C. G. GOMILLION, et al.,
Petitioners,

—vs.— No. 32

PHIL M. LIGHTFOOT, Mayor
of the City of Tuskegee, et al.,
Respondents.

Washington, D. C.
October 18, 1960.

The above-entitled matter came on for oral argument, pursuant to notice,

BEFORE:

EARL WARREN, *Chief Justice of the United States*
HUGO L. BLACK, *Associate Justice*
FELIX FRANKFURTER, *Associate Justice*
WILLIAM O. DOUGLAS, *Associate Justice*
TOM C. CLARK, *Associate Justice*
JOHN M. HARLAN, *Associate Justice*
WILLIAM J. BRENNAN, JR., *Associate Justice*
CHARLES E. WHITTAKER, *Associate Justice*
POTTER STEWART, *Associate Justice*

APPEARANCES:

FRED D. GRAY, ESQ., *34 North Perry Street, Montgomery, Alabama, on behalf of Petitioners.*

ROBERT L. CARTER, ESQ., *20 West 40th Street, New York, New York, on behalf of Petitioners.*

PROCEEDINGS

MR. CHIEF JUSTICE WARREN: No. 32, *C. G. Gomillion et al.*, petitioners, versus *Phil M. Lightfoot*, Mayor of the City of Tuskegee.

THE CLERK: Counsel are present.

MR. CHIEF JUSTICE WARREN: Mr. Gray?

ORAL ARGUMENT OF FRED D. GRAY, ESQ., ON BEHALF OF PETITIONERS

MR. GRAY: May it please the Court:

The argument of the petitioners is divided into two parts. I shall present to the Court the statement of the facts and the surrounding circumstances. Mr. Carter will argue the questions of law applicable to the facts in this case.

We feel that the facts in this case, as alleged in the complaint, are so important that we have reproduced an enlarged copy of Exhibit 2, attached to the complaint, which appears on page 13 of the record, to aid the Court in understanding the facts. We shall periodically refer to this map to the rear of me, pointing out—

THE COURT: What is that?

MR. GRAY: Yes, sir; that is an enlargement of the Exhibit on page 13 of the record. We shall periodically refer to this map, pointing out certain facts as alleged in the complaint.

This is a class action instituted by twelve Negroes who are former residents of the City of Tuskegee, Alabama, as the limits of that city were prior to the enactment of Act No. 140.

THE COURT: [Inaudible][1]

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[1]Because of an imperfect taping system and aging tapes, some passages are inaudible.

MR. GRAY: Yes, sir.

The original limits extend the southern boundaries to this line [Indicating]; the northern boundaries to this line [Indicating]; the western boundaries to the line here [Indicating]; and the eastern boundaries to the line here. Those are the limits as they existed prior to the enactment of Act No. 140.

THE COURT: Was it within the black line or outside the black line?

MR. GRAY: The black line represents the present boundary. 140 changed the limits, withdrawing it from here [Indicating] to this point [Inaudible]; and it made these various figures as indicated, cutting in certain areas.

THE COURT: So what's inside the heavy black line is what the lower court [Inaudible].

MR. GRAY: No, sir; what's in the black line represents what is in the municipality. What's on the outside represents what formerly was in the municipality.

THE COURT: May I ask how long the old limits were—had been in existence?

MR. GRAY: I am not sure, Your Honor, but I'm sure it had been in existence for somewhere over ten years. I'm not sure.

THE COURT: Where is the Tuskegee Institute on that map?

MR. GRAY: Tuskegee Institute is here [Indicating], the northwest corner. It is no longer in the city.

THE COURT: That's now outside.

MR. GRAY: It is now outside; yes, sir.

THE COURT: Well just for geographical, historical interest: When was the Institute founded?

MR. GRAY: The Institute was founded in—I believe it was 1860—1860 something; I'm not sure.

THE COURT: As early as that?

MR. GRAY: Yes, sir.

THE COURT: Well, when did Doctor Washington get there? Do you have any idea? It was about the turn of the century, wasn't it?

MR. GRAY: Yes, sir.

This class action is on behalf of twelve Negroes. All twelve of

these Negroes live in various areas outside of the present city, but within the former city limits of Tuskegee.

The action originated in the Federal District Court for the Middle District of Alabama, and the District Court there dismissed petitioner's complaint without a hearing on the merits. From that action the petitioners appealed to the Court of Appeals; and a divided court affirmed the ruling of the District Court; and this Court granted certiorari.

The complaint alleged—challenged the constitutionality of Act 140, which Act, as I have just indicated, changed these boundaries from their old position to their present position. Petitioners allege that the bill on its face does not disclose any purpose for redefining the—

THE COURT: Mr. Gray, the area which was inside the old city lines but outside the new limits, is it part of another town or municipality now?

MR. GRAY: It is not a municipality of any kind. It is simply a part of the county as a whole.

THE COURT: What is the name of the county?

MR. GRAY: Macon County, of which Tuskegee is the county seat.

THE COURT: Macon County.

THE COURT: And what was the population within the old boundaries and what is the present population?

MR. GRAY: The old population was approximately just better than 6,000. We are unable to determine now, with the new boundaries—the census has just been taken and those figures are not available at this time.

Petitioners have alleged that the obvious purpose and the sole purpose for the enactment of this statute is to deprive petitioners and the class they represent of the right to be residents of the City of Tuskegee; to deny them the right to vote in municipal elections; solely because of their race and color.

We further allege in the complaint that this exclusionary purpose and the effect is revealed, among other things, by the map and by other matters which we shall call to the Court's attention as we proceed.

Now comparing the old limits of the city with the present limits, we have the following aftereffects: Prior to the enactment of Act No. 140, the city, as you can see, was a perfect square, was a square. Now the city begins at this point [Indicating]. It weaves

around, and as best we can detect, it includes or it has, 28 different sides. Before the Act the entire population of the city—Negro population of the city was 5,397.

THE COURT: State those figures again, Mr. Gray.

