

IN THE SUPREME COURT OF THE UNITED STATES

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:  
TOWN OF LOCKPORT, NEW YORK, ET AL., :  
Appellants, :  
:  
v. : No. 75-1157  
:  
CITIZENS FOR COMMUNITY ACTION AT THE :  
LOCAL LEVEL, INC., ET AL., :  
Appellees, :  
and :  
JOHN J. GHEZZI, Secretary of State of :  
the State of New York, et al., :  
Appellees. :  
:  
-----X

Washington, D. C.,

Tuesday, December 2, 1976

The above-entitled matter came on for argument at  
10:00 o'clock, a.m.,

BEFORE:

WARREN E. BURGER, Chief Justice of the United States  
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  
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

VICTOR T. FUZAK, ESQ., 1800 One M & T Plaza,  
Buffalo, New York, on behalf of the Appellants.

JOHN J. PHELAN, 2300 Erie County Savings Bank  
Building, Two Main Place, Buffalo, New York,  
on behalf of the Appellees

MILES A. LANCE, Assistance County Attorney,  
Niagra County, New York; on behalf of the Appellees.

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll resume arguments  
r. Phelan in Town of Lockport. I don't recall exactly -- Mr. Fuzak  
[sic] had you finished?

MR. FUZAK: Apparently I had, sir.

MR. CHIEF JUSTICE BURGER: You have.

Mr. Phelan, you're on. You have 30 minutes.

MORAL ARGUMENT OF JOHN J. PHELAN, ESO.,

ON BEHALF OF THE APPELLEES

MR. PHELAN: Mr. Chief Justice, and may it please  
the Court:

This is voting case. It pertains to the right of  
the voter to cast his ballot and have it counted.

Now, let me say -- first of all make it clear that  
the plaintiff-appellee in this case is a citizen and voter  
who case a vote in favor of the Niagara Charter who brings  
this action on behalf of all voters similarly situated.

In addition to Mr. Shedd, the citizen and voter,

we have joined the community organization which played a leadership role in bringing about this charter. But our primary reliance so far as standing is concerned is upon Mr. Shedd's status as a citizen and voter.

Let me, first of all, refer to the theory of the plaintiff-appellee's action. Number one, in 1963 the State of New York, in order to grant substantially increased local power to its principal unit of local government, the county, passed a constitutional amendment in which it extended this grant of power.

(510) IN so doing, the State of New York provided that there should be a voting process that should take place in connection with that grant of power, and provided that in the geographic unit involved, the county, the principal unit of local government, having general governmental powers, that there would be this voting process.

There is in this case the elements of the plaintiff-appellee's cause of action is that no citizen of the general unit of local government is burdened or benefitted, that there is no citizen, no group of citizens, who are primarily interested as compared to any other group of citizens.

Once the State of New York did that, once the sovereign State of New York did that, and granted that voting process, we respectfully submit that of course, under all the cases in this Court, it became bound to applaud and comport with the

rights of the voters as provided by this Court.

Now, what the State of New York did in such instance, however, it divided the voters of the county into --

QUESTION: Don't get too far away from the microphone, or you may be not on the record.

MR. PHELAN: I'm sorry.

It divided the voters of the county into two separate units consisting of the voters of the cities, to be counted as one unit, and the voters of the town in the area of the -- West of the county in question.

So that -- what our cause of action is, in so doing, what the State of New York did was that it created two separate voting units, that it, number one, those voting units were based upon a geographical basis, based upon the place of residence of the persons, of the voters involved; number two, they were voting units of unequal population; in the case of the county of Niagra, the cities involved -- and this is the only -- the unique case in the State of New York -- the cities had a majority. There are 147,000 residents in cities, and some 80,000 in the area outside the cities and in the rest of the county.

QUESTION: How many cities are there in the county?

MR. PHELAN: There are three, Mr. Justice Stewart.

QUESTION: And how many towns?

MR. PHELAN: There are 11.

QUESTION: And then villages are in towns?

MR. PHELAN: That's correct.

QUESTION: Towns are what we call otherwise townships, is that it?

MR. PHELAN: That's correct.

QUESTION: And there are one or more villages in each town, I suppose --

MR. PHELAN: That's correct.

QUESTION: -- some of the towns.

MR. PHELAN: Right. The basic unit of local government in New York State, and the oldest unit of local government in New York State, is the county.

QUESTION: Is the county.

MR. PHELAN: And the counties have general governmental power. The counties were created in 1683. A hundred years later the towns came into existence. And what New York did, it gridded its counties. It provided, I think, it's 160 square rods, as I recall, and there are so many counties now.

