

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CITY OF CUYAHOGA FALLS, :

4 OHIO, ET AL., :

5 Petitioners :

6 v. : No. 01-1269

7 BUCKEYE COMMUNITY HOPE :

8 FOUNDATION, ET AL. :

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10 Washington, D.C.

11 Tuesday, January 21, 2003

12 The above-entitled matter came on for oral

13 argument before the Supreme Court of the United States at

14 11:03 a.m.

15 APPEARANCES:

16 GLEN D. NAGER, ESQ., Washington, D.C.; on behalf of the

17 Petitioners.

18 DAVID B. SALMONS, ESQ., Assistant to the Solicitor

19 General, Department of Justice, Washington, D.C.; on

20 behalf of the United States, as amicus curiae, in

21 support of Petitioners.

22 EDWARD G. KRAMER, ESQ., Cleveland, Ohio; on behalf of the

23 Respondents.

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

2 (11:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 01-1269, the City of Cuyahoga Falls versus
5 Buckeye Community Hope Foundation.

6 Mr. Nager.

7 ORAL ARGUMENT OF GLEN D. NAGER

8 ON BEHALF OF THE PETITIONERS

9 MR. NAGER: Thank you, Mr. Chief Justice, and
10 may it please the Court:

11 In this case, the Court of Appeals for the Sixth
12 Circuit held that a municipality may be held liable in
13 damages because it withheld the issuance of building
14 permits for a proposed housing project pending a citizen-
15 initiated referendum election on the ordinance authorizing
16 that housing project.

17 In so doing, the Sixth Circuit failed to
18 appreciate that the municipality's actions here were all
19 taken pursuant to pre-existing procedures set forth in the
20 city's charter, procedures that the city followed to the
21 letter. As non-discretionary acts taken in the normal
22 prescribed course, the municipality's actions here were
23 necessarily rational ones taken without discriminatory
24 motives and without treating the respondents here any
25 differently than any other beneficiary of an ordinance

1 would have been treated that was subject to a petition.
2 And for that reason, we respectfully suggest that the
3 Sixth Circuit --

4 QUESTION: There's no evidence of some kind of
5 misbehavior on the part of the city other than the bare
6 claim that they refused to issue the permit during the
7 process of the referendum?

8 MR. NAGER: That's correct, Justice O'Connor.
9 Every official action of the city here favored the
10 respondents. The city planning commission recommended
11 approval of the housing project and of the site plan
12 authorizing the housing project. The city council voted
13 in favor of the housing project.

14 QUESTION: Wasn't there some evidence that some
15 city official was -- sought to delay the proceedings for a
16 period of time, not -- not officially. It didn't take --
17 pass any resolution, but didn't they oppose immediate
18 action on a couple of occasions?

19 MR. NAGER: Justice Stevens, prior to the city
20 council voting on the -- the ordinance to approve the
21 project, there was a lot of public debate, and in that
22 public debate, there were city officials who said we --
23 we need to take time to hear the citizens -- citizens'
24 concerns. We need to take time to understand what we're
25 doing, and there were even comments, we should fight this.

1 We should fight this and delay this.

2 QUESTION: Supposing one of those comments said
3 we should fight this because we don't want
4 African-Americans to -- to move where they're going to
5 move, would that make any difference?

6 MR. NAGER: It -- it could make a difference.

7 QUESTION: Because even -- if that had happened,
8 it would still be true, as you pointed out earlier, that
9 every official action taken by the city was favorable to
10 the -- your opponents.

11 MR. NAGER: Well, if -- if the actions were
12 taken favorably to the opponents, it couldn't make a
13 difference because at that point the alleged statement
14 wouldn't have any connection to an adverse action.
15 That -- that's the important point in this case because in
16 order to have discrimination, either in violation of the
17 Equal Protection Clause, or in violation of the Fair
18 Housing Act, you not only have to have a motive, you have
19 to have adverse differential treatment by the person --

20 QUESTION: So what -- I'm trying to be sure
21 I understand. I -- I think I understand your position.
22 Is -- your position is that even if this ambiguous
23 evidence was -- clearly showed racial hostility and that's
24 why we're trying to delay it, there still would be no
25 cause of action because everything the city did was in

1 favor of -- officially was in favor of --

2 MR. NAGER: That -- that's correct.

3 QUESTION: So that really, we don't have to try
4 and draw -- to decide whether or not inferences of
5 improper motive can be drawn from those statements.

6 MR. NAGER: That's correct because in this case,
7 all of the city's actions either favored the project or
8 non-discretionary actions.

9 QUESTION: Now, what if the city had taken the
10 same official action that it took in this case, and every
11 official action either favored or was at least neutral,
12 and yet the city officials went out and -- and whipped up,
13 in effect, anti-black sentiment and -- and urged the
14 filing of the application for the referendum, would the
15 answer -- would the -- would the result be the same,
16 that -- that there would be no way that the city could be
17 held liable?

18 MR. NAGER: The short answer to that question is
19 the answer would be the same. Of course, if the
20 referendum were enacted, it went to a vote and it were put
21 into effect and it was racially motivated, that action
22 would be subject to challenge because that would be, in
23 fact, an action of the city because they would have
24 adopted, under your hypothetical facts, an ordinance that
25 could allegedly have a discriminatory intent.

1 QUESTION: But isn't the -- isn't the delay
2 simply a -- even the delay in -- in an instance in which
3 the ordinance is defeated simply a lesser degree of
4 damage, but which would, nonetheless, be -- be subject to
5 a claim?

6 MR. NAGER: And the answer to that is no. And
7 the answer to that is no because the delay that happened
8 here is the delay that would happen with regard to any
9 referendum that was subject to a referendum petition. And
10 the record here is quite clear --

11 QUESTION: Well, it -- there's -- there's no
12 question that it -- it would, but is -- is the -- is
13 either the -- the statute in question here or the Equal
14 Protection Clause blind to an obvious reason for the
15 delay? In other words, I -- I quite agree. We start with
16 the assumption that mere delay in governmental processes
17 does not give rise to a cause of action, but when the
18 delay is induced by city officials for a racially
19 discriminatory reason, aren't we then in a different case?

20 MR. NAGER: Well, it's a different case, but
21 it's not different outcome here, and the --

22 QUESTION: Why shouldn't it be a different
23 outcome?

24 MR. NAGER: Well, because under Monell and its
25 progeny, as well as this Court's State action cases, the

1 municipality can be held liable only in damages only if
2 the city -- an official with the authority to authorize it
3 has authorized the discriminatory action that you're
4 talking about. In this specific instance, the -- every
5 official action favored the project, and the delay that
6 you're talking about was authorized by a city charter
7 created 30 years before the fact.

8 QUESTION: Well, the mechanism -- the mechanism
9 is provided by the city charter.

10 I guess what I'm getting at is that if city
11 officials -- let's just say the mayor, for the sake of
12 argument, or the mayor and the city council -- in effect,
13 do not establish a policy in the sense that they say, we
14 want to stop black housing projects, but they follow a
15 policy of trying to make it difficult for those housing
16 projects to be approved, and one way they do that is by
17 spurring the -- the request for referendums. Assuming
18 we're going to apply the Monell rule here, isn't that a
19 policy position of the city even within the meaning of
20 Monell?