MR. GRAY: 5,397 was the Negro population of the city prior to the Act.

THE COURT: Out of what total population?

MR. GRAY: Out of a total population of 6,000—about 6,700.

Now out of the 5,397 Negro residents prior to the Act, there were 400 qualified Negro voters. Since the Act, all of the concentrated areas of Negro residents have been excluded. For example, the Tuskegee Institute area; the area on the northeast side of the city; and on the southwest side of the city, on U.S. Highway 80 going west toward Montgomery. All of these are concentrated Negro areas, and all of these have been put outside of the city.

THE COURT: May I ask you one question?

MR. GRAY: Certainly, sir.

THE COURT: You say there were 400 qualified voters. That means there were others registered and couldn't vote?

MR. GRAY: What I mean is—

THE COURT: What I want to know is: Did they actually exercise the franchise?

MR. GRAY: Yes, sir, they did.

THE COURT: Vote for state or county or city elections?

MR. GRAY: For all elections, beginning with your municipal elections all the way through presidential elections.

THE COURT: Now the old Tuskegee, was the government through a mayor?

MR. GRAY: Yes, sir; there was a mayor and a commission of formal governors—of city council formal governors.

THE COURT: And those were subject to election? They were elected officials?

MR. GRAY: Yes, sir.

THE COURT: Did you have county commissioners, or whatever they're called?

MR. GRAY: We have a County Board of Revenue, and—

THE COURT: Are they also popularly elected?

MR. GRAY: They are elected, but from the county as a whole, as well as from residents of Tuskegee.

THE COURT: Now within the new boundaries, are those—the Negroes that are now contained within the new boundaries—they have the right to vote for county, I suppose?

MR. GRAY: Yes, sir.

THE COURT: But they, of course, are shut out from any relation to the government of what is now the City of Tuskegee.

MR. GRAY: Exactly. And just within the last month there has been a city election, and these Negroes were not permitted to vote in that election.

THE COURT: [Inaudible] school attendance. Are the schools which were within now without the City of Tuskegee?

MR. GRAY: The entire school system within Macon County is a county school system, so the school system as such is not affected.

THE COURT: [Inaudible]

MR. GRAY: Since the Act, there are now only four or five Negro voters in Tuskegee. Before the Act, Tuskegee contained approximately 1,310 white persons, of whom approximately 600 are registered voters in the city. Tuskegee still contains 1,310 white persons, and it still contains approximately 600 white voters. In other words, as a result of changing all of these boundaries not one white person, as far as we've been able to ascertain, has been excluded.

For example, going east on U.S. 80 toward Albany there are white residents along the highway. So the city limits extend outward along 80 east and include the white persons; and extending in the opposite direction, on 80 west, where Negroes reside, the city limits is only about three or four blocks from the downtown section.

This action must be considered, we submit, in the light of the racial composition of Macon County—in the history and in the light of the racial composition of Macon County. For example, the resident Negroes have had substantial difficulty in getting registered. Approximately seven-eighths of the persons in Macon County are Negroes, leaving only one-eighth white. A constitutional amendment to the Alabama Constitution now gives the legislature the authority to abolish Macon County and divides its territory into the adjoining counties, if the need arises.

The complaint further alleges that Act 140 is another device in a continuing attempt on the part of the State of Alabama to disenfranchise Negro residents of Macon County, of which Tuskegee is the county seat. The complaint further alleges that the admitted purpose of the Act was to assure continued white control of Tuskegee city elections. Macon County had no board of registrars to qualify applicants for more than 18 months at the time this complaint was filed. And since that time, a board of registrars has been appointed in Macon County, but only three Negroes have been qualified, which means that over a period of some four years only three Negroes have been able to become registered voters in Macon County.

THE COURT: Well, may I ask whether that situation has been at all affected, or is impliedly affected, by this attempted redistricting?

MR. GRAY: What we're saying, Your Honor, is that this Act—and we have alleged this in our complaint—should be considered—

THE COURT: I understand that; so you've said a little while ago. What I want to know is whether there is any relationship between the things you last said as to the disproportionate Negro representation among the registers and so on—is that at all affected, is that result influenced by or affected by this redistricting?

MR. GRAY: No more, Your Honor, than the few Negroes who still remain in Tuskegee who are not registered will have difficulty getting registered, as is illustrated by the difficulty that they've had over a period of years getting registered.

THE COURT: For reasons unrelated to the redistricting.

MR. GRAY: Yes, sir.

THE COURT: All right.

THE COURT: Mr. Gray, how about the municipal services that these people were getting beforehand. Are they deprived of all those services now? Let us say fire service, and things of that kind; are they beyond the fire services of the City of Tuskegee?

MR. GRAY: It is my understanding that they are.

THE COURT: They are.

MR. GRAY: Now in certain areas I think the city also owns the utilities. But the utilities are still furnished, but they pay for them.

THE COURT: I suppose that applies also to police?

MR. GRAY: I understand there has been a curtailment in police patrols in the area. For example, as we allege—

THE COURT: Do they patrol it at all, the City of Tuskegee? Do they patrol the district that's been cut off?

MR. GRAY: Some of the areas—yes, sir, because they are still within—some of the areas are still within the police jurisdiction of the city.

THE COURT: Of the state.

MR. GRAY: Of the city. You see, in addition to the city limits, then the city still controls to some degree the police jurisdiction which, prior to the enactment of this law, extended for some three miles beyond the actual city limits.But those persons within the police jurisdiction are not eligible to vote in the municipal election.

THE COURT: Well that must have been—that the police authority extended beyond the old limits of the City of Tuskegee must have been some other Alabama legislation—

MR. GRAY: Yes, sir, that's correct.

THE COURT: That's generally true of the state, isn't it?

MR. GRAY: Yes, sir.

THE COURT: Now does that police jurisdiction extend to the outer limits of the City of Tuskegee, Tuskegee before the Act complained of here?