What happened is, over the former government that existed prior to this constitutional amendment in 1963 was that the counties were governed by committees, that the numbers of the -- in each town, had a supervisor, and the supervisor of those towns served on the board of supervisors.



MR. PHILAN: Well, first of all, if the -- you would not then have a self-contained geographic unit, if the state did that.

Now, first of all, let me address myself to the annexation question. So far as annexation is concerned, the State of New York provides that the territory to be annexed shall be treated as a single geographic unit, and have the right, in a single unit vote, to vote whether or not it wishes to annexed.

So far as the merger of two cities, certainly. In the -- so long as -- for example, take the Hunter against Pittsburgh case. What occurred there was the state legislature decided to permit the City of Pittsburgh to merge with the City of Alleghany. The City of Alleghany complained. It was far more developed. It had far more asset properties. And they took that case to this Court, and this court said that they had no complaint, and that the states are sovereign as far as this is concerned. Unless -- unless: I think that's even in the Hunter case -- unless they intrude upon or impair the fundamental rights of citizens.

Now, in the Hunter case, the Court found that this was solely a debt question, a financial question, so there was no such intrusion.

QUESTION: Well, they talked about, in terms of arranging the structure of a political subdivision.

MR. PHELAN: There is no question, Mr. Justice Rehnquist, that the states are sovereign to manage and arrange their political subdivisions as they please. There is great flexibility, so long as they do not intrude upon the fundamental constitutional rights of the citizens.

And once the State -- as I understand the law of this Court -- once a state decides to create a voting process, for example, then they must do it in a way that complies with the fundamental constitutional rights of a citizen. And once a geographic unit is established, and a voting process is provided, once the state feels it's so important to provide a voting process, then they must do it in a way which does not violate the right of each citizen to have his vote counted equally.

QUESTION: Well, let's see -- I doubt -- this is  
#655 rather like the -- this procedure is not unlike the procedure in Hill and Stone.

MR. PHELAN: I believe it is, that's right.

QUESTION: Pretty much the same thing?

MR. PHELAN: That's right.

QUESTION: Then does this case come down to whether the state has established a compelling state interest, as Hill and Stone said it must, to justify that procedure?

MR. PHELAN: The state made no -- it does, in my judgement.

QUESTION: Is that what the case comes down to?

MR. PHELAN: That's what the case comes down to, in my judgement.

And the state made no effort to establish that it had a compelling state interest here. It formed, as I see the division here, the creation of identifiable groups within the county, based upon place of residence. Mr. Fuzak now complains in this Court that the state might have done that.

The fact is, in the District Court, the state defended on the ground of sovereignty, on the ground of form and structure. Mr. Fuzak has been in here as an intervenor appellant for almost two years now, and I see no fact -- as a matter of fact, I suggest Mr. Justice Brennan, that it's inevitable that if the State attempts to demonstrate any facts whereby town citizens, town residents, are different kinds of citizens that city residents, they inevitably fall --

QUESTION: Well, are there town interests, special town interests that might be affected by -- say in the way of transfer of powers to the county government if the county government

MR. PHELAN: There are not, Mr. Justice Brennan. Both charters expressly provide that there shall be no transfer of function, that the towns shall continue to have the same function, the same powers, the same responsibilities as it previously had.



QUESTION: Well, it was suggested yesterday, for example, that the new county government might be able to usurp the law enforcement function by setting up its own county police force and that sort of thing.

MR. PHELAN: The -- it might. The fact is, that there is no transfer of function here. Of course, the purpose of this amendment was that there should be -- what we had was government by 54 man committees in urbanized counties, in effect. Or in this case, 25-man committees.

QUESTION: Sorry, Mr. Phelan, what are the three cities?

MR. PHELAN: The three cities are the city of Niagara Falls, the city of Lockport which is contained within the town of Lockport who's the intervenor, and the city of North Tonawanda.

But what -- Mr. Fuzak was really saying was that if we modernize county government, which the state wanted to do, and saw the necessity for. We're dealing with urbanized counties of a million, million and a half people, which is archaic, obsolete, what our papers call a oxcart government.

And the whole purpose of this was to modernize it. The reason that these --

QUESTION: Can every county in New York State go adopt this?

MR. PHELAN: Outside the City of New York, Mr.

Justice Brennan. The 57 counties of New York State, each one can do this.