21 MR. NAGER: No, because they wouldn't have the
22 authority to do that. There's a difference between six
23 city council members voting at a city council meeting as
24 to what the actions of the city are, and six city council
25 members going out on their own in their private capacities

1 and expressing their views as citizens, and -- and trying
2 to get other citizens to agree with them as to their
3 private views.

4 QUESTION: But not --

5 QUESTION: Well, supposing, Mr. Nager, that you
6 have, say, a -- say, a seven-member city council and it's
7 confronted with a project like this. And one of the seven
8 members of the city council says that, you know, he's
9 opposed to this because he doesn't want African-Americans
10 moving into this area. The other six members of the city
11 council simply treat the thing on the merits. Does the
12 action of this one individual taint the whole action of
13 the city?

14 MR. NAGER: Well, it shouldn't. Under Arlington
15 Heights and this Court's cases, the city could be held
16 liable only if those authorized, in this instance a
17 majority of the city council, had the -- the
18 discriminatory --

19 QUESTION: What if the vote was four to three?

20 MR. NAGER: Four -- if it was four to three in
21 favor of the housing project --

22 QUESTION: No. Against the housing project.

23 MR. NAGER: If -- if they had discretionary
24 power, and four of them exercised their discretionary
25 power against the housing project on the basis of racially

1 discriminatory --

2 QUESTION: Well, only one had the racially
3 discriminatory motive, one of the four.

4 MR. NAGER: Well --

5 QUESTION: The other three did it on the merits.

6 MR. NAGER: I think there, there would be a good
7 argument that they would still -- that -- that the
8 plaintiffs would have -- would have satisfied their burden
9 of showing but for the racially discriminatory motive,
10 that the housing project would have been approved. So
11 in -- in that hypothetical, which is not the facts of this
12 case, of course, they -- they would have had sufficient
13 evidence to state a claim.

14 QUESTION: And your difference in the two cases
15 is, one, you have an official action taken. We deny the
16 project. Here you don't have that.

17 But suppose there had been, to take the clearest
18 case, a tape of a meeting. The mayor, the legal director,
19 the head of the city council, they all got together and
20 say, we want to kill this project and we know that the
21 most effective way to do that is through this referendum
22 because the people won't like it and they'll vote against
23 it. So they have a deliberate plan to string the thing
24 out and then, as the last act, instigate a referendum.

25 And as I take it, your argument -- you would --

1 you're saying even if you have that scenario, there would
2 still be no municipal liability. Am I correct?

3 MR. NAGER: That's correct, Justice Ginsburg.
4 It's obviously our hardest hypothetical, but it's also the
5 same answer. And it -- and one of the reasons it's the
6 same answer is because, remember, under your hypothetical,
7 the notion is that if these city officials, not acting in
8 their -- exercising their official powers, but acting in
9 the role any citizen can, can go out and organize the
10 citizens of the community acting in their private
11 capacities to get a referendum on the ballot and vote
12 against it. Of course, that's what democracy is about.
13 It's about politicians taking on causes on behalf of
14 people --

15 QUESTION: Mr. Nager, I think -- I understand
16 your argument as it applies to the city, but am I correct
17 that the mayor is an individual defendant in this case?

18 MR. NAGER: He was. He was granted summary
19 judgment by the district court on the ground that there
20 was no evidence that he in his individual capacity had
21 committed any of the acts that were alleged against him,
22 and that he had not organized the campaign --

23 QUESTION: But -- but wasn't that reversed by
24 the Sixth Circuit?

25 MR. NAGER: No, it wasn't. That issue was not

1 taken up to the Sixth Circuit.

2 QUESTION: Why is he a petitioner then?

3 MR. NAGER: He's only here in his official
4 capacity. He was sued in both his individual capacity and
5 in his official capacity.

6 QUESTION: I see. So there's no individual
7 liability at stake here at all.

8 MR. NAGER: No, not -- not --

9 QUESTION: Is -- is the --

10 QUESTION: I'd like to ask a question, which is
11 these have been very interesting hypotheticals, but are
12 you going to have time to talk about the questions that we
13 granted cert on?

14 MR. NAGER: Well --

15 QUESTION: And I'm interested -- what we have in
16 front of us now at this point as issues.

17 MR. NAGER: The issue that you have before us is
18 the Sixth Circuit's judgment is -- is -- because under the
19 Sixth Circuit's view there was allegedly evidence of
20 racial bias among the citizens that the municipality could
21 be -- somehow be held liable for that. And that's wrong
22 for two reasons.

23 One, it's wrong because the municipality itself
24 has to have the discriminatory animus, and there's no --
25 not only no evidence of that here, it couldn't have been

1 the case since they -- of course, all of their actions
2 were voting in favor of it, or treating the action
3 neutrally.

4 Secondly --

5 QUESTION: Arguably the discriminatory animus on
6 the part of the citizens could invalidate the referendum.

7 MR. NAGER: If it was voted on and put into
8 effect, the alleged animus --

9 QUESTION: No. Even -- even if it wasn't put
10 into effect. It -- if there were that animus, it -- it
11 could -- by our past cases anyway, if it could be shown,
12 it would -- it would invalidate the referendum. But your
13 point is that whether the referendum was valid or invalid,
14 the municipality would have had to stay the project. It
15 wasn't up to the municipality to make the judgment.

16 MR. NAGER: That -- that is correct, Justice
17 Scalia. I -- I do want to make clear that under this
18 Court's cases, the Court has never said that -- that the
19 First Amendment activity of a petition itself is subject
20 to an equal protection challenge.

21 What the Court's cases say is if there is a
22 vote, either on a bill by elected representatives, or on a
23 petition by citizens, that the end product of that, which
24 becomes a law, can be challenged, and that private animus
25 in that -- is contextual evidence for whether or not the

1 people who voted on that final product were themselves
2 motivated by discriminatory animus.

3 QUESTION: You're -- you're talking about people
4 who vote in a referendum?

5 MR. NAGER: Well, the -- the question is if
6 there's a final product, was the -- the final law, was
7 that racially motivated --

8 QUESTION: But we -- we've never said -- we've
9 never tried to examine the motives of -- of the citizenry
10 who vote in a referendum on that sort of question, have
11 we?

12 MR. NAGER: No, you haven't, Mr. Chief Justice.
13 What the Court has said is, is that intent of the law is
14 the key test, and what the Court has said in Arlington
15 Heights is because you can't look directly at the motives
16 of the people who voted on it, whether they be legislators
17 protected by the Speech and Debate Clause or citizens
18 protected by the -- the secrecy of the ballot in this
19 country, they look at other indicia to determine their
20 intent.

21 QUESTION: But Arlington Heights was a city
22 council, or --

23 MR. NAGER: That's correct.

24 QUESTION: -- was it not?

25 MR. NAGER: That's correct.

1 QUESTION: What -- what is --

2 QUESTION: And here the referendum failed.

3 MR. NAGER: That -- well, the -- we don't know
4 the outcome because the respondents asked for the final
5 vote not to be certified.

