damages. The plaintiff offered no testimony with respect to the other issue that was being

tried, namely, the issue of discrimination, because the court had incorporated the testimony that had been elicited at the time of the preliminary injunction on that issue. Practically the entire testimony on that two days of trial related to the question of the extent to which, if at all, the plaintiff had sustained any actual damages. And in the final analysis, very specifically the trial court rejected that claim and went on to award punitive damages in the amount of $250.

And this topic was the source of some discussion when this case was argued before the Seventh Circuit, and at that time, opposing counsel for plaintiff conceded to the Seventh Circuit that actual damages were in the case.

Now, why is this important? With respect to the second issue in Ross v. Bernhard you look to see what type of relief is requested, particularly at the time when the availability of a jury becomes important to determine the reach of the 7th Amendment, at least in part. And there are two reasons, at least, why the type of relief requested is important to the jury issue, because it goes to the abilities of juries.

I would point this out that we had two claims for money damages -- actual damages and punitive damages. Both of those are issues that juries are particularly responsive to, particularly in determining the extent of damages. This is one area where appellate courts, I find, are loath

to overturn the finding of juries because that is one of their particular strengths. And I think there is probably no damage issue at law that calls upon the common sense judgment of jurors more than the question of whether and to what extent punitive damages should be awarded. Both of these damage issues were before us at the time the jury trial issue became critical.

QUESTION: Would you say in this respect there are some analogies between this kind of an action and a libel or slander suit?

MR. SCOTT: Exactly. And, Mr. Chief Justice, I referred specifically to those types of action in my brief and to the fact that previously this Court has held, and I think specifically in Ross v. Bernhard those types of issues were mentioned as ones to which the 7th Amendment reaches and in which the jury right is preserved.

We pass on, if I may, to the third test in Ross v. Bernhard, and this is the test which was described as being the practical abilities and limitations of juries. I feel in some regard this is the real battleground in this case. That test, as I read Ross was not applied in Ross. In my brief I suggested that the test includes at least two considerations. One is the consideration of whether or not juries, given the particular issues that are going to be tried, can deal competently and justly with those particular issues. It brings in the question of whether or not the issues are very

complicated or for other policy reasons might best be withdrawn from juries. I would suggest there is another consideration included in that third criteria set down in Ross, namely, whether or not this particular cause of action with a jury trial right attached to it will frustrate any particular statutory purpose or frustrate any particular statutory scheme. I am thinking particularly in this regard of Katchen, and I will get to that point after discussing the first consideration, if I may.

I want to suggest that in terms of the competence of juries, this case is an excellent example of just the type of issue that should go to jury consideration, because what is going to be tried here are questions of credibility and motivation. This trial on the discrimination issue particularly involved whether or not at the time Leroy Loether determined not to rent one of the two flats in the two-flat home that he happened to own to the plaintiff, whether or not at that time his motivation was based on race or based solely on other considerations. Leroy Loether testified at this trial, his wife testified -- the two of them own the house together -- and what was called upon for a determination of the discrimination issue was a testing of their credibility. And this is an area where there is particular strength of jurors. The question was whether or not he had a racial motivation. He said he didn't. He said it was because of something else. He

said if the same circumstances had been presented and District Judge Reynolds had been the applicant for the apartment, he would have refused him in those circumstances. This was his testimony on cross-examination at the time of trial.

QUESTION: Mr. Scott, on the issue of discrimination, of course, if the plaintiffs had sought only an injunction, that same issue would have been tried, and you concede then it would have been tried by the court, don't you?

MR. SCOTT: Right. That's right, Mr. Justice Rehnquist.

In further response to that, I believe we have made that concession down the line in the previous hearings on this issue. Injunctive relief was asked for at the outset, and just to put this a little bit in perspective, a temporary restraining order was asked for; it was granted before the first hearing. A preliminary injunction was requested to follow up the TRO. We had a hearing on the preliminary injunction and that injunction was granted by order of the District Court on December 19, 1969, very briefly after the action had been started in November. The following month, in January of 1970, we were advised at a pretrial conference that the plaintiff no longer wished to occupy the apartment, and at that time a proposal was made with the court's concurrence that the matter be resolved by renting to any black family or any black individual. And at the time we returned to argue

the jury trial issue to the District Court in April 1970, the plaintiff's counsel reported back that that particular offer had been rejected by the plaintiff, and at that time the injunctive relief was abandoned. So when this case went to trial, there was nothing in the way of injunctive relief that was requested. All that was asked for by way of relief was in terms of money damages, both punitive and compensatory.

