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In the

Supreme Court of the United States

Inez Moore,

Appellant,

v.

City Of East Cleveland, Ohio

Appellee.

No. 75-6289

Washington, D. C.
November 2, 1976

Pages 1 thru 42

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INEZ MOORE, Appellant,	:	
v.	:	No. 75-6289
CITY OF EAST CLEVELAND, OHIO, Appellee.	:	

Washington, D. C.,

Tuesday, November 2, 1976.

The above-entitled matter came on for argument at 1:37 o'clock p.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:

EDWARD R. STEGE, JR., ESQ., 2108 Payne Avenue, Cleveland, Ohio 44114; on behalf of the Appellant.

LEONARD YOUNG, ESQ., Prosecutor and Assistant Director of Law, City of East Cleveland, East Cleveland, Ohio 44112; on behalf of the Appellee.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 75-6289, Moore v. City of East Cleveland.

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

ORAL ARGUMENT OF EDWARD R. STEGE, JR., ESQ.,

ON BEHALF OF THE APPELLANT

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

This is an appeal from a criminal conviction of Mrs. Inez Moore, in the East Cleveland, Ohio Municipal Court. Mrs. Moore is a grandmother and she was convicted under a city ordinance for living in her own home with her own two sons and her two grandsons. She appealed her conviction to the Cuyahoga County Court of Appeals, which affirmed, one judge dissenting. Her conviction was further appealed to the Ohio Supreme Court, which dismissed the appeal for want of a substantial constitutional question, and the case was further appealed here.

QUESTION: Has she had to serve any of that prison sentence?

MR. STEGE: Pardon? I'm sorry?

QUESTION: Has she had to serve any of that five-day prison sentence?

MR. STEGE: She has not. That five-day prison sentence was suspended on the condition that she, by July 1, 1974, which was roughly 45 days after the conviction was handed down,

that she put her grandson, John, Jr., out of her home. She has failed to do that, pending the appeal of this Court.

It is the appellant's position in this case that the East Cleveland ordinance which prevents many family members from living together with their families in the City of East Cleveland substantially interferes with fundamental rights, privacy and association in matters of family life. This ordinnance is both over-broad and violative of the equal protection clause of the Fourteenth Amendment.

And the justifications offered by the city in support of this ordinance simply do not support this substantial interference with constitutional rights.

QUESTION: Are you suggesting that there is an over-breadth test applicable when you get outside of the area of the First Amendment?

MR. STEGE: That is correct.

QUESTION: Well, what do you rely on for that?

MR. STEGE: Well, I am suggesting that all the cases, for example, such as Roe v. Wade, the abortion decisions, when a state passes a statute that interferes -- and I think the Danforth case of last term -- which interferes too seriously with the fundamental right, such as in that case, the right of privacy, the right to control, the decision to terminate one's pregnancy, that in a sense the statute interferes too deeply with that fundamental right. It is truly over-broad. The term

over-broad --

QUESTION: Well, it is one thing to say that the statute violates the right in question and therefore it can't stand; it is another thing to say, as I think of the term over-breadth to mean, that it covers areas that it shouldn't cover so that even though it doesn't violate any right in this case, we are not going to let it apply because it may infringe on rights in other cases. Which meaning do you adopt?

MR. STEGE: The former, Your Honor.

QUESTION: I take it the fundamental right you are talking about or perhaps embraced in that is the right for a person to give a home to a near-relative who is in need, that is the grandchildren here who --

MR. STEGE: That's correct.

QUESTION: Where do you place that fundamental right?

MR. STEGE: Well --

QUESTION: You seem to rule out the First Amendment rather quickly.

MR. STEGE: It was not my intention, Mr. Chief Justice, to rule out the First Amendment.

QUESTION: Would that be broad enough, right of association, if you can find that in the First Amendment in this context, would that be broad enough to reach having a grandmother give a home to her grandchildren?

MR. STEGE: I think so. I think that the fundamental

right here does not arise from any one single point in the Constitution, it arises from several different influences in the Constitution. First of all, it arises from the line of cases beginning with Skinner v. Oklahoma, which discuss and afford protection to the right to procreate, the right to create a family, the right to determine the extent of one's own family. That is one clearly defined source of constitutional protection.

A second line of cases is that line beginning with Meyer v. Nebraska, and continuing on through the Yoder case, the Amish school education case, which gives parents and gives persons within the family the rights to control the very upbringing of the members of the family, particularly the minor children, to make decisions about the rearing of those children, the secular, the moral education of those children.

Thirdly, we have the associational interests involved, which have been recognized most specifically in the marital context in Griswold and in Eisenstadt, which I also think extend to the relationships among family members.

QUESTION: When you say family members, how broad does that term sweep?

MR. STEGE: It sweeps -- it encompasses ties of blood, marriage and adoption.

QUESTION: So it would include presumably cousins?

MR. STEGE: It would include cousins, yes.

QUESTION: Suppose this ordinance merely said that anyone not related within the third degree shall not be regarded as a member of the family, do you think this would be valid, just that?