6 But what is important here, I think, to address
7 the issue in this case, Justice O'Connor, is that the --
8 the position of the Sixth Circuit here is that the
9 municipality is somehow supposed to inquire behind a
10 facially neutral referendum petition and determine the
11 intent and motives of people engaged in the First
12 Amendment.

13 QUESTION: Did -- did the city have discretion
14 here to go ahead and issue building permits while the
15 referendum process was pending?

16 MR. NAGER: No, it didn't. Once the referendum
17 petition was filed, under the city charter, the -- at that
18 point, all the city council could do is repeal its own
19 ordinance or submit the ordinance to a vote of the voters.

20 QUESTION: So what is the claim in your opinion
21 that we are reviewing? I mean, I want it to be specific.
22 The Sixth Circuit, insofar as its -- insofar as we're
23 concerned, we're interested in what the lower courts held.

24 MR. NAGER: Correct.

25 QUESTION: What, in your opinion, is the claim

1 that they're reviewing? Is the claim that these three
2 individuals, the mayor, the clerk, and an engineer, acting
3 in their official capacities, violated the Fourteenth
4 Amendment or other parts of the Constitution when they
5 refused to issue the permit despite the petition and
6 despite the provision? Is that the claim? Or is the
7 claim they did something else as well? They stirred up
8 the petition people, or they did some other thing.

9 MR. NAGER: Well, the -- the Sixth Circuit said
10 it was the former.

11 QUESTION: Only the first.

12 MR. NAGER: Correct. Respondents in their brief
13 have abandoned what the Sixth Circuit held and which we
14 petitioned and the Court granted cert to review to argue a
15 completely different theory.

16 QUESTION: May I ask you, Mr. Nager, is the
17 complaint in the record? I couldn't find it. In the --
18 in the papers here?

19 MR. NAGER: I don't believe that it is. No, I
20 don't believe -- I mean, it's -- it's obviously in the
21 record of the case. It wasn't reprinted in the -- in the
22 joint appendix.

23 Unless the Court has further questions, I'll
24 reserve the remainder of --

25 QUESTION: Well, I -- I do. Weren't -- weren't

1 there some other questions here, like didn't we grant cert
2 on three questions --

3 MR. NAGER: Well, you did --

4 QUESTION: Have they given up on the second one?

5 MR. NAGER: Well, they've abandoned their claim
6 that they litigated and prevailed on in the Sixth Circuit,
7 that they could proceed on the disparate impact theory.

8 QUESTION: And the last is a due process?

9 MR. NAGER: A -- a substantive due process
10 claim.

11 QUESTION: Substantive due process?

12 Yes.

13 MR. NAGER: And the Sixth Circuit held that
14 there was a triable question of fact as to whether or not
15 the city had acted rationally in proceeding forward with
16 its referendum petition. And we would say that the simple
17 answer to that was at that time, the city charter required
18 the city officials to do so and that judgment was adopted
19 by three courts until the Ohio Supreme Court several years
20 later reversed itself on what the meaning of the Ohio
21 constitution was. But the subsequent reversal of this
22 highest court's evaluation of what the law was can't
23 change the rationality of the acts at the time that they
24 were taken.

25 QUESTION: Very well, Mr. Nager.

1 Mr. Salmons, we'll hear from you.

2 ORAL ARGUMENT OF DAVID B. SALMONS

3 ON BEHALF OF THE UNITED STATES,

4 AS AMICUS CURIAE, IN SUPPORT OF PETITIONERS

5 MR. SALMONS: Mr. Chief Justice, and may it
6 please the Court:

7 Respondents challenge only the delay caused by
8 the city charter's neutral, longstanding provisions
9 facilitating the orderly processing of citizen-initiated
10 referenda to review ordinances passed by the city council.
11 Such a challenge requires courts to balance the vital
12 First Amendment right implicated in the referendum process
13 with the equally valid goals of equal protection and fair
14 housing.

15 In this case, that balance is clear. The city's
16 actions in giving effect to the properly filed referendum
17 petition cannot give rise to liability under the Fair
18 Housing Act or the Equal Protection Clause. It is
19 undisputed that the referendum petition was facially
20 neutral and that numerous reasonable, non-racial grounds
21 supported it.

22 It is also undisputed that the city's process
23 for handling such petitions was longstanding and
24 race-neutral. Under any conceivable standard, respondents
25 have failed to provide any evidence that the referendum

1 process was tainted with discriminatory motive either on
2 the part of the city officials or the petition organizers.

3 QUESTION: Suppose it was. I mean, I don't
4 understand your brief from this point of view. You were
5 talking about an antitrust analogy. I mean, imagine a
6 plaintiff in an antitrust case deliberately, to ruin his
7 competitor -- and no one doubts it -- files a case in the
8 court. Now, no matter how evil that person was, I can't
9 imagine or I haven't heard to date under the antitrust law
10 or any other law somebody who would sue the clerk of the
11 court because he docketed the -- he docketed the -- the
12 claim -- he docketed the complaint. And according to what
13 you've said, that's what's at issue here, that they're --
14 they're simply carry -- now, I -- I need some explanation.
15 I'm bringing it up because I'm quite honestly confused
16 about that part --

17 MR. SALMONS: Yes -- yes, Your Honor. Yes, Your
18 Honor. To be sure, the analogy to the Noerr-Pennington
19 line of cases is not perfect in this case, but it -- it --

20 QUESTION: I -- I bring it up because I'm
21 confused as to how in your mind you see this thing
22 working. I -- I mean, I suppose if a city has a totally
23 evil, horrible petition for a -- for a -- for a
24 referendum, a person still could make it and the person
25 who's in charge of carrying out the -- the non -- the

1 ministerial duties himself would not be sued even if that
2 person himself was evil. So -- so what is the -- what --
3 what -- how does this all work in your mind?

4 MR. SALMONS: Yes, Your Honor. The -- the
5 approach that we recommend in our brief, Your Honor, is
6 that the Court undertake the question as to whether the
7 petitioning at issue was genuine or whether it was a sham.
8 That's the same type of analysis the Court has
9 undertaken --

10 QUESTION: Assume it's a sham. It -- they're
11 evil. They're horrible.

12 MR. SALMONS: Yes.

13 QUESTION: They're terrible. I would think even
14 an evil, horrible, terrible person has the right to go to
15 the legislature and petition and that the clerks who are
16 to file that petition are themselves clerks, and they're
17 to do it even if they're evil themselves.

18 MR. SALMONS: That is correct, Your Honor.
19 I think there are two ways in which the city could
20 potentially be held liable. I think this is not a case
21 where the Court has to decide whether the city could ever
22 be held liable based on the discriminatory motives of the
23 referendum petitioners because it's clear in this case
24 that the petitioning was genuine and this isn't a sham.

25 QUESTION: But what -- what --

1 MR. SALMONS: But in the situation where you do
2 have a sham --

3 QUESTION: What -- what do you mean by saying
4 the petition was genuine as opposed to a sham in these --
5 in this context?