MR. GRAY: Well there is a substantial question with reference to that, because our state statute states that a city whose population is 6,000 or over, the boundaries extend for three miles; if it's less than 6,000, then it can extend for a mile and a half. And by the substantial reduction in area, as we understand it, it would mean that the present city limits—Tuskegee is less than 6,000, so the police jurisdiction would only be a mile and a half and it would in some instances; in other instances it would not.

THE COURT: Well even if it's three miles, since there's a contraction, the three miles wouldn't radiate as far as it did previously.

MR. GRAY: No, sir; it would not.

THE COURT: Would it go as far as previously or not? Would you tell me: Would a mile and a half go as far as the extreme southwest corner shown on that map right there?

MR. GRAY: No, sir. From this point to here [Indicating], it's farther than a mile and a half.

THE COURT: It's what?

MR. GRAY: It is farther. I'm saying from this point [Indicating], the end of the city limits here [Indicating], to the outer end of the old city, in my opinion it's farther than a mile and a half.

THE COURT: Indicate where a mile and a half is on your map, from that point.

MR. GRAY: Well, I would have to—

THE COURT: No, from where you first started with your pointer, from there. That's right. Now indicate on your map how far a mile and a half would take one.

MR. GRAY: It would be difficult, without referring to the scale on the map here, Your Honor.

THE COURT: Well what is your scale?

MR. GRAY: The scale is 800 feet to two inches, I believe.

THE COURT: 800 what?

MR. GRAY: 800 feet to two inches.

THE COURT: 400 feet to the inch, then; is that right?

MR. GRAY: That's right.

THE COURT: Twenty inches, then, would be about 8,000.

MR. GRAY: Here [Indicating], from this point to the end would be [Inaudible]—

We submit that—the complaint further alleges that the purpose and the effect of this Act is to deny Negroes the right to vote, solely because of their race and color; that the Act deprived petitioners of the right to participate in other activities as residents of the City of Tuskegee, solely because of their race and color, in violation of the Fourteenth Amendment to the United States Constitution and the Fifteenth Amendment.

Mr. Carter will at this time argue the law in the case.

MR. CHIEF JUSTICE WARREN: Mr. Carter?

ORAL ARGUMENT OF ROBERT L. CARTER, ESQ., ON BEHALF OF PETITIONERS

MR. ROBERT CARTER: Our position in this case is quite simple. We take the position that this is purely a case of racial discrimination, solely and simply racial discrimination; that the natu-

ral result of the passage of Act 140 was to put out of the city limits, as has been indicated on this map, all the areas of concentrated Negro residents without affecting any white persons and without affecting any white qualified voters.

Now, as you can see on here, what the map does—what the changes do is to weave in and around the Negro residents in order to exclude as many of them as it possibly can. Now as Mr. Gray has pointed out, there has been no statement of the purpose of the legislation other than the fact that we allege in our complaint that the purpose of this legislation was discriminatory.

Now it's our position that as a result of the enactment of Act 140, that the petitioners and other Negroes similarly situated have been deprived of personal and private constitutional rights protected under the Fourteenth and Fifteenth Amendments to the Constitution of the United States; that they have been denied the right of municipal residence in the city and the benefits which are incident thereto; and that they have been denied the right to vote in municipal elections. And we contend that they have been denied these rights solely because they are Negroes and for no other reason.

Now as the city has been redrawn, Tuskegee has become virtually a white city, with Negroes denied the right to vote in the city and the right to live in the city. Now we take the position, if the Court please, that it is quite obvious that Alabama could not pass a statute which would openly disenfranchise Negroes, which would openly set a test of their right to vote in any election in any territorial unit which was different from those applying to other persons. And if such a law were before the court, there would be no question but that this would be constitutionally impermissible, and that if such a claim were made, that this would be cognizable in the Federal courts and that redress would be available.

We also contend that if Alabama had passed a statute which denied Negroes the right to live in Tuskegee or to any of the benefits which accrue to citizens of Tuskegee, that this would be a denial of Fourteenth Amendment rights; that there would be no question that this kind of claim would be available for redress in the Federal court.

We further would like to point out to the Court, on the basis of its decisions, that it would not matter whether this was done openly or covertly. The fact that it was done and this was the result—there would be a claim of constitutional deprivation which would be actionable before the Federal Judiciary.

Now our contention is that this is our case; that this is the same case as the cases which are applied to these kinds of discriminations, discriminations and disenfranchisements. We feel that this passage of Act 140 is as gross a case of racial discrimination as any case that has come before this Court between *Gitlow* versus *Hopkins* and *Cooper* versus *Aaron*. We also contend that our allegations, the allegations which are undisputed at this stage of the proceedings, which the court cited in its memorandum opinion in the District Court, that these allegations of rank discrimination cannot be cast aside or discounted by placing labels upon them, labeling action one way or the other so far as the problem is concerned.

We think that the fact that the defendants rely upon the cases like *Mount Pleasant* versus *Beckwith*, which involves the plenary power of a state to redefine its borders, or *Colegrove* versus *Green*—are not cases which apply to this situation.

We think that our situation is based upon settled constitutional doctrine, that the state cannot discriminate against persons because of race, creed, or color. They can't discriminate against them in terms of the benefits that are applicable in terms of residence; they can't discriminate against them in terms of their right to participate in any elections; and that where such claims are made, that we have a prima facie case which the Federal courts can hear.

THE COURT: It isn't a question of whether it's a prima facie case or non-prima facie; it's a question of whether they're allowed to go to school, isn't it?

MR. ROBERT CARTER: That's right. Our problem is that, in the kinds of cases that we have alleged, that it is the kind of case in which normally we have been permitted—in the history of the kinds of race discrimination cases which occur, there has been no question that this type of case can go to court and that we have a right to a hearing on the merits.