What happened was, and I think it's fair to say, it was a new way of political decision. Upstate New York, the people that are affected by this constitutional amendment, there are two and a half million city residents, seven and a half million town residents. The amendment was adopted in 1963. As soon as the line of cases started in this Court with Baker against Carr, it should have been repealed.

In 1967 we had a constitutional convention; the most prominent men in the State of New York. This was repealed unanimously, the proposition was passed unanimously on the floor of the convention. I think in six months it was the only proposition passed unanimously to comport with just what we're talking here, to comply with the one man, one vote doctrine.

That constitution was not adopted because it was all submitted as one package. But the vote on this proposition, which I refer to in my brief, was unanimous.

And this is not rooted in the law of the State of New York. It was done pragmatically; I think it's fair to say, in order to have the amendment adopted. The fact is that it violates the principles that this Court has enunciated over the past ten or twelve years. It creates --

QUESTION: Mr. Phelan, your opposition relies on

Gordon against Lance. And I'll confess I'm somewhat bothered by that case. Somewhere, will you comment on that before your time is up.

QUESTION: Yes, right now, Mr. Justice Blackmun.

Gordon against Lance recognized -- and I concede that in a proper case a state could conceivably, based upon fact, could find that because of the nature of the function being involved that there had to be a super majority as its called in Gordon against Lance.

But at the same time Gordon against Lance specifically referred to the fact that there was in that case no classification of voters based upon where they lived; there was no discreet insular minority who were going to be affected; that there were no violations -- the principles of Gray against Sanders -- and in my judgement, Gray against Sanders which applied statewide virtually applied county-wide here. And if you didn't have --

QUESTION: Where's the discreet, insular minority in this case as you see it?

MR. PHELAN: In this case, the case now before this Court, it's the residents and voters of the town. It could be either one. The fact is that this provision separating voters based upon the place of residence in this case permitted some 18% of the voters to --

QUESTION: Well, we used the term discreet, insular

minority in our opinions, that is suggesting people in need of special protection. You're suggesting the very opposite, aren't you?

MR. PHELAN: What the appellant suggests is that the voters of the towns are in need of special protection, despite the fact that they're a majority. The point I make is that what happens here is that the vote of one or the other units cancels out the vote of the unit which wishes to pass the charter. If there's a majority, as occurred here, a countywide, a majority in the cities, those votes aren't even counted because the minority in the towns voted against the --

QUESTION: Wasn't this true as a matter of principle in Gordon against Lance where 40% controlled 60.

MR. PHELAN: That's correct in Gordon against Lance. The only question there was whether or not, in a particular instance based upon a compelling state interest, that a -- other than a substantial or equal account might be permitted.

In this case, I really think that the question of population in this case is secondary. The primary thing that was done here is that the voters of the counties of New York were separated into town voters, that they were divided based upon where they lived. And it's inevitable when that's done that you divide them based upon the --

In other words, the point is, there's no difference

between city and town voters.

QUESTION: Are you saying that really Lance is not applicable here? Because that dealt with whether the Court in that circumstance be a requirement of more than a simple majority, a 60% majority?

MR. PHELAN: That's right, Mr. Justice.

QUESTION: You say that can't be -- this is more like the dual box situation that we had in Hill and Stone.

MR. PHELAN: That's correct.

QUESTION: Because it's not a simple majority here. The smallest of minorities, I gather, can have a veto.

MR. PHELAN: That's correct.

QUESTION: Over the majority vote of the cities.

MR. PHELAN: As little as 2% in Nassau County.

And more -- I think in that regard, there was no effort here -- first of all there was no effort here by the State to justify why in changing the form and structure of its most basic form of local government, that there even should be a --

QUESTION: What is the minority, the city or the town?

MR. PHELAN: The minority in this case is in the towns, Mr. Justice Marshall.

QUESTION: I mean in the statute?

MR. PHELAN: No, the statute requires that there be



dual majority.

QUESTION: And it's not aimed at any particular group?

MR. PHELAN: No, it's not. It's not --

QUESTION: It's not aimed at any particular group?

MR. PHELAN: Yes, it is aimed at a particular group.

QUESTION: What particular group?

MR. PHELAN: It's aimed at the group that is opposing change. It's aimed at the governments -- it permits -- it permits --

QUESTION: You mean the majority never the one desiring change?

MR. PHELAN: The majority under this provision of the New York Constitution, the majority could vote for change and it would occur. The fact is that in this --

QUESTION: But there is no -- this wasn't targetted on any group?

MR. PHELAN: I think that's fair to say, that it's complementary --

QUESTION: Well, where do you get under Reynolds and Sims and all the other cases?