6 MR. SALMONS: I -- I think genuine here means
7 the same it means in -- in the other contexts in which the
8 Court has used the sham doctrine, namely that it was about
9 the First Amendment activity. The -- the process that --
10 that the city here --

11 QUESTION: I just -- this is such a strange
12 argument. Why wouldn't we wait and see if some action was
13 taken by means of a referendum, passed and became law?
14 Then wouldn't we be able to say that constitutes State
15 action at that point and you would subject it,
16 conceivably, to an equal protection analysis if the issue
17 is raised, and apply rational basis or whatever it is?
18 I don't understand why you ever get to this sham action
19 and Noerr-Pennington.

20 MR. SALMONS: Certainly, Your Honor, it -- in
21 the event that you have a referendum that's actually
22 enacted into law, the Court would examine it in the way
23 that -- that you have articulated.

24 We thought it was important to point out to the
25 Court that this process by which a city ordinance is, if

1 you will, stayed pending resolution of the referendum vote
2 is a traditional and important part of the process for
3 referendums, but it is also a process that can give rise
4 to abuse if you have a petition that is a sham. It's not
5 about the First Amendment process at all. It's simply --

6 QUESTION: I don't --

7 MR. SALMONS: -- taking advantage of the delay.

8 QUESTION: I don't know what you mean by abuse
9 in a situation like this. I mean, presumably anybody has
10 a right to petition, and you know, the fact that maybe
11 they won't get the necessary votes surely doesn't make it
12 a sham.

13 MR. SALMONS: That -- that is certainly true,
14 Your Honor. But -- but I think there are -- to -- to get
15 back to the original question, what I'm trying to --

16 QUESTION: The reason I'm worried, in about
17 2 minutes from now I'm going to hear the other side get
18 up, and they're going to say this is a sham. Okay?
19 I suspect. Now, that's why I want to understand the
20 relevance of this.

21 And I -- I come into this thinking if it's the
22 Nazis, the -- the most terrible racists that steal, the
23 most terrible people in the world, if they're Americans,
24 they can come in and they can vote and they can go to
25 their legislature and they can put anything they want on

1 the ballot. And the -- the people who are mechanically in
2 charge of seeing that those things are voted on, that's
3 their job, they should do it, and if those are evil and
4 terrible and contrary to the Constitution, the courts will
5 strike them down when they get passed.

6 Now, what's -- now, you explain how your thing
7 fits into that.

8 MR. SALMONS: Yes, Your Honor. First of all,
9 let me just say that there's -- there would be -- need to
10 be both an objective and a subjective component to the
11 sham standard as there is in other contexts.

12 But to try and address the question that you
13 originally posed, it does seem to us that there are at
14 least two ways in which the city can be held liable in the
15 event that you have sham petitioning. One would be that
16 if the city officials themselves were part of the sham,
17 and the other would be --

18 QUESTION: Well, wait a -- what is --

19 QUESTION: We're trying to find out what is a
20 sham. That's -- that's our basic problem. I don't
21 understand what is a sham. In the antitrust context --

22 QUESTION: You -- you haven't told us.

23 QUESTION: In the antitrust context, I
24 understand it because -- because there is the law, and --
25 and you come up with a phony -- a phony law, you know, you

1 can say it's a sham. But there's no law about
2 referendums. You could have a referendum on anything you
3 like. How can you have a wrong referendum --

4 MR. SALMONS: Well, Your Honor --

5 QUESTION: -- and thus a sham referendum? It
6 doesn't make any sense to me.

7 MR. SALMONS: Your Honor, this Court's sham
8 analysis has to do with whether or not it's actually about
9 the First Amendment activity or it's just about an effort,
10 in this case, to take advantage of the delay to interfere
11 with someone's housing rights. We think that same
12 analysis can apply here by inquiring as to whether, first
13 of all, the -- the referendum petition is objectively
14 baseless. Is there any way that that petition could
15 have -- be enacted into law and enforced?

16 If, for example, you had a petition that said no
17 minorities shall live in the City of Cuyahoga Falls,
18 clearly that's a referendum that could never go into
19 effect and never be enforced, and therefore, it may be
20 strong evidence that the process here is not about
21 changing a law of the city --

22 QUESTION: So the clerk in that case -- the
23 clerk of the court who says I'm putting this on the
24 ballot -- he's violated the law in putting it on the
25 ballot? Of course, if it's passed, it's totally

1 unconstitutional. But you're saying that the clerks
2 shouldn't even put that on the ballot? I mean, that would
3 be quite a novel proposition to me.

4 MR. SALMONS: Your Honor, I -- I'm not
5 necessarily saying that the clerk shouldn't put that on
6 the ballot, but that would be one part of the analysis in
7 determining whether or not the process was being abused
8 and it was just a sham.

9 QUESTION: Well, isn't -- wouldn't it be a
10 sham -- let me just put this on the table. As I
11 understand it, the Ohio Supreme Court said that this was
12 not a legal referendum when it got all through with
13 things. And if everybody had known before the -- the case
14 started that it was an illegal referendum, that would have
15 been a sham, wouldn't it?

16 MR. SALMONS: I -- I think that very well may be
17 strong evidence that it was a sham. This was about an
18 attempt to abuse the process. It wasn't about any
19 protected First Amendment activity. And -- and in that
20 situation I think there is, in -- in addition to the
21 possibility, although I think perhaps unlikely that you
22 can hold the city vicariously liable based on the motives
23 of the citizens, I think that is a difficult question as
24 to whether the actions of -- of the referendum -- the
25 petition signers, the 10 percent who signed the petition

1 and file it, whether that action is the official action of
2 the city with regard to the petition just as the action of
3 the voters at the referendum vote is an action of the city
4 for which the city can held liable. This Court need not
5 address that in this case.

6 QUESTION: May I ask your view on the
7 hypothetical I asked to the other lawyer? Supposing it
8 was perfectly clear that the mayor and everybody else in
9 this used the referendum as a method of delaying a
10 granting of the permit and that they did so for racially
11 motivated reasons, would there be any -- any liability on
12 anybody?

13 MR. SALMONS: Potentially, Your Honor. I think,
14 again, the -- the way in which the analysis would work is
15 the Court would need to inquire as to whether the
16 petitioning was genuine in the sense that there was a
17 genuine effort to try and change the city's ordinance.
18 And if so, then the First Amendment would provide
19 immunity.

20 QUESTION: Well, there was, but they -- they
21 figured it was going to lose in the long run, but
22 nevertheless, let's assume they wanted to delay things for
23 60, 90 days, whatever it might be, because they wanted to
24 delay it on -- on, you know, this -- this project.

25 MR. SALMONS: Yes, Your Honor.

1 QUESTION: If it -- if it were clear because
2 this case is on summary judgment, so really don't know
3 what the facts are --

4 MR. SALMONS: Well, but --

5 QUESTION: -- but if there were clear evidence
6 that the mayor and everybody else act up in a racially
7 motivated reason, would there be liability in that
8 situation?

9 MR. SALMONS: I -- I think you'd need to examine
10 both the motives in -- in your hypothetical not only of
11 the city officials, but also of -- of the petition
12 signers.