Now this, we think, is our position and we don't believe that we need to involve ourselves into any argument as to whether Alabama has the right to redraw its boundary lines or whether we petitioners have any vested right to participate in the electoral process of any territorial unit of Alabama; or whether the petitioners have any vested rights to live in any territorial unit. We do contend that Alabama may retract its territorial units, but it cannot do it in order to accomplish a racially proscribed discrimination under the Constitution of the United States; and that the petitioners do have a vested right to reside in any territorial unit in Alabama and to participate in the election process; that they have

a vested right not to be deprived of the right to live in that unit or to participate in it because they are Negroes. This, we think, is the contention we make here, and this is the kind of case which we think this presents.

Now—

THE COURT: Mr. Carter, becoming nonresidents of the municipality of Tuskegee did not in any way impair the right of the 400 former voters in Tuskegee to vote in all other state and county elections?

MR. ROBERT CARTER: That's absolutely correct.

THE COURT: It did not impair.

MR. ROBERT CARTER: It did not. They had the right to participate in all other elections, other than elections that involve only Tuskegee.

THE COURT: Within the municipality.

MR. ROBERT CARTER: That's right.

THE COURT: And the registrars are county officials, are they not?

MR. ROBERT CARTER: Yes, sir.

THE COURT: So that living in Tuskegee doesn't give you, as a practical matter, more of a chance to become eligible to vote. You don't go before different registrars or anything like that?

MR. ROBERT CARTER: Same registration board, the Macon County Registration Board, which has been made a part of the Report of the United States Commission on Civil Rights is the same board that registers people—

THE COURT: Both residents and nonresidents of the city.

MR. ROBERT CARTER: It makes no difference in this regard. Our contention is that, because these persons who are Negroes are not permitted to vote in the municipal elections, that they have been denied, because of color, of a right of value; and because they're Negroes, because they can no longer live in the City of Tuskegee, that they have been denied rights protected under the Constitution of the United States. We don't contend that they have been in any way placed in any different position in other respects. But in our judgment this is a serious constitutional claim which we think, in other circumstances, we are entitled to have a hearing to prove, and if we can prove our case we think we're entitled to the relief which has been asked in the court below.

THE COURT: Mr. Carter, what is the procedure in your state for changing the boundaries of a city? How is this accomplished?

MR. ROBERT CARTER: This was accomplished by an Act. This is called a private bill which was sponsored by the senator from this county. Now this was submitted to the legislature as the bill of Senator Sam Engelhardt, which was referred to in our petition in our brief. This bill was passed by the state legislature, a statute affecting only the contours of Tuskegee. Now this is the way in which it is done, as far as I have been able to gather.

THE COURT: Is that the normal way that the boundaries of a city are changed in your state?

MR. ROBERT CARTER: Well this is the normal way that I understand it is changed. There might be a petition from the residents to the legislature to change the boundaries. But in most regards there was nothing unusual, so far as I have been able to gather, about the fact that this bill was passed.

THE COURT: In other words, in your state the legislature fixes the boundary lines of all cities, and the voters have nothing to do with determining what the limits of the city will be?

MR. ROBERT CARTER: This is my understanding.

[Aside:] Is that correct?

I have been advised by Mr. Gray that there is a procedure through which they can do it, too, Mr. Justice Black—

THE COURT: What procedure?

MR. ROBERT CARTER: That there is a procedure whereby the voters may participate.

THE COURT: Initiate?

MR. ROBERT CARTER: Yes; initiate it by some kind of referendum.

THE COURT: But in any event, there's no issue as to the fact that, based on Alabama law, this Act was perfectly proper and valid?

MR. ROBERT CARTER: Based on Alabama law in terms of—

THE COURT: —in terms of the power of the legislature.

MR. ROBERT CARTER: Right; and in terms of the procedural requirements to make the Act valid. We raise no issue about that at all. Our issue that we raise is that it is invalid under the Constitution as a substantive matter.

THE COURT: Because of the purpose?

MR. ROBERT CARTER: Beg your pardon?

THE COURT: Because of the purpose?

MR. ROBERT CARTER: Because of its effects, because of its effects; because the result of the statute is as we have indicated. And we indicate that the statute—Mr. Justice Black, we don't even believe that at this time we have to go into purpose, in terms of the fact that the result of this line, as we have shown, what we allege has been accomplished, and that is to put Negroes outside the limits, all the electors, and keep the white people in the limits. So that the purpose and effect of the statute, as far as we are concerned, is this; and for that reason we think the statute is unconstitutional.

THE COURT: What is the proof that you would offer?

MR. ROBERT CARTER: The proof that we would offer would be to show how this city—

THE COURT: I'm sorry, Mr. Carter, I don't hear you.

MR. ROBERT CARTER: I'm sorry.

THE COURT: Suppose you begin: The proof you would offer.

MR. ROBERT CARTER: The proof we would offer is that this territory, which is four-sided [Indicating], has now been recast into this, what I consider, extraordinary design.

THE COURT: The District Court called it a seadragon, I think.

MR. ROBERT CARTER: Yes, a seadragon. That as a result of this, all the Negroes have been cast outside of the city—close to 5,000 Negroes—and 1,000 white persons have been left in.

THE COURT: Would it be open to the city, if it went back to the trial, to—

MR. ROBERT CARTER: Beg your pardon, sir?

THE COURT: Would it be open to the city, under your theory, to show that there was another reason for it?

MR. ROBERT CARTER: We would think that they would, because we would be at a point of proof. We would have to prove our case.

THE COURT: So purpose becomes the central aim of the litigation.

MR. ROBERT CARTER: Well purpose and effect, because we

think that we can show that the line was drawn where a line drawn through a street would put the white people on one side and the Negroes on the other side of the line; and that here [Indicating] and other places where the line comes to weave around, that it weaves in and around the Negro neighborhoods. Now we believe that if we can demonstrate that, as a result of this, that all the Negroes are wiped out, that we are in as good a position to show discrimination as we would be able to show discrimination in the jury discrimination cases. And this would be the kind of proof we'd have.

MR. CHIEF JUSTICE WARREN: We'll recess.

[Whereupon, argument in the above-entitled matter was recessed, to reconvene the following day.]