MR. STEGE: I think that that begins to approach an area in which the legislative body might step in and determine a cut-off point, but the purpose of the cut-off point is completely different. It is just simply a matter to resolve controversies, it is a matter to decide perhaps -- perhaps the third cousin is too close, but perhaps the fourth and --

QUESTION: I take it you aren't conceding there is a cut-off point?

MR. STEGE: I am conceding that there could be a cut-off point but for a very different purpose than this ordinance is designed. The purpose would only be to determine at what very attenuated point in the family blood lines do family members who are related to the 32rd degree, let's say, stand in effect as strangers to one another. That would be the sole function of that kind of limitation.

I would emphasize that I don't think that that kind of example has a lot of practical significance for a city like East Cleveland. Those problems simply do not come up. For example, in the Belle Terre case, the ordinance there said family members related by blood, marriage or adoption. And state courts --

QUESTION: But that is not this ordinance?

MR. STEGE: That is not this ordinance.

QUESTION: And your first two categories, you spoke of children. Now, this ordinance doesn't cut against children, does it? Your client could have 13 children and she wouldn't be as to them side-wise with the ordinance, would she?

MR. STEGE: Well, as long as they were minor children, as long as they have no children of their own, as long as they are not married --

QUESTION: I am assuming all that.

MR. STEGE: -- that's correct. The final thread -- I mentioned three --

QUESTION: To continue the question of Brother Blackmun, if a family decided, well, we are going to be a tribal organization in our particular family, the Jones family, the Smith family, whatever, we are going to be tribal rather than think of ourselves as organized in a nuclear family or anything close to it, that the state would be constitutionally required to recognize that?

MR. STEGE: Well, I am not sure, to be honest about it, I am not sure what you are getting at by the term "tribal family."

QUESTION: Wall, anybody related at all, like most of the population of the hills of Kentucky, for example.

MR. STEGE: It seems to me that -- well, using that

example, the answeris clearly no, and my response to that is --

QUESTION: Well, why, if they asserted that, this is the kind of family we want to belong to and these are the associations we are constitutionally entitled to maintain, and the State of Ohio and the City of East Cleveland has no constitutional right to invade our constitutional right of association as a tribal organization?

MR. STEGE: My response is that if we examine the prior decisions of the Court, they build on blood relationships.

QUESTION: Well, is there anything in the Constitution about that?

MR. STEGE: There is nothing specifically in the Constitution; on the other hand, there is nothing specifically in the Constitution that creates a fundamental right of a parent to raise his child, but yet it has been recognized; and there is nothing specifically in the Constitution that talks about procreation, yet it has been recognized. And I focus on certain areas of decisions and identified three of them, and the third I think relates to protection that has been accorded to the family home, and from that we assert a right to privacy and freedom of association in matters of family life.

What good is it to have a right to control the upbringing of your child if you can't even live with that child? In the Prince case, Prince v. Massachusetts --

QUESTION: Well, nobody is being denied to live with

their child here, unless you are talking about the grandmother's right to live with her grandchildren.

MR. STEGE: Yes, that's correct.

QUESTION: In a particular single house, a single dwelling.

MR. STEGE: In the family home. In the family home.

QUESTION: But the application of this statute, of this ordinance has what effect upon the father living with his children in the home of the grandmother? It cuts across that, does it not?

MR. STEGE: The application of the statute by its terms should preclude the father as well from living in the home, but, as a matter of fact, John Moore, Jr., who is now age 10, was 7 at the time of the prosecution, was singled out as the "illegal occupant in the home." He is the one who is being asked to leave. It was based on his presence in the home that Mrs. Moore was found guilty.

QUESTION: Have you and your opposition been able to get together as to where John Moore, Sr. lived? Was he in the home or was he not in the home? As I read your briefs, you are at opposite poles on this.

MR. STEGE: John Moore, Sr. was in the home at the time of trial, he is in the home now, and he has been there ever since the trial. The family — the composition of the family home at the time of trial was Mrs. Moore, her two sons,

John, Sr. and John, Jr., and their two respective sons -- I'm sorry, the two sons, John, Sr. and Dale, Sr., and their two respective sons, John, Jr. and Dale, Jr. Now, that family composition has remained intact in exactly the same way, those family members have continued to live in the home to this date.

QUESTION: This is an awfully small point, but is there any reason why John, Jr. rather than Dale, Jr. is the villain in the picture?

MR. STEGE: It is beyond me. I cannot explain that.

QUESTION: Did the judge express why?

MR. STEGE: I did not try the case below. The Housing Code singled out John, Jr., as I say, the notice of violation --

QUESTION: Does it have to do with schools or something, is it suggested in the record?

MR. STEGE: There was a coincidence time-wise, a peculiar coincidence, time-wise, with John, Jr.'s entry into the first grade.

QUESTION: All right.

MR. STEGE: I would emphasize that this ordinance interferes in the most substantial and direct way with matters of family life. For example, it applies to all dwelling units in the entire City of East Cleveland, Ohio. It applies to single-family units, it applies to two-family units and multiple dwelling units. There is no place in the entire city

of East Cleveland that Mrs. Moore can live together with her family.

QUESTION: Even an apartment?