13 QUESTION: Everybody. Everybody.

14 QUESTION: Are you talking about personal
15 liability or official liability?

16 QUESTION: Liability --

17 MR. SALMONS: I'm talking about the liability of
18 the city, Your Honor.

19 QUESTION: Okay. So you're talking about
20 liability --

21 QUESTION: I'm assuming everybody who opposed
22 the project was racially motivated and that could be
23 demonstrated with tape recorder.

24 MR. SALMONS: I guess the short answer, Your
25 Honor, is that even people with racial motives have the

1 right to petition their government to change the law.
2 And -- but if they -- what no one has the right to do is
3 abuse the process in order to interfere with someone's
4 fair housing and equal protection rights.

5 QUESTION: So -- so your answer would be no
6 liability in that case.

7 MR. SALMONS: If it was genuine petitioning,
8 that is correct.

9 Thank you, Your Honor.

10 QUESTION: Thank you, Mr. Salmons.

11 Mr. Kramer, we'll hear from you.

12 ORAL ARGUMENT OF EDWARD G. KRAMER

13 ON BEHALF OF THE RESPONDENTS

14 QUESTION: Mr. Kramer, opposing counsel says
15 that you have, in effect, abandoned the second question
16 presented, the disparate impact question. Is that correct
17 or is it not correct?

18 MR. KRAMER: It's correct, Mr. Chief Justice.
19 We -- we have waived that claim that had been certified
20 by -- by this Court.

21 Mr. Chief Justice, may it please the Court:

22 The city and the Solicitor General has tried to
23 complicate what really is a very simple case. What is the
24 injury that the plaintiff is complaining about? The
25 plaintiffs have been denied unlawfully their site plan and

1 its benefits, including a building permit. City conduct.
2 Nothing to do with referendums. Nothing to do with First
3 Amendment rights.

4 The issues of liability in this case, which the
5 Sixth Circuit took up, was did the city and its officers
6 act out of discriminatory motive by delaying this housing
7 project and refusing to give effect to the site plan
8 ordinance to appease racial and anti-family prejudices in
9 violation of the Equal Protection Clause --

10 QUESTION: How could they do that if they had no
11 choice? I mean, if the law told them you have to stop the
12 project once the referendum is filed, even if in -- in
13 their heart and -- heart of hearts they were delighted for
14 racial reasons that this was the case, nonetheless they
15 had no choice.

16 MR. KRAMER: We believe that they did have a
17 choice and we cite cases to the Court from the Ohio
18 Supreme Court on page 25 of our brief that indicates that
19 the petitions did not have to be certified by the -- the
20 court -- by the city.

21 QUESTION: But didn't the lower -- the lower
22 courts didn't adopt that proposition, did they?

23 MR. KRAMER: The lower courts weren't asked that
24 question, Your Honor, because we're really talking about
25 whether or not the -- there was an official conduct by the

1 city.

2 QUESTION: So didn't they go on the basis that
3 the -- that the city officials' action was mandatory? The
4 lower courts.

5 MR. KRAMER: As I said, I don't really believe
6 the Sixth Circuit approached the -- the case from -- from
7 that particular issue.

8 QUESTION: So it didn't --

9 MR. KRAMER: There was discretion, we believe,
10 and we certainly provided evidence. And again, as -- as
11 was indicated by the Court to the Solicitor General, this
12 is on summary judgment. For example, in the record, there
13 is an affidavit from the law director for the Village of
14 Orange that we filed with our brief in opposing summary
15 judgment that indicated that there was discretion not to
16 certify the referendum.

17 QUESTION: Well, but that -- that's a question
18 of Ohio law, I take it?

19 MR. KRAMER: That's correct.

20 QUESTION: And the way you sought to prove it
21 was to get an affidavit from the law director of some
22 suburb of Cleveland?

23 MR. KRAMER: As one element of proof, we
24 indicated that that showed that there was discretion. But
25 the Ohio case law indicates there are instances where, if

1 the subject was inappropriate -- and let's remember the
2 Ohio Supreme Court ruled that this was not an appropriate
3 subject for a referendum.

4 QUESTION: Would it be --

5 QUESTION: But it rules that way many years --
6 many years after this case was -- went to litigation, did
7 it not?

8 MR. KRAMER: Yes, Your Honor.

9 QUESTION: And it had nothing to do with whether
10 it was racist, sexist. It -- it had to do with was it
11 administrative or legislative.

12 MR. KRAMER: That's correct, and it also only
13 had --

14 QUESTION: Do you have -- do you have any -- do
15 you have any authority to say that there is discretion to
16 reject a petition that is properly legislative?

17 MR. KRAMER: Well, the -- yes, Justice Ginsburg.

18 QUESTION: Suppose -- suppose you had a
19 legislative proposal that members of a certain race will
20 never be included in any kind of an equal opportunity law.
21 Suppose you had -- that was the referendum. Is there any
22 authority that says that under Ohio law, that couldn't be
23 put on the ballot?

24 MR. KRAMER: I don't know of Ohio law, but
25 certainly this Court's decision in Hunter versus Erickson

1 dealing with an Ohio referendum indicates that that type
2 of referendum is unconstitutional.

3 QUESTION: Well now, I don't believe that's a
4 correct statement of the holding in Hunter. I thought in
5 Hunter, this Court said that a municipality cannot make
6 racial laws subject to referendum and no other laws, which
7 is quite a different proposition from what you suggest.

8 MR. KRAMER: Well, with -- Mr. Chief Justice, we
9 are talking about the -- this Court's jurisprudence that
10 deals with the -- simply because it's a referendum, if
11 the legislature could not do this, pass a law that says,
12 for example, that African-Americans cannot own property,
13 like in Buchanan versus Warley --

14 QUESTION: If a legislature could do that,
15 would -- would we enjoin a legislature from passing an
16 unconstitutional law?

17 MR. KRAMER: And -- no.

18 QUESTION: The Federal -- the Federal Congress
19 passes unconstitutional laws all the time.

20 (Laughter.)

21 QUESTION: We've -- we've never been asked to
22 enjoin them.

23 (Laughter.)

24 MR. KRAMER: And -- you're correct, Justice
25 Scalia. And we have not asked for that.

1 QUESTION: So there's a difference between
2 whether the product is unconstitutional and whether the
3 doing of it is unconstitutional. And the doing of an
4 unconstitutional referendum, as far as I know, is not
5 unconstitutional. You are entitled to pass an
6 unconstitutional referendum. We will ignore it, however.

7 MR. KRAMER: And it may subject, if there is
8 direct injury, damages to my client, and that is all we
9 have before this case.

10 QUESTION: What -- but wait. The -- the project
11 is built. Right?

12 MR. KRAMER: That's correct.

13 QUESTION: So -- so you've got your project.
14 And now what you're saying is that they violated the
15 Constitution in not giving you the permit quicker. And
16 they -- am I right?

17 MR. KRAMER: That's correct.

18 QUESTION: All right.

19 And they come back and they say, how could we
20 give it to you quicker? There were petitioners who
21 they -- a petition and the law prevents us from giving it
22 to you quicker because once a petition's on the ballot,
23 the law says we can't give it to you. Now, what's your
24 response to that?