C. G. GOMILLION, et al.,
Petitioners,

—vs.— No. 32

PHIL M. LIGHTFOOT, Mayor
of the City of Tuskegee, et al.,
Respondents.

Washington, D. C.
October 19, 1960.

Oral argument in the above-entitled matter was resumed, pursuant to recess,

BEFORE:

EARL WARREN, *Chief Justice of the United States*
HUGO L. BLACK, *Associate Justice*
FELIX FRANKFURTER, *Associate Justice*
WILLIAM O. DOUGLAS, *Associate Justice*
TOM C. CLARK, *Associate Justice*
JOHN M. HARLAN, *Associate Justice*
WILLIAM J. BRENNAN, JR., *Associate Justice*
CHARLES E. WHITTAKER, *Associate Justice*
POTTER STEWART, *Associate Justice*

APPEARANCES:

ROBERT L. CARTER, ESQ., *20 East 40th Street, New York, New York, on behalf of Petitioners.*

PHILIP ELMAN, ESQ., *Department of Justice, Washington, D. C., on behalf of the United States, as* amicus curiae, *urging reversal.*

JAMES J. CARTER, ESQ., *Second Floor, Hill Building, Montgomery, Alabama, on behalf of Respondents.*

PROCEEDINGS

MR. CHIEF JUSTICE WARREN: *C. G. Gomillion, et al.*, petitioners, versus *Phil M. Lightfoot*, as Mayor of the City of Tuskegee.

THE CLERK: Counsel are present.

MR. CHIEF JUSTICE WARREN: Mr. Carter, you may continue your argument.

ORAL ARGUMENT OF ROBERT L. CARTER, ESQ., ON BEHALF OF PETITIONERS—Resumed

MR. ROBERT CARTER: If I may recapitulate briefly from where we were when the argument broke off yesterday, it's our contention that Act 140, the statute here in question, by redefining the boundaries of Tuskegee in the bizarre fashion indicated in the facts, that it has accomplished a purposeful and intentional discrimination against Negroes as a class. The Act has cast outside of the city all of the qualified Negro voters, with the exception of four or five, and has reduced Tuskegee from a city of approximately 7,000 persons, of whom in excess of 5,000 were Negroes and 1,300 white, to a population of approximately 1,320 white persons and at best a few hundred Negroes.

The Negroes who were left in the city were left in the city only because of the fact that they could not have been cast out of the city without affecting white persons. And it's our contention that this is a purposeful and intentional discrimination; and that this case is governed by the discrimination cases; and that the rule of law applicable to them controls here; that the allegations that we have made make out a case which is justiciable and actionable in the courts; and that we are entitled to a hearing in the court below. Now, we—

THE COURT: You didn't have the exact number of Negroes that were left in the redistricting?

MR. ROBERT CARTER: No.

THE COURT: You say a few hundred, which means two hundred or eight hundred?

MR. ROBERT CARTER: We don't know, if the Court please. We know of, and we allege in our complaint, that only four or five qualified electors or qualified voters were left. But we do not, as Mr. Gray indicated yesterday, have the exact census figures to be able to tell the Court with exactitude how many Negroes were left in the city.

THE COURT: Are they clustered in some particular place on that map?

MR. ROBERT CARTER: They are not clustered on the map. They live in this very area here. Now our contention is—

THE COURT: What is that area? What kind of an area is that? Is it closely settled?

MR. ROBERT CARTER: What I mean is, some of them are living on this side of the line and they live within the confines—

THE COURT: It's not in the center of the city, Mr. Carter.

MR. ROBERT CARTER: Not in the center of the city.

THE COURT: Suppose they had reduced it only half. Would you see any difference?

MR. ROBERT CARTER: Reduced it only half?

THE COURT: Reduced the size of the city only half that much.

MR. ROBERT CARTER: And therefore left more Negroes inside than there are now; is that the question?

THE COURT: Yes.

MR. ROBERT CARTER: Well, if the Court please, I think I would have a more difficult question in terms of showing that there was discrimination.

THE COURT: You mean proof that there was?

MR. ROBERT CARTER: Proof of purpose.

THE COURT: That's right. So you finally get back to proof of the purpose.

MR. ROBERT CARTER: Proof of the purpose. But I also have, if the Court please, the natural consequences that we think we can show; the fact that this cannot be disputed: that the facts of the matter are that all of these Negro neighborhoods have been cast out of the city.

THE COURT: Suppose they were to decide to split up a county that way. Would you say that dividing up the county into two parts, if it could be shown they did it because they wanted to get the colored people in one county and the white people in another, that that would violate the Constitution?

MR. ROBERT CARTER: Yes, sir, I do.

THE COURT: You would?

MR. ROBERT CARTER: I think that that would violate the Constitution, because I think the boundary line would be drawn on the basis of race, and I think that this is violative of the Constitution.

THE COURT: The only way you could get to that, of course, would be to show that that was the purpose.

MR. ROBERT CARTER: Well the only way I could get to that would be to show that that was the purpose. But I could also get to it to show that that was the effect.

THE COURT: Well, suppose it is the effect. If a state divides up two counties, one county into two or three, and the effect of it is to leave one of the counties predominantly white and the other predominantly colored.

MR. ROBERT CARTER: I think that if I can show that in terms of the facts, I would be able to show discrimination because I believe that if the effect, if the question of proof is the effect, this isn't an incidental effect; this is something else. But with this question we have before the Court, with the way these lines are drawn, as they weave in and out of the city, the natural effect—this cannot be an incident for this to occur. This has to be the natural consequences of the Act.

THE COURT: What your argument gets down to is this, isn't it: that wherever it is shown by the facts of the way a county's divided itself, or a city is split up, that it leaves one part of it predominantly white, which had been predominantly colored, that is enough to deprive the state of the power to create—to take part of the land out of the municipality.

MR. ROBERT CARTER: Well, that is enough I think, for us to go to court.

THE COURT: And the state doesn't have a right to adopt that policy.