MR. PHELAN: You get on it because it's a division of voters based on where they live. It's one of the suspect categories of race, sex, wealth, occupation or place of residence.

QUESTION: Don't people live -- what constitutional provision are we talking about, where people live?

MR. PHELAN: I'm talking about a division of voters of giving them a right to cancel out the vote of the entire geographic unit based upon where they live.

QUESTION: What case makes that a suspect category?

MR. PHELAN: The -- first of all, I think the Gray against Sanders case applies, because as Judge Timber said, this is in accordance with Gray, Reynolds and Avery line of cases, Mr. Justice Stevens.

QUESTION: Very clearly the fact, and undoubtedly the purpose of this legislation, was to allow a minority who were opposed to change to block a change favored by the majority. That was its purpose, and that's its effect.

MR. PHELAN: I think that's true. That's right. That's exactly right. I don't think it's any different than the Carrington case --

QUESTION: And in that respect, it's precisely the same as the super-majority requirement, isn't it?

MR. PHELAN: No, it's not.

QUESTION: Well, that's exactly -- it permits a minority to block a change, and specifically for that purpose, doesn't it?

MR. PHELAN: In the Gordon against Lance case, you found that because of the long term effect of the incurring

of debt because the State of West Virginia had justified the situation, it had come in with evidence of the necessity for it, you said, in that case, yes, there may be a super majority.

QUESTION: Well, that isn't the answer. The Gordon and Lance -- see, everybody's treated alike. Everybody's treated alike. But not here.

MR. PHELAN: No, that's right.

QUESTION: Well, isn't that the difference?

MR. PHELAN: The difference here is that people are treated differently based upon where they live.

QUESTION: Whether they live in towns or live in cities.

MR. PHELAN: Whether they live in towns or whether they live in cities.

QUESTION: All of them living within the political subdivision which --

MR. PHELAN: Which exercises general government --

QUESTION: -- exercises the electoral franchise.

MR. PHELAN: Right. Right.

May I pass what I consider to be the major contention of the opponent -- of the opponent here, and that is the question of form or structure, and whether or not you've reached form or structure so far as the application of one man, one vote. And I suggest to you that the line -- first of all, going right back to Reynolds against Sims, it's the

voting process -- the majority said it's the voting process that's in question.

I think a good focus on the question so far as the application to this case is the language of Justice Black in the Hadley case, when he tried to analyze this whole question of local governments creating a voting process, in which he said that whether or not -- which is most important, to vote for a sheriff, to vote for a United States Senator ? And that once a local government decides that the matter is so important that there shall be a vote, as the State of New York decided here, then the vote shall be in accordance with -- and comply with the constitutional rights. But once the State -- what's happened here is the State has said that this should be government by the people. And what we're saying here is that therefore it shall be government in accordance with the equal protection.

792 QUESTION: Mr. Phelan, has there been any further effort to repeal this provision since the defeat of the Nebraska constitution?

MR. PHELAN: There has been no effort, Mr. Justice Brennan. No, only in the constitutional convention.

QUESTION: Mr. Phelan, is your argument equally applicable as a ground for holding a bicameral legislature unconstitutional?

MR. PHELAN: No, I think you -- and as you said

at times here, there are special -- I don't think so. You've got special provisions relating -- you've got history relating to bicameral legislature which, I guess, in Gray against Sanders, where the State of Georgia tries to take advantage of it.

And I think the -- in this case it's no -- it's simply the division based upon where people live. Let me -- if I may, because of my time limitation, move on very quickly. My opponent refers to the res judicata issue here, and I'd like to point out that what occurred here is after the defeat of the 1972 referendum, the county of Niagra in main brought this action. They had no right to represent the aggrieved class of voters. There was no privity.

And more importantly, I think, the question -- as Judge Timbers focussed on in his opinion -- whether or not there could ever be adequate representation.

I think the clearest way to say it is the fact that Mr. Fuzak and I are on opposite sides of the issue, that the county -- there were two classes of voters here. There is a class of voters here that favored change and asked for their constitutional rights as a majority, and there's a class that opposed it. And we're both here. And it's impossible for the county to represent the two.

Secondly -- secondly -- if you will look at the original action, I think that it's fair to say that the



question of adequate representation was very much involved so far as whether or not the constitutional issues were presented to that district court in the first place. The district court in that case, a good district judge who is now deceased, was called upon to do his only search on this entire subject. Not one of these cases, including Baker against Carr, was presented to him. He did a certain amount of research. Unfortunately, his research did not take him to the Avery case.