QUESTION: What happened to the preliminary injunction?

MR. SCOTT: The preliminary injunction was dissolved with the consent of the plaintiff, your Honor. It was dissolved in April 1970 after the plaintiff rejected our proposal for resolving the --

QUESTION: Is that in the record? I missed it. Is that in the appendix? I can find it if it is, but I guess I missed it.

MR. SCOTT: I am fully sure it's in the appendix. I know that it's in the record, because I argued the matter on the jury trial issue to the District Court on that April day in 1970 when it was decided -- I believe I have a record cite or appendix cite in my brief.

QUESTION: If it's in the record I can find it.

MR. SCOTT: All right. I don't have to go beyond the record, your Honor.

QUESTION: Mr. Scott, you have emphasized the credibility issue as one in a peculiar way for 12 jurors rather

than a single judge, but all those credibility issues were presented in connection with the equitable relief for an injunction, were they not? And the judge tried those issues.

MR. SCOTT: We had a fairly elaborate hearing on that, your Honor, and certainly the court was called upon to make a determination. But it was not a binding determination on the merits. And this is why I would argue that the availability of a jury in this case does not frustrate the need for speed of relief.

QUESTION: When a permanent injunction is entered, that's done by a judge acting alone, is it not?

MR. SCOTT: That's correct.

QUESTION: Well, if a permanent injunction had issued in this case, would you still take the same position on the damage point?

MR. SCOTT: Yes, your Honor. If a permanent injunction had been requested in this case, together with the other elements of relief,then I would be still before you this morning arguing that the 7th Amendment reaches that.

QUESTION: So you have to have two full trials.

MR. SCOTT: No, you wouldn't have to have two full trials. You would have to have a trial on the issue of discrimination, on the issue of damages, and on the issues of fact would be directed to the jury.

QUESTION: And they would be different?

MR. SCOTT: They would be different in what regard?

QUESTION: That's what I am asking, would they be different?

MR. SCOTT: Would what be different? I am afraid I don't follow you.

QUESTION: Would the evidence, the testimony, the record be different in the injunction case where a permanent injunction was issued and the trial on the damage point?

MR. SCOTT: No.

QUESTION: Would the issue be exactly the same?

MR. SCOTT: It would be exactly the same.

QUESTION: Well, why have two trials?

MR. SCOTT: We are not proposing two trials.

QUESTION: I thought you said if you got a permanent injunction, you still would have to have a trial on damages.

MR. SCOTT: If we had a request for permanent injunction, all factual issues -- I believe this is the teaching of the cases under the 7th Amendment -- all factual issues would be addressed to the jury. They would have to determine in the first instance, your Honor, whether or not there is any discrimination.

QUESTION: Wait a minute now. You ask for an injunction, a permanent injunction, and $1,000 punitive damages and actual damages. There is a full trial, a full hearing before the judge sitting as a chancellor and he

grants a permanent injunction. Is it your position that after that he holds a new trial with the jury to determine the damages?

MR. SCOTT: No, it is not.

QUESTION: But it is your position that under cases like Beacon Theatres and Dairy Queen, what my brother Marshall has postulated could not properly occur. Since he has joined a legal and an equitable action, there has to be a jury trial of the factual issues that are common to the two. Right?

MR. SCOTT: That's my position.

QUESTION: That's what Dairy Queen and Beacon Theatres certainly seem to say. I decided in both those cases so I am very aware of what they said.

QUESTION: You say section 812 says that?

MR. SCOTT: No, I say that this Court has said it and has said it repeatedly.

QUESTION: Then section 812 is unconstitutional?

MR. SCOTT: No, I don't believe section 812 is unconstitutional, and the Seventh Circuit --

QUESTION: Well, it says there that the court may award the plaintiff the actual damages in addition to the temporary injunction.

MR. SCOTT: And I would argue that that use of the term "the court" is an institutional reference.

QUESTION: And in order for it to be constitutional

it would have to include the jury. If it didn't include the jury, it would be unconstitutional, isn't that your position?

MR. SCOTT: If 812 can be properly read to exclude the right to a jury on the factual issues pertaining to a case that involves common law issues, then 812 is unconstitutional. That issue was avoided by the Seventh Circuit by another reading of that section and to a certain extent their position was supported by the only legislative history that has been brought into this record, and that is the testimony of the Attorney General Katzenbach at the time this statute was in issue before the Congress. And I refer specifically to the research brief at pages 15 and 16 where Senator Ervin asked whether or not there would be any objection to having the statute amended to spell out that a man has a right to have the issues of fact tried to a jury when there is a damage issue, and the Attorney General said, no, in a damage suit I have no objection to that. That's the only legislative history we have got in the record on this case, and I think it supports an appropriate reading of 812, and that is that it's silent on the jury trial issue and you can avoid ruling that that statute is unconstitutional.