MR. ROBERT CARTER: That's right.

THE COURT: It gets down to the purpose of the policy.

THE COURT: What do you do with *Colegrove* and *Green* on that?

MR. ROBERT CARTER: We don't believe, if the Court please—we don't think that the *Colegrove* doctrine has anything to do with this problem.

THE COURT: Do you ask us to overrule *Colegrove* and *Green*?

MR. ROBERT CARTER: We do not.

THE COURT: Do you ask us not to reconsider it?

MR. ROBERT CARTER: We think that this has nothing—

THE COURT: Suppose one was of the opinion we should have to reconsider it. Are you asking that that be done?

MR. ROBERT CARTER: If the only way we can reach—if the Court concludes that the only way they can reach our problem is to overrule *Colegrove* versus *Green*, we would have to take that position. But we do not believe that at the present time that we are in that position.

THE COURT: In other words, you're not asking us to? Am I to understand that you're not asking us to?

MR. ROBERT CARTER: That's right, we're not asking you to overrule *Colegrove* versus *Green*. Our contention is that this is not a reapportionment case and that the *Colegrove* doctrine has nothing to do with the problems which are raised here. We take the position that this is purely a race discrimination case and that it is not involved in the *Colegrove* versus *Green* problem at all.

THE COURT: Mr. Carter, suppose I go along with Mr. Justice Black's hypothetical case: An existing county happens, through natural coagulation, through natural aggregation, to have predominantly in one half of it white citizens and in the other half colored citizens; and the state then splits it into half, but each half continues to have voting rights. Nothing is done to take away, either directly or through any manipulation of the electoral machinery, the potentiality or the opportunity for the exercise of the franchise. What do you do with that case?

MR. ROBERT CARTER: Well, as I said to Mr. Justice Black, I don't believe that the state can adopt a policy which would amount to dividing a county or any territorial unit in order to ghettoize it in terms of white and Negro. I think that this is forbidden by the Constitution.

THE COURT: Forbidden by what, the equal protection clause?

MR. ROBERT CARTER: I think this is forbidden by the equal protection clause. In your instance, it would seem to me it would be forbidden by the equal protection clause. I wouldn't hide the Fifteenth Amendment, but I think it would be forbidden by the equal protection clause because—

THE COURT: All right, suppose you have one half is industrial and the other half is agricultural. Then what do you do with that?

MR. ROBERT CARTER: Well that is a more difficult question. But the problem I have—I would think in that case, in that particular kind of case, that you would be able to show that this was a denial of equal protection. But at the same time it seems to me, if the Court please, there might by differences in terms of this, in terms of whether this is an equal protection argument. I don't believe that we have that problem when race is involved because of the Fourteenth Amendment and because of this clear prohibition in respect of what this Court has held. So where race is involved—and our contention is, this is a race discrimination case—we have the clear protection under the Fourteenth Amendment, which would forbid the state from doing exactly what you suggest, in my opinion.

THE COURT: But here you argue—or you did yesterday—that you haven't got a kind of an admixture here because the redistricting throws out practically every theretofore qualified Negro voter.

MR. ROBERT CARTER: Yes, sir.

THE COURT: How many are left?

MR. ROBERT CARTER: We say in our brief approximately three or four.

THE COURT: Three or four of the 400. All of them, with negligible exceptions, were re-carved out.

MR. ROBERT CARTER: Yes, sir. So that in this case—

THE COURT: But you say it throws them out of the right to vote?

MR. ROBERT CARTER: It throws them out of the right to vote in the municipality of Tuskegee.

THE COURT: Because the area of it has been changed.

MR. ROBERT CARTER: That's right.

THE COURT: With the consequences, as the Chief Justice indicated yesterday in a question to you, that they haven't got fire protection and they haven't got—they've got a shrinking of police protection, if any; and all the other amenities of a municipal life.

MR. ROBERT CARTER: That's right, plus the fact that they do not have the right to participate in making the rules and regulations which would govern them in terms of the kinds of protection that they would have.

THE COURT: Well they have a county government, do they not?

MR. ROBERT CARTER: Yes, sir; they have a county government.

THE COURT: Your position, I take it, to face it squarely on the facts as they actually are, from my viewpoint—your position seems to me to be that when a state decides in the exercise of its policy or polity, if you wish to call it polity—I believe the Government's brief used that term, if you wish to call it policy or polity—has the policy that it wants to change a municipality, make it smaller, cut off a large part of it, but it does not take away the rights of the people that are taken out of that municipality to vote. They are left with such rights to vote as those in the county outside of the municipality have—I presume what you have to meet here is—although the state has a right to change the areas of its cities, you have to look at its purpose. That's your argument: To see, and if you find that the purpose was to put colored people out of that area so that they could not vote in that area, although they could vote outside of that area, that that violates the equal protection or due—whichever clause you say it does.

MR. ROBERT CARTER: I agree.

THE COURT: That's the real fact.

MR. ROBERT CARTER: I agree with that; yes, sir.

THE COURT: Mr. Carter, have you got a heavier burden—have you got a heavier burden in this case than the offer of proof that your allegations tender under the facts of this particular case, without making the generalization any bigger, namely, that there were 400 qualified Negro voters and the redistricting took all the 400 out with reference to the enjoyments they theretofore had in the City of Tuskegee? Have you got a greater burden than that in this case?

MR. ROBERT CARTER: We don't think so.

THE COURT: Well what difference does it make if they've un-

constitutionally deprived these people of the right to vote, whether it was 400, 3,000, or 6. If the purpose is to do this, the purpose invalidates it as a discrimination, why are not 6 entitled to protection the same as 425 or 3,000?

MR. ROBERT CARTER: I think that the 400—

THE COURT: Now and then we've held that with reference to one man who's deprived of a jury trial.

MR. ROBERT CARTER: Yes, sir. But I think that in terms of this case, if Your Honor pleases, the fact that 400—that 397 or 396 or 400 were cast out seems to me to lessen the burden that we have in terms of proof.