MR. STEGE: Even an apartment. East Cleveland is a city of roughly 40,000 people, and it is encompassed within about a three square-mile area. And the criminal sanctions are severe as well. It is six months in jail for every day that a violation is allowed to continue.

QUESTION: Do you think the City of East Cleveland could pass an ordinance that said there shall be no more than three people per room permanently residing in any single-family dwelling?

MR. STEGE: In a sense it has done that, although not in those terms. It has passed two ordinances, one which keys -- it sets an occupancy limit. For example, based on --

QUESTION: Do you think it can?

MR. STEGE: Yes, I do. The answer is yes.

QUESTION: Such an ordinance though would certainly have a fairly sharp impact on even a nuclear family, wouldn't it, that wanted to have a lot of children?

MR. STEGE: It could conceivably have an impact, although that is clearly not the purpose of the ordinance. The purpose -- I think that as in the -- let me use the example of the ordinance that East Cleveland has already passed. They determined in a mathematical way how many people ought to live

in how many square-feet of space, how many are required to support an individual, two individuals, et cetera.

QUESTION: Well, would that be valid?

MR. STEGE: Yes, I believe that is valid. In this case, for example, Mrs. Moore is entitled by virtue of the square footage in her home and by virtue of the number of bedrooms to have seven people there, and she has always had less than seven in her home. And it seems to me that that kind of ordinance has the very precision that this ordinance lacks. The problem that that ordinance is addressing is a problem of density.

QUESTION: But couldn't you attack that ordinance on the grounds that it could conceivably interfere with the decision as to a nuclear family, mother, family, children, who wanted to have a lot of children, and say instead of passing that kind of an ordinance, the ought to pass the kind of an ordinance that you are attacking here. It doesn't have any effect on the nuclear family but just cuts it off at the nuclear family.

MR. STEGE: It seems to me that what the Court focuses on -- and this is particularly true in the First Amendment over-breadth cases, but I think it should be equally true here -- is on the substantiality and the degree of impact that the ordinance has on the particular fundamental right involved, and that ordinance would have a very minimal impact generally

speaking on families, if it is properly tailored. If indeed the legislature sits down, as the legislative body did, for example, in Young v. American Mini Theaters, and decides that this particular measure is keyed to the problem, the impact on families would be very incidental and would be slight. I concede that in a particular situation there might be a rather severe impact, but that overall it would be minimal. And I think that the other key distinguishing factor between that kind of an ordinance and this ordinance is its very precision.

There is nothing precise about this ordinance. If this is an anti-overcrowding ordinance, where is the relationship? If you cut out -- apparently, under some circumstances, one sub-group of grandchildren may live in the home, provided that the child of the grandparent is dependent upon the grandparent. Now, that sub-set might have several children, whereas the next sub-set, the married adult child who is separated from his wife returns to the home, that child is automatically out. There is no precision, there is no logical relationship between this particular ordinance and the control of density. I think the relationship, if it exists, is purely accidental, and I think that is the distinction between the two kinds of ordinances. And I would emphasize that East Cleveland has on the books here a par-person occupancy limit ordinance --

QUESTION: Is there anything that prevents if this fellow, the young man that is in trouble, if he goes out, does

he go on home relief or something, on welfare?

MR. STEGE: He goes on presumably --

QUESTION: Well, I guess that is what the city wants, to put him on welfare.

MR. STEGE: -- presumably what happens is that if John --

QUESTION: Well, I assume that a seven-year-old child can't take care of himself

MR. STEGE: Well, I think if John Moore, Jr. is forced to leave, I think his father will go with him.

QUESTION: And he then goes on relief, huh?

MR. STEGE: And then what happens? Then the relationship between the grandmother and her own son is disrupted and severed.

QUESTION: Well, there is nothing in the record that shows that he has an independent income, is there?

MR. STEGE: That is correct.

QUESTION: There is nothing about income at all, is there?

MR. STEGE: About income, either way.

QUESTION: That is what I mean.

QUESTION: Well, would that be relevant to this issue here?

MR. STEGE: I don't believe it would be. It is only relevant insofar as the statute is applied to -- insofar as the

dependency question is involved in the application of the statute.

QUESTION: Do you mean that if they don't have any money at all, the child can be thrown out in the street? Is that correct?

MR. STEGE: That is absolutely correct in this instance. Let me emphasize that the application of this ordinance here would not only severe and disrupt the relationship between Mrs. Moore and her own son, but it would disrupt the relationship that is established between young John and young Dale, which is in essence a sibling type relationship, and it would most importantly disrupt the relationship between young John and his grandmother, which is the only maternal influence that he has had during his entire life. So the interference here, to go back to Mr. Justice Rehnquist's question, is very substantial.

QUESTION: On that argument, would the case be any different if the grandfather had, say, had his first wife die and remarried someone who was not actually the maternal grandmother but yet brought up the children? Would it be really a different case? Does it really depend on the blood relationship or just the fact that these five individuals happen to live together?

MR. STEGE: I think that there is something perhaps sacred as going too far, something very, very significant in

our society and in history about blood ties, the notion of kinship, the notion of sometimes it is a religious sort of obligation to look out for your own kin, that is what is at work here.