25 MR. KRAMER: The response is that it was the

1 city's actions -- we believe the evidence that we've
2 proffered to -- in the summary judgment shows that they
3 took this action as a public-private partnership. The
4 mayor, city councilpeople looked for -- as they -- one
5 city councilman said, any legal shred to be able to reject
6 this development.

7 QUESTION: No. But explain to me a little bit
8 better what -- their response is the reason we didn't give
9 you the permit faster is because here's the provision of
10 the law. It says once a petition for referendum is filed,
11 and it says whether it's legal or illegal, we have to
12 delay this. Now, your response to that is -- they say,
13 what should we have done that we didn't do once that
14 petition was filed. And your response is?

15 MR. KRAMER: What should be done in a case like
16 this is that there is an injury to my client. The injury,
17 whether it was discretionary or non-discretionary, is --
18 is not the -- the question. What was the purpose behind
19 denying the building permit? And under Arlington Heights,
20 this Court has indicated one of the things that a court
21 can look at as competent evidence is did the city
22 officials take action to appease racial bias. Even if it
23 was a nondiscretionary act, if the effect of that was to
24 permit private bias, they've committed a violation.

25 QUESTION: That's quite a proposition. If -- if

1 I have a -- you know, I'm -- I'm a racist and it really
2 makes me happy that this act, which I'm compelled to do by
3 law, hurts someone of a certain race, that renders that
4 act invalid even though I'm compelled to do it by law?
5 I don't think so.

6 MR. KRAMER: What we're saying is that it may
7 not be invalid, but it may cause liability. It can be a
8 legal act --

9 QUESTION: All right. So what I'm hearing you
10 saying -- what I'm hearing you saying in response to my
11 question is, I'm the mayor and the other, and I say, what
12 do you want me to do? The statute said, don't give you
13 the permit because the petition has been filed. What
14 could I have done? And your answer to that basically
15 seems to be, nothing. You couldn't have done anything.
16 We agree. But the petition itself was an evil petition.

17 QUESTION: Right.

18 QUESTION: I mean evil being quotes for what we
19 all know is going on. All right?

20 So it's an evil petition. And therefore, when
21 you face this evil petition, even though you couldn't do
22 anything about it, you have to pay damages because the
23 reason we were delayed was because of that process. Now,
24 is that basically your argument?

25 MR. KRAMER: Yes, Justice Breyer. We're --

1 we're saying that even if it was a legal thing to do, if
2 the act of it was because of racial or anti-family bias,
3 that would be a violation of the --

4 QUESTION: And now, the reason that that bothers
5 me, of course, is because I can think of a whole range of
6 evil legislative acts, and I can think of quasi-acts that
7 I'm not sure about, and then I can think of a lot of ones
8 I like. All right. So -- so -- but I'm worried. In the
9 first category and the second category, once we got into
10 the business of paying damages, because it turns out that
11 they are evil, that would, in fact, chill the legislative
12 process, which is a democratic process. And I think
13 that's the argument they're trying to make. So I'd like
14 to get your response to that.

15 MR. KRAMER: What I would say, Justice Breyer,
16 is that the fact that there was an evil motive behind any
17 of these acts -- and by the way, the referendum is only
18 the culmination of the acts. There was a series of
19 discretionary acts. For example, the strategy of the city
20 was to do two things. One was to delay this project
21 because they knew that there was a -- a very finite period
22 of time for our little non-profit tax-exempt developer to
23 build this project or lose their financing. So they knew
24 the longer they could delay, the more likely the project
25 would die.

1 And second of all, they wanted to make the
2 project more costly. So, for example, they required,
3 before we even talked about a referendum, a barrier wall
4 to be built before even a building permit that could be
5 issued, a 6-foot earthen wall with a 5-foot fence between
6 two conforming multi-family projects.

7 QUESTION: Your client agreed to that. Your
8 client didn't make any objection to that.

9 MR. KRAMER: My client was willing to do that
10 because he was told by the city it would smooth the
11 process over. He certainly did not waive his rights.

12 And in the depositions, the planning
13 commissioner, Louis Sharpe, specifically testified the
14 reason he was demanding that was because our project was
15 going to have a large number of children. Now, under the
16 Federal Fair Housing Act, as amended in 1988, such an act
17 may well violate the protection against -- against
18 children.

19 QUESTION: You said -- but -- but, nonetheless,
20 he didn't contest it.

21 Then you say the whole object was delay. And as
22 I see this thing unfold, the big delay is during the
23 pendency of the referendum because it was at the end of
24 February when the planning commission got this. They had
25 conditions on it, but it acted on the very same day. The

1 ordinance was approved on April 1st. As things go in the
2 zoning area, from February 21st until April 1st is not a
3 very long time, is it?

4 MR. KRAMER: No, but there was three hearings
5 and there was a great deal of public opposition. And one
6 of the reasons for the --

7 QUESTION: But the delay -- as far as -- that --
8 that's not -- the delay that you're complaining about is
9 from the moment the petition was filed for the referendum
10 until when he finally got the building permits.

11 MR. KRAMER: The actual complaint that we are --
12 where we think we were injured was the building permits
13 not being provided to us. The delay goes to the amount of
14 damages we think our client has suffered. The official
15 act that we're talking about is the building permits
16 being -- not being issued. And --

17 QUESTION: But you couldn't have expected them
18 to be issued the -- the day you filed the site plan.
19 I mean, there has to be a meeting of the planning
20 commission. There has to be a meeting of the city
21 council.

22 MR. KRAMER: That's correct, and we submitted
23 our building permits after the -- the approval by the --
24 the city council.

25 What we're talking about, Your Honor, is that

1 the city's actions in denying that building permit --
2 we're -- at this stage of the proceeding, all we're
3 talking about is summary judgment. Is there sufficient
4 evidence that a trier of fact would find that the -- the
5 actual denial was racial prejudice of city officials or
6 appeasement by city officials --

7 QUESTION: Mr. Kramer, I asked your opponent,
8 but is the -- is the complaint in the papers before us,
9 do -- do you know?

10 MR. KRAMER: Your Honor, the complaint is not in
11 the appendix, but it is in the joint appendix that was
12 filed with the Sixth Circuit. You'll find that in
13 volume I on page 37 of the record. But it's -- it's the
14 Sixth Circuit joint appendix --

15 QUESTION: I see.

16 MR. KRAMER: -- which I believe this Court does
17 have.

18 QUESTION: The thing I was curious about, to
19 tell you the truth, did you include a regulatory takings
20 claim in your complaint?

21 MR. KRAMER: No, we did not.

22 QUESTION: You did not.

23 QUESTION: Mr. Kramer, would you explain to me
24 what exactly you think the relevance of the subsequent
25 referendum was? For example, do you say the relevance of

1 the subsequent referendum to your claim for delay in
2 issuing the permit simply is the evidence that it
3 furnishes of -- of racial bias ultimately on the part of
4 city officials? Or is -- is its relevance that it
5 increased the damages otherwise attributable to the day --
6 delay in the permit?

7 How exactly should we regard the referendum?
8 You -- you understand the problem that we're all having
9 with -- with it. Precisely how does it figure in your
10 claim?