THE COURT: Of showing the proof.

MR. ROBERT CARTER: That's right.

THE COURT: You're using it as an evidential thing.

MR. ROBERT CARTER: That's right.

THE COURT: To show the purpose.

MR. ROBERT CARTER: That's right.

THE COURT: You finally get back to whether or not it violates the Constitution for a state to reduce the area of a city for the purpose of taking colored voters out of that city, throwing them out into the county where they have only the right to vote that they have or the rights to vote that other people in the county have. That's where you finally get to—

MR. ROBERT CARTER: Yes, sir.

THE COURT: —without regards to the number, isn't it?

MR. ROBERT CARTER: Yes, sir.

THE COURT: What you're talking about now is the use of the number for the proof.

MR. ROBERT CARTER: That's right.

THE COURT: That if it's proveable, I can understand that.

THE COURT: Well, of course if there's an unconstitutional deprivation there's an unconstitutional deprivation. But the facts may determine that there isn't an unconstitutional deprivation.

MR. ROBERT CARTER: This is why in our judgment, since we have 396 persons, that we feel that we have no problem of showing that this Act, if we get to trial and are able to go to proof,

we think that we'd have no problem of showing that this Act is unconstitutional because, we feel, we have overwhelming evidence to demonstrate that—

THE COURT: But the state here—the litigation derives from the fact that the state says, in effect, everything you say is so. The external facts aren't disputed, and there is no explanation for this other than the fact of having done it.

MR. ROBERT CARTER: That's right.

THE COURT: In fact, in the old-fashioned language, they demurred to your facts.

MR. ROBERT CARTER: That's right.

THE COURT: So we have here a clear case of demurring to the facts you're ready to prove, so you don't have to prove them.

MR. ROBERT CARTER: That's right.

THE COURT: Mr. Carter, supposing there were no voters at all registered in the old city, that is, no Negro voters, and they had accomplished this same result. Would you be in any different position?

MR. ROBERT CARTER: Well at that point what we would have to show—I think that we would have a Fifteenth Amendment argument because they would not be entitled to vote in the old city. Then we would have an equal protection/due process argument as well under the Fourteenth Amendment, because the line was drawn, as we suggest, on the basis of race. I don't think that would change our position. It would, as Mr. Justice Black suggests, change the nature of the evidence that we would have to bring on to prove that this was the intent of the Act.

THE COURT: Your case gets down, does it not, to where we've got to look at the clear evidence, the evidence to be offered either before a judge or a jury, to show the purpose of the legislature in passing this particular law?

MR. ROBERT CARTER: Yes, sir.
Now—

THE COURT: Are there any colored residents in the city as now defined who are not voters?

MR. ROBERT CARTER: We're sure that there are. As I attempted to indicate a little earlier, we don't know. We attempted to get the exact figures as to how many Negroes were in the city at the present time, but the census figures are not available and will

not be available until December. We have alleged in our complaint—and this has been taken as true—that only three or four qualified voters are left in the city. Now—

THE COURT: But there may be a number, perhaps, of—

MR. ROBERT CARTER: There may be.

THE COURT: —Negro residents in the city who are not voters?

MR. ROBERT CARTER: That's right, sir, who were not able to be cast out with these lines without taking white persons out too. This is our contention, that the only Negroes left in were those who were left in that the state could not put out without affecting white persons as well.

THE COURT: Conversely, Mr. Carter, are there any white people who are now resident of the county because of this reduction in the area of the municipality, who used to be residents of the city, but who are not voters?

MR. ROBERT CARTER: No, sir; no white person who lived in the city has been in any way, voter or not voter, affected by this change in boundaries.

THE COURT: I have this thought in mind: The city as it used to be before the enactment of this 140 statute was what, five-sixths Negro, was it not?

MR. ROBERT CARTER: Yes, about five to one; yes, sir.

THE COURT: So that any reduction in size of the city, presumably on the law of averages, would put five Negroes outside the city to every one white person. That is, any haphazard reduction in the size of the city.

MR. ROBERT CARTER: I'm not sure of that, Mr. Justice Stewart, because as you note where the Negroes live as this city is redrawn, the residences of white persons are around the center, clustered around the center of the city. The Negro neighborhoods are on the periphery, the periphery of the city. So that a reduction in this way, as they have done it in this way, it does not necessarily follow that there's going to be a five-sixths—

THE COURT: It doesn't necessarily follow, and perhaps statistically it's not too good a sample or some such reason. But if you simply reduce the size of the rectangle, let us say, and instead of creating a seadragon you made a smaller rectangle, I gather that at least the ratio of five to one of people who were then in the county would prevail. And I say "at least" because you just told

us that there were more Negroes on the periphery of the old rectangle.

MR. ROBERT CARTER: Well, in that kind of case. But this, of course, is not our case. Because in that kind of case you would have a reduction in whites and Negroes, the case that you suggest. In our case we have a reduction only in Negroes and no reduction in terms of the population of whites.

THE COURT: None at all of any, whether or not they were voters?

MR. ROBERT CARTER: No, sir.

THE COURT: Well, if that's true, then I take it the ratio of five to one no longer obtains within the city as it was drawn.

MR. ROBERT CARTER: Oh, that's true. The city as it's been redrawn, as we attempted to indicate yesterday, is virtually a white city. It is overwhelmingly white with, we think, no more than about 200 Negroes.

THE COURT: Oh, no more than about 200.

MR. ROBERT CARTER: We offer this as a guess, because we don't know.

THE COURT: Well if that's so, then the five to one ratio has just been reversed.

MR. ROBERT CARTER: That's right.

Now if I may close, I want to indicate to the Court our position that, this being as we contend, a race discrimination case, we think that there are no problems of relief involved here; that this is not the kind of case in which there would be any question of any unusual problems in terms of relief, as we requested. We request a declaratory judgment which would hold that this statute violates the equal protection and due process clauses of the Fourteenth Amendment, and the proscriptions of the Fifteenth Amendment as well. We also request an injunction to enjoin the enforcement of the statute, and an injunction to restrain state officials from keeping the petitioners and other Negroes from voting in the municipal elections in Tuskegee.