QUESTION: So you would say that would be a different case, in other words?

MR. STEGE: Yes, I would. I can see that in a given situation the reality of that situation might approximate the same kinds of blood relationship, but it truly is different, and I am not asking this Court to reach that point.

QUESTION: Well, would it be different if John, Sr. was the adopted son of the grandmother and John, Jr. was in turn the adopted son of John, Sr.? I am puzzled by why you put so much on the blood relationship, once the legal relationship is established?

MR. STEGE: I'm sorry. By emphasizing the blood ties, I did not mean to exclude ties of marriage and ties of adoption.

QUESTION: Adopted children, for almost every purpose that I can conceive of, are treated the same as natural issue, are they not?

MR. STEGE: Exactly, and there is very clear state policy along those lines, and it is -- if this ordinance were tailored the way the Belle Terre ordinance was tailored, obviously we would not be here, but also I would have no constitutional objections to that ordinance. It says all persons

related by blood, adoption or marriage, and then it is up to the family members to decide within their family how they want to live.

QUESTION: And to prevent the over-crowding, you say that the municipality may put a density, a space requirement on, and that that you would accept because presumably it relates to health and safety?

MR. STEGE: Yes. And in fact such a space requirement has been passed in this case, it is quoted in part on page three of appellant's brief.

QUESTION: Counsel, does this ordinance have any provision for individual variances? Is there any procedure by which you could have applied on behalf of the family for a tolerance of some kind?

MR. STEGE: Yes, there is a procedure within ten days after a citation by the housing code official, there is a right to appeal for a variance. And the standards that I would emphasize --

QUESTION: Does the record show whether that was done in this case?

MR. STEGE: The record does not show either way, but the fact is that no appeal was taken. I would emphasize that that particular emphasize is reproduced in the appendix to the appellee's brief. I would emphasize that, as a matter of fact, in the appellee's brief there is a statement that had -- and I

am quoting -- "has Mrs. Moore sought a variance," it "probably" would have been granted "possibly with some stipulations." And I think that those three qualifiers in the statement by the appellee are borne out by an examination of the particular variance provision.

The provision permits variances provided that the granting of the variance will not be inconsistent with the overall purposes of the ordinance in question. It seems to me that it is very difficult to expect East Cleveland, on the one hand, to grant a variance for Mrs. Moore if it is saying that the presence of John Moore, Jr. in the home is in fact inconsistent with the very purpose of the legislation.

QUESTION: I don't follow that. Any variance, by definition, assumes there is a violation of the literal general application of the ordinance, doesn't it?

MR. STEGE: But there is also a provision in the variance section that provides that if it is to be granted, it must be granted on the condition that it is consistent with the overall purposes of the ordinance, and I think what East Cleveland does in granting these things is they give you an extension of six months or a year and then you have to leave. We will give you a variance but we will give it to you temporarily for six months or a year and then you have to go. I would emphasize --

QUESTION: Does the record support that or is this of

a --

MR. STEGE: That is not in the record. That is based on my own examination of the minutes of the appellate review unit that makes these decisions. I would emphasize that it is correct, Mrs. Moore did not seek a variance in this case. We contend that that is constitutionally irrelevant.

In essence, the appellee's argument is that there was some requirement of exhaustion of the administrative avenue here, and it is our position that in a criminal case it is not a precondition to asserting a defense based on the unconstitutionality of the ordinance that one need to have exhausted a variance or an administrative appellate procedure.

QUESTION: Is there a legislative history which tells us the purpose of this ordinance?

MR. STEGE: There is a legislative history, but it does not illuminate the purposes of this ordinance. This ordinance was passed in 1961. Its precedecessor was passed in 1961, at the time the Housing Code was adopted for the City of East Cleveland. And what the appellee has done in its brief is cite the prefatory language to that Housing Code, which talks about upgrading property, control of density, and there is no provision that zeroes in on by way of explanation of this particular provision.

QUESTION: In addition to the specific density ordinance, this also has a purpose related to density?

MR. STEGE: That is the position as I understand it of the appellee.

QUESTION: I think you told us they have the seven-house -- or the house, in any event, could within the density ordinance accommodate seven people, is that right?

MR. STEGE: That's correct.

QUESTION: And with only six kids?

MR. STEGE: Five.

QUESTION: Five.

MR. STEGE: Yes.

QUESTION: I was wondering, is there any law in Ohio that says if you are charged with violation of the zoning code, you cannot after that time be given a variance? Does that prevent you from getting it?

MR. STEGE: Well, by the terms of the variance of the ordinance, you must file an appeal within ten days.

QUESTION: From the time --

MR. STEGE: From the time the citation -- the citation occurred in January '73, roughly a year or so prior to the prosecution.

QUESTION: I see.

MR. STEGE: I would point out, in further response to Mr. Justice Stevens' question, that in Stabb v. City of Baxley, 355 U.S. 313, this Court considered the question of whether -- reached the constitutional validity of an ordinance,

a municipal ordinance that precluded persons from engaging in certain kinds of organizing activity without first seeking a permit, and the fact was that the individual who challenged the ordinance did not seek a permit in that instance, and this Court addressed the very specific question of whether or not the individual somehow lost his right to raise the question before this Court by failure to seek a permit, and the Court rejected that position.