QUESTION: Is that kind of an insuperable task, if you ask a district judge to do his own research?

MR. PHELAN: Well, this is a very difficult -- this is a tough question.

No, it's not insuperable. My point is -- no, my point is --

810 QUESTION: Mr. Phelan, sometimes we have to weed it out.

MR. PHELAN: I know that, Mr. Justice Brennan.

No, my point is, Mr. Justice Rehnquist, as Judge Timbers pointed out, on the question of whether or not there's been adequate representation, one of the elements is whether or not the constitutional issues were so framed that they can be focussed on by the court.

And in addition to that, throughout this case, in the district court the county has been our adversary. And including the point in time when, after they lost the case

but it hadn't been appeal, Mr. Shedd going before the county legislature and asking them, please just file a notice of appeal so we could protect the situation.

Secondly, on the question of the 1974 trial, I'd like to make this point, that what occurred here -- with an unusual situation -- that after the State of New York decided not to appeal --

QUESTION: Counsel, I've just been informed that the length system seems to be malfunctioning today, and you're cutting into your colleagues' time. We'll take some responsibility for that, but not all.

MR. PHELAN: Mr. Chief Justice, may I just say in closing, one conceptual point. Yesterday, in preparing for this argument, I happened to run across Mr. Justice -- Mr. Rogers' comment here about the importance of the whole line of Baker against Carr, and his reference to Mr. Chief Justice Warren's comment after he retired. And what's occurred here in the State of New York is that this provision has frozen in our system the flexibility which should be permitted has not been. And as a result, the democracy is not breathing, that the political system has not kept pace with the social and economic changes throughout in our metropolitan area in the State of New York.

QUESTION: Mr. Phelan, could I just suggest, though, that in the towns where the vote only lost by some 200 votes,

you only got about 20% of the vote out, or 25%. Maybe the freezing isn't the provision, but just not adequate campaigning in this particular issue.

MR. PHELAN: Well, I don't think--

QUESTION: I mean, there is -- that's part of the problem if they didn't get the change, I suppose.

MR. PHELAN: I think that's right. And may it please the Court, Mr. Chief Justice and members of the Court, I respectfully submit that the judgement of the District Court should be affirmed.

MR. CHIEF JUSTICE BURGER: Mr. Lance, Mr. Phelan has used about 5 minutes of your time, but we won't charge all of that against you, because it's our system that's malfunctioning. So you have 8 minutes left.

ORAL ARGUMENT OF MILES A. LANCE, ESQ.,

ON BEHALF OF THE APPELLEES

MR. LANCE: Mr. Chief Justice, and may it please the Court:

I appreciate your consideration in this matter.

The main reason I want to speak to this Court is to bring certain matters to the Court's attention. IN the first instance, there's never been a stay in this matter stemming from the lower court's judgement until this -- up until and including this very day.

We've had a situation where the county of Niagra

has proceeded to implement the 1974 charter. We've elected a county executive. He's made certain appointments; we've elected a commissioner of finance this last November; we've elected legislators for four year terms; we've spent several hundred thousand dollars in implementing the structure of county government pursuant to the 1974 charter.

QUESTION: But you've done all that in the knowledge that this matter is still in litigation.

MR. LANCE: Yes, this matter is still in litigation, and I'm asking -- I'm addressing this to the sound discretion of this Court, regardless of how the constitutional issue is decided, that in view of the fact the State of New York voluntarily filed the 1974 charter, which I would take as acquiescence in the decision of the lower court, that the 1974 charter of the county be allowed to remain in the full force and effect, regardless of any decision this Court makes regarding the constitutional issue which has been placed before it. That would be the first point I'd want to make to this Court.

Now, you get some benefit from , I suppose --

QUESTION: In other words, you say the town has no standing to bring the case in?

MR. LANCE: I think based on the order allowing intervention--

QUESTION: The County is a superior form of govern--

ment, I take it.

MR. LANCE: The county is a superior form, administratively. I will not say the county --

QUESTION: If that's so, can the town usually be sued, sue or be sued?

MR. LANCE: A town may sue or be sued. Any municipal corporation in the State of New York.

QUESTION: Under New York law?

MR. LANCE: Under New York law.

QUESTION: It has interests different from the county?

MR. LANCE: It may have interests different from the county.

QUESTION: Well, it does, if it can sue and be sued, I suppose.

MR. LANCE: Yes, depending on the facts of the case.

QUESTION: You brought this litigation.