As I said, I believe that this case is particularly appropriate for jury determination because of the issue of credibility. I would also urge that this statute with a jury trial right attached to it under the 7th Amendment does not

frustrate any statutory scheme in any of the regards suggested. In the cases of Katchen v. Landy or N.L.R.B. v. Jones & Laughlin. And I distinguish in my brief the Katchen case on the basis of the facts in that case, namely, what the court was dealing with there was a very specific summary type of proceeding. And in Katchen Justice White distinguished between the summary proceeding of bankruptcy and the plenary proceeding.

QUESTION: That's what the Court did.

MR. SCOTT: That's correct, your Honor. The distinction was made in that case by the Court. And I believe the distinction is important to our case, because what we have here is a civil action established by Congress as such with all of the accoutrements of an ordinary lawsuit accompanying it at the time of trial-- pretrial conferences, pretrial orders, a regular trial, not a summary proceeding, an informal proceeding such as that provided for in the bankruptcy statute for a summary proceeding.

The petitioner in this case has said that Katchen is dispositive of our case. As a matter of fact, Katchen and N.L.R.B. v. Jones & Laughlin are quite distinguishable; they involved what was referred to in N.L.R.B. v. Jones & Laughlin as a statutory proceeding. We have a civil action very much like ordinary lawsuits.

It's interesting to note that the statute that we are talking about here provides for an alternate proceeding that is

really quite a bit more like the summary proceeding than our ... we have here, and that's the proceeding by which an aggrieved party can apply to the Secretary of Housing and Urban Development for conciliation, and it provides the Secretary with a vast panoply of discovery procedures, subpoena power, to get at the heart of whatever the dispute is. That path was not chosen in this case. Instead, the petitioner started a civil action. And for whatever reason, upon their choice of trying their case in district court as a civil action with questions of damages attached, we would strongly urge this Court to affirm the unanimous opinion below and to return this case for trial by jury in accordance with that decision below.

If there are no further questions.

MR. CHIEF JUSTICE BURGER: Mr. Greenberg, you have about 10 minutes left.

REBUTTAL ORAL ARGUMENT OF JACK GREENBERG

ON BEHALF OF THE PETITIONER

MR. GREENBERG: May it please the Court, we submit that in Title VIII Congress created a single, integrated, equitable remedy out of which a court might fashion relief appropriate to particular cases. That remedy consists of various parts. The statute says the court may issue temporary restraining orders, preliminary injunctions, may appoint counsel, may foster conciliation, may award compensatory damages, may award punitive damages, may award costs and may

award counsel fees, or all or none of those.

Now, the fact that money damages is part of it, the entire remedy does not necessarily make it legal as Jones & Laughlin demonstrates. The judge is supposed to pick and choose among these various aspects of the remedy and harmonize them in a manner appropriate to the case. And it's instructed to look at just what the judge did in this particular case. He granted a temporary restraining order, he granted a preliminary injunction, he urged settlement discussions which went on for many months, so long, in fact, that Mrs. Rogers had to take a new apartment. He denied compensatory damages. He granted punitive damages. And in doing that, he took into account the fact that the respondent had been denied rent for the apartment for a period of six months. He denied attorney fees, and he denied costs. He engaged in the typical kind of balancing that a chancellor engages in and indeed he referred to the fact that he had had a very difficult case before him and it would take, as he said, the wisdom of a Solomon to decide it.

Indeed, in the second hearing that he had, he incorporated all the evidence that was taken at the first hearing o temporary restraining order granting a preliminary injunction, and that is something that could not have been done with a jury, and if one imagines interposing a jury into this complicated, delicate process which has been confided to

the judge and which he actually exercised, it's easy to imagine how terribly confused the whole thing could be.

QUESTION: You say it's more complicated, more delicate than the function the jury undertakes in a libel or slander case where it must evaluate malice or recklessness or motives, and all that sort of thing?

MR. GREENBERG: Well, it involves conciliation and to some extent presiding over the conciliation. It involves --

QUESTION: That's a separate route, isn't it?

MR. GREENBERG: Well, the judge did this -- it is a separate route. It also may occur in the course of the action. And it did. The judge said, "Can't you two get together," and he --

QUESTION: That's like a pretrial settlement conference.