QUESTION: But wasn't the holding in Stabb that the very statute that required the permit was bad?

MR. STEGE: That is correct, but that was not material to the exhaustion argument. The exhaustion argument was that, look, this whole case could have been avoided if you simply would have sought a permit and it might have been granted, and that point was specifically addressed by the Court and was rejected.

In fact, the very language of standing, somehow the appellant had no standing in the case is adopted by the appellee in his brief.

QUESTION: In short, if the municipality has no authority to put this kind of a limitation based on other than density, then the variance falls in the same category?

MR. STEGE: Exactly.

At this time I would just like to conclude by saying that this Court is presented with an ordinance which on the

one hand exhibits no rational methodology whatsoever, but on the other cuts ever so deeply into the fabric of family life. We urge that Mrs. Moore's conviction be reversed and that she be allowed to live together with her sons and grandsons in East Cleveland, unmolested by this ordinance.

I would like to reserve my remaining few minutes.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Young.

ORAL ARGUMENT OF LEONARD YOUNG, ESQ.,

ON BEHALF OF THE APPELLEE

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

At this time, the appellee would like to point out that with respect to John Moore, Sr., the housing code file of the City of East Cleveland shows that at the time the citation was made, John Moore, Sr. was living on Central Avenue in the City of Cleveland, he was not living on the premises in question.

Further, we would like to point out again from the appendix of appellee's brief that the initial citation occurred in January 1973. From that point until April 1974, the Housing Department of the City of East Cleveland worked with the appellant in trying to resolve this question of occupancy. It wasn't until April 1974 that the citation was -- that the matter was taken to court.

QUESTION: When you say resolve it, in what respect, have them go somewhere else or --

MR. YOUNG: No.

QUESTION: -- get a variance or what?

MR. YOUNG: Your Honor, the procedure with respect to code citations are to notify the party involved, either ask him to call the Housing Department or set up conferences with him, to find out what can be done to correct the situation, including conferences. There is nothing in the record, but I can only make this point, in the usual situation like this, the housing inspector, if there is a possibility of a variance, would make a verbal response to the person involved in that situation. But again, there is nothing in the record to reflect that, and I couldn't find anything in the record of the housing code.

QUESTION: Well, I am a little puzzled yet. What solution could they work out?

MR. YOUNG: All right. If I may go to that, Your Honor. When you look at this situation, you have to look at the entire housing code. One of the things that I focus on at this point is that under the housing code there is this appellate route. They are, for example -- and I take exception with regard to hardships. With regards to a variance, a showing of hardship is made, if it can be done with harmony with the ordinance, that is to maintain the safety, the welfare of

the community, variances are granted. In this situation, the record does not reflect and to my knowledge there was no showing of any need or any hardship as to why the grandson should remain on the premises. And again, I go back. If these arguments made on behalf of the appellant were made by John Moore, Sr., involving personal rights, I think you have a different situation. But here you have the appellant, a grandmother, making these arguments of personal rights which there is no guardianship, no adoption on her part of John Moore, Jr., therefore these are the types of things that John Moore, Sr., as the natural parent, has the right to determine.

QUESTION: Mr. Young, why John, Jr. and not Dale, Jr.?

MR. YOUNG: Thank you, Mr. Brennan. If we go back again to the citation, I mean the ordinance in question, the normal head of the household -- in this case it would be the appellant, she is listed as the owner of the premises -- can have one unmarried child with her. Also in the situation, since he had a son, Dale, Sr. was there, and Dale, Jr. was there. In looking at the total situation, the premises could accommodate the three individuals. The Housing Department would not give a citation on that type of situation.

When you bring in John, Jr., who is there at that point, you have exhausted the ordinance which allows the unmarried son to be there, you are bringing in another family. In addition to that --

QUESTION: Well, both sons are married.

MR. YOUNG: But at the time of the -- right. I don't know that.

QUESTION: Is John, Sr. married?

MR. YOUNG: I do not know that. Possibly he is. But again, I go back to the time of the citation. As far as we can determine, John, Sr. was not in the home. Now, in addition to this, John, Jr. was in the process, as counsel for the appellant has pointed out, of starting to school. One of the things in the public school system of East Cleveland, there must be some person or parent, a person who stands in the position of the parent to whom the school can look to if there is a need, for example, the child is injured, a need to give consent for treatment. Without the appellant having a guardianship, this meant that they couldn't turn to that.

QUESTION: A grandparent couldn't do that?

MR. YOUNG: Unless she is a parent.

QUESTION: As a grandparent, I would like to think that I could.

MR. YOUNG: Well, under the situation, as far as we can --

QUESTION: Well, your answer is that they could not?

MR. YOUNG: It is my understanding that they could not, particularly since the natural father is alive and had not given his consent to the grandmother in that respect.

QUESTION: Of course, the city is not the school district, is it?

MR. YOUNG: No, it is not, Your Honor.