MR. LANCE: Initially, your honor.

QUESTION: It's not as if you were dragged into court unwillingly.

MR. LANCE: No, we brought the initial litigation concerning the 1972 charter. And that action was dismissed. Rather than take an appeal to the 2nd Circuit to try and get that action reversed, we decided to implement county government.



by a charter which the voters might find more acceptable.

QUESTION: Well, I take it that the district judges knew about New York law -- allowed the town to intervene, didn't they?

MR. LANCE: Yes.

QUESTION: And apparently conceded them as a party, treated the town as a party?

MR. LANCE: The county was treated as a party in that --

QUESTION: I mean the town.

MR. LANCE: The town was, yes, sir.

But as far as the result of this Court deciding against Mr. Phelan's position would be concerned, I think we have a germane and direct interest in what would occur then. If the decision of this Court, and its direction to the District Court would be, that the county of Niagara must dissolve the charter form of government it now had, I envision a result where the District Court would end up making administrative decisions as to how to do these things, and I think create great chaos in county government.

QUESTION: Whose responsibility is that, do you suggest?

MR. LANCE: I would suggest no one bears direct responsibility, Mr. Chief Justice. I think it was one of those things that was bound to happen, the way the lawsuit

was brought, and the way it was handled throughout by the litigating parties. I don't think anybody could have avoided that result, really.

There has been some notion, if I might say, there has been some notion in the past that the county of Niagara and state officials disregarded the District Court's order regarding -- or judgement regarding the '72 charter, and that simply is not true. Those bodies went ahead and did what they were allowed to do under state and municipal law in the State of New York. There was no necessary -- there was no application necessary to the court, nor was there any violation of any court order.

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QUESTION: You said there had been no stays entered. Were any stays sought?

MR. LANCE: They were sought. They were sought from the District Court and I believe one was sought --

QUESTION: By whom?

MR. LANCE: I think it was sought by Mr. Fuzak, if I'm not mistaken about that. And I know there was one sought from Mr. Justice Marshall by Mr. Fuzak.

And I would like to -- if I might go on with one further point here. I suppose that the county as a litigant here, or at least through its officers, is responsible for this direction on remand that has caused some difficulty to some of the other parties, at least, they briefed it this

way.

I want to point out one thing to the Court: that when we were called down to District Court, and this Court's direction on remand was said, Judge Curtin said to all the attorneys who were there present, we have a procedural problem here, and unless I get a stipulation from all counsel that I can look at the 1974 counsel, and unless I can make the state court proceedings part of the record.

Now, there was some discussion on that, but I recall, and the Judge's decision recites, and the judgement recites, that that stipulation was had.

That being the case, and there being no issue of fact before the court, I believe that the court had jurisdiction to enter the judgement it did in regard to the 1974 judgement. Incidentally, when that happened, the county of Niagra was then satisfied that there was no issue of mootness before the court, because the issue involved before this court now involved a charter which we're operating under.

I believe that, therefore -- and I agree wholeheartedly as I said before with Mr. Phelan -- that there is a violation of due process of laws requirement of the United States constitution. Under the article of the state constitution which is being attacked, and under municipal home rule law, Section 33, subdivision 7.

There was one other point which I'd like to mention

to the Court, and it's this, if I may: and it's this question of Huffman versus Pursue, and the injunction entered against the state court proceeding. I think a reading of that case in our situation will clearly differentiate the two cases.

In our particular case, a federal court action had been pending some time before the state court action was instituted. In the Huffman case, it was just the reverse, as I recall it.

I have no more comment to make in regard to the constitutional issues --

QUESTION: Mr. Lance, could I then ask you just an informational question?

MR. LANCE: Yes, sir.

QUESTION: What kind of vote does it take to amend the New York constitution?

MR. LANCE: The New York State constitution? I believe it has to pass the legislature twice and be voted on by a majority of all the voters in the state.

QUESTION: But it's a majority, not a super-majority?

MR. LANCE: That's my understanding, your honor.

QUESTION: A majority of all the voters, not just of those voting?

MR. LANCE: A majority of the voters voting in the State of New York.

QUESTION: That's much different from all the --  
I guess, depending on the term, voters.

MR. LANCE: Then -- maybe I misunderstood the  
question.

QUESTION: A majority of those actually voting?

MR. LANCE: Yes. When the resolution is put on the  
ballot boxes in the state of New York, it's a majority of  
those voting.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 10:36 o'clock, a.m., on December 2,  
1976, the case in the above-entitled matter was submitted.]