11 MR. KRAMER: It's the latter, Justice Souter.
12 We're saying that the referendum, which was part of an
13 overall scheme by city officials to delay this project so
14 that it would kill it. And so the injury that we're
15 talking about from -- from the referendum deals with the
16 city officials using that as the legal shred to be able to
17 deny the building permits. And the evidence we believe
18 that we have proffered to the Court through the summary
19 judgment motion is that there was not only citizen bias,
20 which under Arlington Heights, this Court has indicated we
21 certainly can allow -- it's competent evidence that can be
22 looked at of whether or not legislators used that bias to
23 be able to take that action.

24 QUESTION: No. I -- I understand that.

25 If -- if there had been no referendum, no

1 petition had ever been filed for the referendum and none
2 had ever been held, would you still have essentially the
3 same claim, though with a different evidentiary basis?

4 MR. KRAMER: Absolutely, Justice Souter, because
5 the -- what we are complaining about is the denial of the
6 building permit. That's the injury that --

7 QUESTION: But there would have been no denial
8 of the building permit absent the referendum, there --

9 QUESTION: You could win without the referendum.

10 MR. KRAMER: That's correct.

11 QUESTION: The referendum's the worst part of
12 your case. You -- you wish there weren't a referendum.
13 Then they would have had no basis to deny.

14 MR. KRAMER: To deny in -- in this case.

15 QUESTION: No, but you -- I -- I thought your
16 claim was that -- that you would still have been delayed
17 in being issued the permits and that you would still have
18 had a claim for that. Am I -- am I wrong on that?

19 MR. KRAMER: I would say that we had some claim
20 for the time between when we submitted the request for the
21 building permits and how long it took them to be able
22 to --

23 QUESTION: And in -- in the absence of the
24 referendum, how long would that have been?

25 MR. KRAMER: That would have been a matter --

1 well, we don't know. Let me say --

2 QUESTION: Why don't you know? Because you --
3 there's a 30-day period. There's a -- the city council
4 acts on April 1st. That goes into effect in 30 days
5 unless there's an intervening referendum. So that you
6 would have had by May 1st the building permits.

7 MR. KRAMER: We don't know because in the record
8 Mayor Robart sent a letter ordering his building
9 commissioner not to issue a building permits, and that
10 was --

11 QUESTION: That was --

12 MR. KRAMER: -- even prior to the referendum --

13 QUESTION: But that was in the 30-day period
14 when they couldn't be issued because it hadn't become
15 effective yet. The -- the instruction was simply what the
16 law was, that the ordinance approved by the city council
17 doesn't become law until 30 days after that approval. So
18 that the -- the mayor, to that extent, was just telling
19 them to do what the law would require.

20 But in understanding your complaint and how you
21 are tying in the officials to the referendum, are you
22 saying that absent the official prompting, instigation, or
23 whatever you call it, that there would never have been a
24 referendum, that in -- in fact that the mayor whipped up
25 the referendum?

1 MR. KRAMER: Yes, Justice Ginsburg. We -- we
2 believe we indicated that this was not something that the
3 city responded from -- responded to from their citizens,
4 but this was a scheme where city officials, including
5 Mayor Robart with other private citizens, got together and
6 said, how can we deny this project.

7 QUESTION: But you've lost on that and didn't
8 appeal it. I mean, he'd be a very bad man for doing that,
9 and you might have a cause of action against him. But I
10 don't see any official city action involved in that.
11 Is it official city action for the -- for the mayor to
12 stimulate a referendum? How is that official city action?

13 MR. KRAMER: And we're not talking about that
14 that's something that caused a damage. What we're talking
15 about is, is there evidence that we can use to show that
16 the ultimate decision, which was to deny the building
17 permit that caused the injury -- is there evidence that
18 the mayor participated in -- to appease racial and anti-
19 family bias.

20 This is really a simple Arlington Heights case.
21 The --

22 QUESTION: If it --

23 MR. KRAMER: -- the problem --

24 QUESTION: I just want to finish -- But I just
25 wanted, before you finish, if you'd respond to something

1 Justice Stevens said, which is about regulatory takings.
2 I mean, what is in the back of my mind here, to stimulate
3 an answer, is suppose you weren't Section 8 housing.
4 Suppose you were building a hotel. And suppose the
5 referendum wasn't people who might be bigoted -- may,
6 perhaps -- I don't -- but suppose they were
7 environmentalists, and -- and suppose the constitutional
8 claim was not --

9 QUESTION: People that didn't want rich people
10 to move in the neighborhood.

11 QUESTION: What?

12 QUESTION: People that didn't want rich people
13 to move into the neighborhood.

14 (Laughter.)

15 QUESTION: Okay, good.

16 The -- the -- you see. And suppose the
17 constitutional claim were a takings claim. Now, if I
18 uphold for you here, if the Court votes for you here,
19 wouldn't it then have to say that all these environmental
20 cases and so forth -- I -- I don't want to win your case
21 for you, but I might be in my question.

22 (Laughter.)

23 QUESTION: The -- the -- you see -- see there'd
24 be quite a problem about whether a city wouldn't have to
25 pay damages every time that they make a mistake in their

1 environmental regulation and perhaps try to stop a hotel
2 and they thought they could stop it, but it turns out
3 later they couldn't. You see -- do you see the analogy
4 that's worrying me?

5 MR. KRAMER: I understand the analogy.

6 QUESTION: So what do you -- what do you -- what
7 do you say about that?

8 MR. KRAMER: The difference, Justice Breyer, is
9 that the -- we are asking only for the Court to look at
10 the issue of has the plaintiffs proffered sufficient
11 evidence that racial bias and anti-family bias was
12 involved in the decision to deny the building permit.
13 The referendum was part of the -- an overall scheme by
14 city officials to delay and ultimately kill this project.
15 If that is the case, then the referendum, which Ohio
16 Supreme Court has ruled was illegal to begin with -- even
17 if it was legal, we believe under your jurisprudence if
18 the motivation of the city to use the referendum was
19 unlawful, the violation occurs under the Fourteenth
20 Amendment and the Equal Protection Clause.

21 With regards to your question about the
22 regulatory taking, we saw this -- this case under a due
23 process -- substantive due process, procedural due
24 process -- examination very similar, I think, to the
25 situation that's actually the exact opposite to the City

1 of Eastlake versus Forest City case, which Justice Stevens
2 is the only participating member that was on that
3 particular case.

4 QUESTION: Also there were eight other members
5 of the Court that disagreed with me if I remember
6 correctly --

7 (Laughter.)

8 MR. KRAMER: But we have a new Court, Your
9 Honor.

10 (Laughter.)

11 MR. KRAMER: And -- and we believe --

12 QUESTION: Now, you're -- you're now addressing
13 the third of the questions presented. It's the first
14 we've heard about the due process claim.

15 MR. KRAMER: That's correct.`

16 QUESTION: You haven't abandoned that and --

17 MR. KRAMER: Absolutely not.

18 QUESTION: -- you're still making the due
19 process claim. Now, you know, this is substantive due
20 process we're talking here. Right?

21 MR. KRAMER: Well, substantive, or --

22 QUESTION: You think it's a fundamental right to
23 have a building permit granted within a -- within a
24 reasonable period?