QUESTION: Where do you want this young man -- the only complaint is one boy, right? Is that the complaint?

MR. YOUNG: At the time of the citation, the second family --

QUESTION: As of now, what is the complaint?

MR. YOUNG: As of now, there is a second family, John Moore, Sr. and John Moore, Jr., if they are there.

QUESTION: Is it one person?

MR. YOUNG: Two.

QUESTION: One person too many?

MR. YOUNG: Two, the father and the son, if they are there now.

QUESTION: They are both wrong? I thought it was only one.

MR. YOUNG: Well, your question, Mr. Justice Marshall, was as of now.

QUESTION: I want to know how this family can conform to the code, with the minimum conflict.

MR. YOUNG: With the minimum conflict?

QUESTION: Yes.

MR. YOUNG: Mrs. Moore, under a rooming house license, could apply for additional roomers.

QUESTION: Well, this woman stands convicted of something, and I want you to tell me what she is convicted of.

MR. YOUNG: She is convicted, Your Honor, of -- the conviction is for having more than one family in the premises in question.

QUESTION: And who is that "more than one family" as to parson?

MR. YOUNG: As to person at the time of the citation would be John Moore, Jr. As of now, since then, apparently John Moore, Sr. is there, it would be John Moore, Sr. and John Moore, Jr.

QUESTION: Well, as of the time of conviction?

MR. YOUNG: As of the time of conviction, based upon the stipulation by the appellant, John Moore, Sr. was there also, so it would be the two of them.

QUESTION: I thought you said a minute ago that --

MR. YOUNG: Citation is different, Your Honor, from conviction.

QUESTION: Well, citation -- the only way they could conform would be to throw this kid out in the street?

MR. YOUNG: No. No, Your Honor.

QUESTION: Well, how else?

MR. YOUNG: One, the father, since he was living elsewhere, Your Honor, could take the child himself.

QUESTION: Well, I am not talking about -- John D.

Rockefeller could give them a million dollars. I mean -- but so far as the city is concerned, he could go out in the street.

MR. YOUNG: I would not go to that extent, Your Honor. The second thing in the brief is that if the appellant, the grandmother had guardianship, John Moore, Jr. would be part of her immediate family and --

QUESTION: Did anybody tell her that she could do that?

MR. YOUNG: The record does not reflect this, Your Honor. I can assume that -- my thoughts would be that the normal procedure is that they are told this.

QUESTION: I can't assume that.

MR. YOUNG: Your Honor, I might point out that after the --

QUESTION: Did you testify at the trial?

MR. YOUNG: At the trial in question, I was present. After the conviction, this question was discussed with the counsel who represented the appellant at the trial level. This was discussed in my presence with the members of the Housing Department.

QUESTION: Well, is it in the record in this case?

MR. YOUNG: No, it was not, Your Honor.

QUESTION: I am not interested -- I am interested in the record.

MR. YOUNG: I understand.

QUESTION: And so far the record is concerned, this young child could go on home relief or welfare or something?

MR. YOUNG: No, Your Honor. I would like to expand on the question that was raised when the appellant was present. At this point, I see the -- at this point in time, and even after the conviction, for the appellant to make application for a variance. I think that question was raised, and I would have to submit that it is possible, even after the conviction, for the application for a variance to be made.

QUESTION: Of course, on this constitutional claim your friend's position is that the municipality has no right to require them to ask for a variance, his right exists independent of that.

MR. YOUNG: I might address myself to that. First of all, with regards to the fundamental rights issue, if we look at all of those cases dealing with that matter, if we look very closely at dealing with personal rights, the right, for example, of a person to vote, this is personal, the right of the female to determine whether she would procreate -- again, personal rights. There is no law that counsel knows of in the State of Ohio that gives a grandmother a personal right to decide that her grandson can live with her.

QUESTION: What is the right of association, is that personal?

MR. YOUNG: The right of association, in the line of

cases dealing there, again I would focus on the point that they deal primarily with relationship between what we call the nuclear family; again personal rights, the right to associate in this respect, the appellant is not being refrained from allowing her son or grandson to stay on weekends or even if she under the two systems I suggested, hardship or guardianship, to actually assume full responsibility for him.

I might point out that under the equal protection argument that is suggested by counsel, that in equal protection situations, the ordinance in question must be of a suspect character. There hasn't even been any argument to this effect raised in the briefs in this instance.

The procedural due process, the -- no proper notice was given, conferences were held and in this respect to try to determine how best to resolve this matter. Now, we might --

QUESTION: Do you suggest, counsel, that we have never found that grandmothers were a suspect classification or grandfathers

MR. YOUNG: No, what I am saying is in suspect classification, Mr. Justice Rehnquist, is that --

QUESTION: Mr. Young, before you proceed, I would like to hear you talk about what state interests are served by this ordinance?

MR. YOUNG: Fine.

QUESTION: What legitimate state interests or purposes

does this ordinance promote?

MR. YOUNG: All right. With regards to the state interests, Your Honor, we are talking here of overcrowding conditions. That is only one. There is the problem of traffic, tax burdens with respect to not only the city services --

QUESTION: Doesn't the density provision take care of the overcrowded aspect, the health conditions?