MR. GREENBERG: Well, but this was pretrial and post trial, and he urged them to try to settle it. I'm not trying to evaluate rigors of difficulty, but I am trying to describe the quality of what goes on here and how it is peculiarly appropriate to a judge. For example, the attorneys fees and costs and various other things that are involved, and appointment of counsel, that are just entirely inappropriate for a jury. And he balanced all these things.

QUESTION: We have appointment of counsel in a criminal case where there is a jury. That doesn't give any difficulty.

MR. GREENBERG: No. But --

QUESTION: Some things the judge does alone.

MR. GREENBERG: Some things he does alone, that's true. But Congress here fashioned what I would term a single, integrated, equitable remedy that had all these various components to it.

QUESTION: Mr. Greenberg, are there any counterparts for a single, integrated, equitable remedy, as you style it that includes authorization to the chancellor to award actual damages and punitive damages? Is there any other statute like that?

MR. GREENBERG: I'm not -- in Title VII, sir, employment cases, there is no explicit mention of punitive damages in the statute, I believe, but at least one court has awarded them out of general --

QUESTION: Ordinarily, does the chancellor award punitive damages?

MR. GREENBERG: We have a considerable discussion of punitive damage aspects in our brief, and --

QUESTION: I know, but my question is are you familiar with any other equitable action, which is what you style it --

MR. GREENBERG: In punitive damages?

QUESTION: Yes.

MR. GREENBERG: Certainly in contempt matters which

are always before a chancellor punitive damages may be imposed, both in civil and criminal contempt by chancellor.

QUESTION: Are they labeled punitive damages?

MR. GREENBERG: I'm not certain --

QUESTION: They are more nearly a fine, aren't they?

MR. GREENBERG: -- what label is put upon them. It amounts to the same thing.

What the judge did in this case and what the statute says is of the essence, we submit, of how equity acts. Congress could have decided these cases should be treated in equity because of the need for speed and expedition, because of the possibility of jury bias. It could have done it because this particular cause of action was unknown to the common law and what was done involving the conveyance of real property, or the signing of a lease, resembled equity more than it resembled law and did bear some sort of analogy to equitable servitudes on real property. Congress could have seen that the equitable and legal aspects were so inextricably entangled that it had to be one or the other, and therefore exercised a choice to deem it equitable, not legal.

And against all of these considerations, the 7th Amendment, we submit, can be applied only by saying this is a cause of action at common law, and that can't be said except by some sort of an analogy. And we submit that this analogy should not be indulged in view of the congressional determinatio

under the 13th and 14th Amendments and the policies of those amendments which Title VIII seeks to advance.

QUESTION: Mr. Greenberg, when state courts, as a good many of them have done, have stricken down sovereign immunity and allowed civil action for damages against a municipal corporation or a State, would you say that that was a common law action that was then arising?

MR. GREENBERG: Well, I'm not certain, Mr. Chief Justice, but I do know that in actions against the United States under the Tucker Act are not heard by a jury simply because --

QUESTION: Those are created by -- they are comparable to the Federal Tort Claims Act.

MR. GREENBERG: Yes.

QUESTION: But when the States have set aside sovereign immunity --

MR. GREENBERG: I am not aware of how those State court actions --

QUESTION: Similar actions arose, did they not? The Bivens case, there was some reference to that yesterday, and I didn't get a chance to take a fresh look at it this morning. The Bivens case, when the court in exercise of a common law function created a new cause of action, was that -- that's decided by a jury, is it not?

MR. GREENBERG: Well, it may be. But there was no

congressional -- if Congress had passed a statute which said that the cause of action of this shall be tried in a certain way and it had equitable components and bore no relationship to what existed at the common law, I would say we would have something closer to this case.

QUESTION: I am addressing myself only to the constitutional aspect now, not the construction of the statute. That's a separate question. But I think it's probably quite clear that the Bivens case in creating that new cause of action must have created an action which is triable by jury, although I think the opinion was silent on the subject.

MR. GREENBERG: Well, I really don't know whether it's quite clear, and we certainly don't have the component here of a quite complicated multifaceted congressional remedy, large parts of which are unquestionably equitable and a congressional determination that the entire thing should be treated in equity for the reasons that I stated, because it's largely equitable, resembles equity, it's not common law but it could be deemed such only by analogy.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Greenberg.

Thank you, Mr. Scott.

The case is submitted.

(Whereupon, at 10:37 a.m., the oral argument in the above-entitled matter was concluded.)