25 MR. KRAMER: We're not talking --

1 QUESTION: It's fundamental --

2 MR. KRAMER: -- about a reasonable period.

3 We're talking about both -- we had raised both procedural

4 and substantive due process claims in the lower courts.

5 What we're saying is the process was so fundamentally

6 flawed that it rises to a -- a due process violation.

7 Whether it's substantive or procedural, we don't believe

8 is -- is really the issue here.

9 We're talking about a process where there was a

10 whole set of procedures set up by the City of Cuyahoga

11 Falls of how to approve this site plan ordinance. The --

12 the site plan procedures were set forth, permitted for a

13 record to be developed, and there was a -- planning

14 commission meetings. There was the city council meetings.

15 And if the city council or the planning commission had

16 denied our right to the site plan ordinance and its

17 benefits, we would have had a right under Ohio law to go

18 under the Ohio Administrative Procedure Act and get a

19 court to review that issue.

20 QUESTION: Because there would have been

21 official action. And that's the problem here, that

22 there -- do you -- do you call a referendum that's put on

23 the ballot because 10 percent of the electorate had signed

24 petitions -- do you call that State action, which is

25 subject to the equal protection surveillance? I had

1 thought that that's a -- that's an initiative of the
2 people and it's not action of the city.

3 MR. KRAMER: Well, the only reason why the
4 people are able to get a referendum is because the city
5 charter, which is their constitution, permitted that.

6 QUESTION: But that permitted it 30 years ago,
7 did it not?

8 MR. KRAMER: That's right, but in the -- the due
9 process area, Your Honor, we're not talking about
10 discriminatory intent. All we're talking about is looking
11 at whether the procedure set forth is fundamentally flawed
12 and does it -- is it arbitrary and capricious and not
13 substantially related to the general welfare as -- as this
14 Court has talked about ever since --

15 QUESTION: But there are all kinds of nutty
16 referendum measures that voters put forward. I -- your
17 theory would seem to subject a State or a city or whatever
18 it is to a lawsuit every time there's one of these nutty
19 proposals put forward.

20 MR. KRAMER: No. We're talking about whether
21 you have to have a -- a protected property interest and
22 you also have to have a situation where there is a
23 arbitrary and capricious action.

24 In this case, we have ownership of property,
25 which under the original intention of -- of the Framers of

1 the Constitution, ownership of private property and the
2 ability to develop using this property for a lawful
3 purpose is protected by the Due Process Clause. And when
4 you look at the issue --

5 QUESTION: But your theory, as I understand it,
6 is that there was -- if it was racially motivated, there
7 was just sort of an arbitrary. There was an absence of a
8 legitimate reason for the delays and the shenanigans and
9 so forth. But it seemed to me the same argument could --
10 could be made if they were trying to protect the wetlands,
11 and they used the same kind of shenanigans.

12 MR. KRAMER: Well, Your Honor, we certainly
13 raised the question about if this was a discriminatory
14 motive, that would mean that there would not be -- under
15 general welfare.

16 QUESTION: There would be no racial basis.

17 MR. KRAMER: But more importantly, our argument
18 is that there is a per se violation whenever you have an
19 administrative matter which should be taken up through the
20 city council or through the courts or through a -- from --
21 from an administrative agency like the planning
22 commission.

23 And the evidence in the record, as the lower
24 courts point out, is that we met all the requirements for
25 the city to -- to get our site plan. And then, when the

1 city council approved it, when the planning director said
2 we met or exceeded the site plan ordinance, they put it to
3 a referendum and they asked 20,000 voters to approve or
4 disapprove a site plan ordinance, they never saw and
5 the -- and whether or not that site plan ordinance
6 conformed to the building and zoning code that they never
7 read. If that is not --

8 QUESTION: No. But what your -- what your
9 argument boils down to is to say that there is a
10 recoverable substantive due process violation whenever a
11 property right of yours is interfered with by a misuse of
12 the legislative process, even a temporary one. Isn't that
13 the -- the nub of your claim?

14 MR. KRAMER: I would say we -- we are asking for
15 a fairly narrow interpretation. We're saying if it's an
16 administrative matter which should not be subject to the
17 decision of voters because this is not legislative --

18 QUESTION: But what -- from the standpoint of
19 your claim, why does it matter whether it -- it was a
20 legislative use countering an administrative action, or
21 whether it was a legislative use with a racial motive? It
22 is an improper use of a legislative procedure. And you're
23 saying, as I understand it, whenever that, in fact, is
24 effected, there -- and -- and you can -- you can make a --
25 a colorable claim of -- of some economic damage, that you

1 have a substantive due process right to recover. Isn't
2 that correct?

3 MR. KRAMER: Justice Souter, we -- that is
4 something that we have raised in our brief, but we have --
5 also have raised a much narrower issue which would be
6 simply looking at a site plan ordinance, should it be
7 subjected to a popularity contest? There -- it's
8 standard-less. This Court has ruled in --

9 QUESTION: You never mentioned procedural due
10 process in your brief. The first mention I heard of it is
11 in your argument here, where you say it doesn't matter
12 whether it's substantive or procedural. Your brief went
13 entirely to substantive due process.

14 MR. KRAMER: Well, the reason that we didn't
15 raise that is the Court didn't certify a question other
16 than to substantive due process. We believe that it
17 really subsumes that issue when you look at -- the
18 procedure itself is so fundamentally flawed. It is very
19 similar to the -- the situation in the City of Eastlake
20 that this Court looked at.

21 QUESTION: Would you say -- be saying that if
22 the Ohio court had stuck to its original position?
23 I mean, it was four/three both times.

24 MR. KRAMER: Well, the Ohio court in both cases,
25 Justice Ginsburg, first ruled that it was an

1 administrative matter.

2 QUESTION: Thank you, Mr. Kramer.

3 MR. KRAMER: Thank you, Chief Justice.

4 QUESTION: Mr. Nager, you have 3 minutes
5 remaining.

6 REBUTTAL ARGUMENT OF GLEN D. NAGER

7 ON BEHALF OF THE PETITIONERS

8 MR. NAGER: Thank you, Mr. Chief Justice.

9 With respect to the disparate impact claim, I
10 would just like to clarify that we were the petitioners,
11 and the Court did grant certiorari on the issue and there
12 is a judgment of the Sixth Circuit against my clients on
13 that issue. And while they've abandoned the claim and
14 declined to defend the Sixth Circuit's judgment, we would
15 request the Court vacate that judgment and instruct that
16 the disparate impact claim be dismissed with prejudice.

17 With -- Justice Breyer, with respect to your
18 questions to my opposing counsel, a point we'd like to add
19 to what you had to say is simply that if we had done what
20 they wanted, we would have been subjected to a damages
21 claim. It would have been a First Amendment claim by the
22 citizens seeking to put something on the ballot by
23 initiating a petition, and it -- it can't be that in order
24 to avoid a Fourteenth Amendment damages claim, we have to
25 violate other people's First Amendment rights.

1 If the Court doesn't have any further questions,
2 we have nothing further.

3 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Nager.

4 The case is submitted.

5 (Whereupon, at 12:01 p.m., the case in the
6 above-entitled matter was submitted.)

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