QUESTION: You have a separate ordinance on density, don't you?

MR. YOUNG: Yes, we do, Your Honor. The ordinance with respect to square-footage and density partly covers the problem. If I may go back for a moment, the ordinance sequence was passed initially in 1961 defining "family." It was redefined in 1964. It would appear that the legislative body at that point found that they needed something additional, the two ordinances together cooperating or working complementary to deal with these three,actually four problems -- overcrowding, traffic congestion and the tax burden. So that the safety of the city, the welfare of the city is handled within the income that the city is producing.

QUESTION: Is there any legislative history that indicates what the council had in mind when it devised an ordinance that prevents a grandmother from living with her children and grandchildren?

MR. YOUNG: To my knowledge, Your Honor, there is no

legislative history in this respect.

QUESTION: There was in fact an historical fact, an abrupt and rather dramatic change in the nature of the population of East Cleveland, wasn't there, just about the time this ordinance was passed?

MR. YOUNG: '66, that would be the beginning of it, yes, Your Honor.

QUESTION: Mr. Young, is it conceivable that the city council might have been willing to allow more people per square-foot in a house if it was a nuclear family than if it was not?

MR. YOUNG: Yes, certainly, Your Honor. In fact, the nuclear family based upon -- would be the idea or we would suggest, rather, I would suggest that it is the nuclear family that the city commissioners had contemplated in passing this ordinance.

I might point out that under the provisions or the definition of family, that if it could be under proper circumstances, it would not relate or -- if on the proper circumstances other members of the family might be allowed to live in a given home.

QUESTION: Mr. Young, let me be sure about this. Another solution to the dilemma here would have been for Dale, Sr. and Dale, Jr. to move out?

MR. YOUNG: Yes, that --

QUESTION: Would that be all right?

MR. YOUNG: -- that was a choice that the appellant could have made, yes.

QUESTION: And the grandmother could have moved out, and that would have helped, too, wouldn't it?

MR. YOUNG: No, I would not say the grandmother could move out, she was the owner of the premises.

QUESTION: That doesn't stop her from moving out.

MR. YOUNG: No, as long as the owner I would think it would be --

QUESTION: On your traffic congestion, certainly the kid didn't have a license, did he?

MR. YOUNG: Your Honor, I would agree with that. However, I might point out that, based on what has been before the Court at this time, you have Dale, Sr. and John Sr., the appellant, who are adults, and there are three automobiles there. This is a two-family -- at least two adults on the other side.

QUESTION: They are all legitimate, there is nothing wrong with that?

MR. YOUNG: When you asked me a question with respect to traffic, what I am pointing at is that in a home where there is a two-car garage you might have as many as five automobiles at this home, and I am focusing on the fact that the ordinance was aimed at more than just the question of overcrowding.

QUESTION: I take it that neither Dale, Sr. nor John, Sr., if they did not have these two boys, Dale, Jr. and John, Jr., there would be no problem, even though the grandmother and the two sons each have a car?

MR. YOUNG: No, I would not --

QUESTION: There would be no violation of the ordinance if just the appellant and her two sons lived in the house, would there?

MR. YOUNG: You can only have one married son under the ordinance.

QUESTION: Even though neither had any children?

MR. YOUNG: That is correct.

QUESTION: The mother can have only one of her children live with her, is that it?

MR. YOUNG: She could have -- one unmarried son is considered part of -- may I expand on that -- one unmarried son considered the family. The second son, since this is a two-family, would be there as what we call under the ordinance as an unlicensed roomer.

QUESTION: But if they are both unmarried and neither has a child, aren't they all right, can't they stay with their mother? As I read the definition of family in 1341.08 --

MR. YOUNG: I'm sorry, you are correct in that, the unmarried children.

QUESTION: If neither Dale, Jr. nor John, Jr. had

been born, and John, Sr. and Dale, Sr. lived with their mother, and each had an automobile, there would be no violation of the ordinance notwithstanding the traffic problem that created, would there?

MR. YOUNG: I would have to, under that factual situation --

QUESTION: So it is only because these two seven-year-old grandchildren are there, the three automobiles became a traffic problem?

MR. YOUNG: In this case, that might be the situation, Your Honor. I believe that the younger grandson was not seven at this time.

QUESTION: That doesn't answer Mr. Justice Marshall's suggestion. He is not a licensed automobile driver, is he?

MR. YOUNG: No, he is not.

QUESTION: A mother and six children would be okay?

QUESTION: Of course, I suppose --

MR. YOUNG: Yes.

QUESTION: No problem there? How about a mother and twelve?

MR. YOUNG: There would be a problem there on the square-footage ordinance.

QUESTION: Well, it just depends on the size, wouldn't it, of the building?

MR. YOUNG: Well, let me -- if the appellant and the

mother and twelve children --

QUESTION: If the woman had twelve children and a 14-room house, it would be fine, right?

MR. YOUNG: If under the ordinance this met with the square-footage, it would be fine, yes.

QUESTION: So the reason is to cut down the density and the traffic problem? Oh, incidentally, could all of those children have cars?

MR. YOUNG: I suppose if the proper age, they could.

QUESTION: Could each one of them have a Volkswagen bus? And then I am going to ask you about a truck. How much -- I mean the traffic thing --

MR. YOUNG: With regards to the Volkswagen bus, I would have to answer this on the basis of depending on whether it is classified as a truck or not. There might be some problem with regards to where they would be parked -- whether trucks or not are permitted to be parked in residential areas.

QUESTION: Certainly, Mr. Young, your traffic argument is just a factor, isn't it, it isn't the factor?

MR. YOUNG: In the instant case it is a factor, it is not the factor. Again, I would like to go back with regard to again the tax situation, with respect to the income generated to provide services for the city, the normal services, fire, police, and so forth. If we have an overcrowded condition on the basis of the city's limited income, of course, you are

going to reduce the ability of the city to properly provide services for all of the citizens of the community.

I might point out that with regards to --

QUESTION: I gather the way this would work, one father and son would have to leave in order to satisfy the ordinance, is that right, or both the grandchildren, one or the other, they would have to leave this house in order to satisfy the ordinance?

MR. YOUNG: Yes, or --

QUESTION: Now, how does that alleviate the tax burden?

MR. YOUNG: Well, Your Honor, I am talking about taking the situation where the case we have at hand and in effect -- again, I realize that it is not in the record, but in effect multiplying the situation that you get continued overcrowded conditions throughout the city of East Cleveland.

QUESTION: Well, as I understand it then, if there were nothing but a density problem, there would be no overcrowding, is that right?

MR. YOUNG: If there was nothing but a density problem, possibly.

QUESTION: In this house there would be no overcrowding? But now the way it is, the two grandchildren, there is an overcrowding, and this somehow increases the cost of police and fire and other services, is that it?

MR. YOUNG: With regards to this, I would have to submit that that is the situation because, again, I have to go back. John, Sr. initially was living elsewhere and, assuming he was employed, he was paying his taxes to another municipality, yet his son is being educated in the East Cleveland School District.

In the situation before the Court, the appellant is challenging the state interests with respect to the passage of these ordinances. However, it is submitted on behalf of the City of East Cleveland that these ordinances -- this ordinance, rather, was passed on the proper exercise of the police power that it is rationally related to the purposes for which it was enacted, therefore in order to raise the challenge the appellant has the obligation, has the burden to show by clear evidence that there is an infringement on the appellant. And I submit that the record below does not show any evidence on the part of the appellant that this is a situation, that the ordinance is not rationally related to its purpose.

In fact, this is a point that is mentioned by the Ohio Court of Appeals in affirming the decision of the trial court.

In summation, the appellee submits that the issue before this Court is whether when a city, in properly passing a municipal ordinance on this police power in the interests of the welfare, safety of its community, provides in that

provides in that ordinance means by which the appellant, if it cut harshly, could have gotten a variance, and the appellant does not make an effort to apply to the appellant route, then the appellant has first of all no standing before this Court; secondly, since there is no record to show that the appellant presented clear evidence that there has been an arbitrary -- that this ordinance is arbitrary, the Court should sustain the judgment of the Ohio Eighth Appellat District, affirmed by the Ohio Supreme Court, and we respectfully submit that this Court affirm the decision below.

QUESTION: Mr. Young, just before you sit down, you made a point -- and I asked the question before -- about the availability of appeal to the other side, she could have asked for a variance. Doesn't that work both ways? Why couldn't the City of East Cleveland, when they found out the facts, and they don't seem very extreme, why couldn't they have withheld prosecution here? Why should the burden be on them when you have a situation like this, of trying to get a seven-year-old boy out of a house?

MR. YOUNG: Well, with regards to -- first of all, the facts, I don't know the facts available to the housing inspector at the time of the citation.

QUESTION: But they surely were when the -- at the time of trial, weren't they?

MR. YOUNG: At the trial, Your Honor, at the time of

the trial, the appellant simply stipulated that these five individuals were living there and filed a motion to dismiss on constitutional grounds.

QUESTION: There is no evidence taken at the trial?

MR. YOUNG: After they made that stipulation, there was no further evidence taken. And since there was no application to the Board of Zoning Appeals, I don't know whether the -- there was no application made, there might have been a denial and it may have been granted, I really don't know in this instance because there was no application made to the Board of Zoning Appeals in this respect.

QUESTION: I thought you said in your brief that in your experience you were sure it would be granted or did I read you wrong?

MR. YOUNG: I said possibly. I said possibly granted, would probably with some limitations.

QUESTION: Probably. Possibly, you said, and would probably have been granted -- probably. But you said it would probably be granted, didn't you? Well, would it or would it not?

MR. YOUNG: I really don't --

QUESTION: You really don't know?

MR. YOUNG: -- know at this point, until the facts were presented to the Board of Zoning Appeals.

QUESTION: But as of now you don't know?

MR. YOUNG: No, I can't give any guarantee, no.

Thank you very much.

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

Do you have anything further, Mr. Stege?

MR. STEGE: I have nothing further at this time. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 2:32 o'clock p.m., the case in the above-entitled matter was submitted.]

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