As far as we are concerned, we think that this is the same kind of relief which this Court has normally granted in cases of this kind, and that therefore it offers no peculiar difficult problems of equitable relief. For this reason, if the Court please, we think that we have presented a case which comes within the race discrimination cases; and that we have presented a case which requires, under the rules and the doctrines, the constitutional doc-

trines which have been announced by this Court, that the state cannot discriminate against persons because of their race or color.

THE COURT: Well, Mr. Carter, if you have a declaratory judgment that 140 is constitutionally invalid under the Federal Constitution, do you need all the injunctions? Do you need restraints of any kind? If that were so, would that not just destroy the reorganization?

MR. ROBERT CARTER: Well it would destroy it and the city would revert to where it was.

THE COURT: Well, do you need affirmative relief? That's what I'm getting at.

MR. ROBERT CARTER: Well, we may not need the kind of relief. But we're asking for it to make sure that there would be no difficulty in terms of the petitioners participating in the electoral process.

MR. CHIEF JUSTICE WARREN: Mr. Elman?

ORAL ARGUMENT OF PHILIP ELMAN, ESQ., ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE

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

Because of the fundamental constitutional rights which are here asserted and the national significance of the issues, the United States is appearing here in this case as *amicus curiae* in support of the petitioners.

Before proceeding with the argument I should like, if I may, by way of response to a question from the bench yesterday to state that according to an official report of the United States Bureau of the Census, January 1953, the area of the City of Tuskegee as it existed in 1950 and prior to the alteration of the boundaries made by the 1957 law, the area of the city then was 6.3 square miles. In other words, roughly about two and a half miles square. Each of these lines on the periphery [Indicating] being about two and a half miles.

Now it's perfectly obvious, looking at the face of the map—this is two and a half miles [Indicating]—that from any point of the new city to any boundary of the old city is less than one and a half miles which, as was stated yesterday, has some significance under Alabama law. Title 37, Section 9, of the Alabama Code of 1958 provides that: "The police jurisdiction of every municipality having a population of less than 6,000"—which is now the case as to new Tuskegee—"The police jurisdiction . . . extends beyond its

corporate limits for one and one-half miles."

There's another provision of Title 37, Section 491, which puts upon the municipality—which gives the municipality the power of maintaining health and cleanliness within its police jurisdiction. So that the inhabitants of this area outside new Tuskegee [Indicating], inside old T kegee, now receive, to an extent not shown by this record but which has been illuminated by counsel, are now receiving municipal services of a sort from the city. The point is, of course, that while they receive these services to some degree and extent not shown, they are no longer in the position that they were before Act 140, of being able to assert through the exercise of the franchise and through the exercise of less formal ways their rights—

THE COURT: Is that a general statute?

MR. ELMAN: Yes, sir; that's Title 37.

THE COURT: I thought it had been in effect.

MR. ELMAN: I believe it's been in effect for years, for a considerable period of time. I found it in the 1959 division.

THE COURT: I remember writing a memo on it many years ago.

MR. ELMAN: Title 9, Title 37, Section 9, according to the—

[Pause]

I'm afraid that, unlike the U.S. Code Annotated, this does not show the historical derivations. I cannot answer that.

THE COURT: Mr. Elman, can I ask: Does the city have responsibility for those services as well as jurisdiction to render them, if it desires to do so, outside of the city?

MR. ELMAN: Well, I'm not sure that I'm qualified to answer that question, Mr. Chief Justice. So far as the statutes show, the police jurisdiction extends to this area. Now, the extent to which that imposes affirmative responsibilities upon the municipality, I cannot ascertain from the statute.

THE COURT: I had the idea, although it may be wrong—I was hoping maybe you could tell me—

MR. ELMAN: Yes, sir.

THE COURT: —that that meant that they could go out there and make arrests for offenses committed in the city. It may mean much more.

MR. ELMAN: Well so far as the allegations of the complaint are concerned to the extent they shed light on this—and they must be

taken as true—the allegation is that the petitioners no longer receive the police patrols at school crossings. They used to have that and they don't have that now. Now as residents of the city, of course, they would be in a position to complain about that, as constituents of city councilmen, as electors of the mayor, and so on. That right they no longer have; and that, of course is, in the context of this case, an important consideration.

THE COURT: Can the city levy any tax on those people out there for services?

MR. ELMAN: Again, so far as the statutes show, if there are street construction, new construction, new roads and so on, I think that there's a power to make assessments. But so far as ad valorem—

THE COURT: In the city?

MR. ELMAN: If I speak erroneously here, it is—

THE COURT: I don't know.

MR. ELMAN: —only because, as a non-Alabama lawyer, I'm not sufficiently at home with the statutes. But I've made an effort to look through the Code on this. There is a provision that, where there is—new streets are laid, there is power to assess within the police jurisdiction. But I'm sure that counsel for the respondents is in a far better position to respond than I am.

But I should like, if I may, to go to the heart of the case as we think the questions of Mr. Justice Black and Mr. Justice Frankfurter have exposed it. The complaint in this case was dismissed for lack of jurisdiction and for failure to state a claim upon which relief can be granted. The Court of Appeals affirmed. Your Honors do not have before you proof. You are not called upon to decide what the relief should be, if that proof should be accepted and a judgment of a violation of constitutional rights made. The only question which has been considered below, the only question which is here, is the question stated by Judge Brown: Whether the Federal courts are open to hear and determine the serious charges that are made by this complaint, the charge that this Act of the state legislature, although cast in neutral surveyor's terms and terms of metes and bounds, that the line which this statute draws is a line based upon race or color, and that it deprives these petitioners of basic constitutional rights secured to them by the Fourteenth and Fifteenth Amendments.

Now both courts below answered that question in the negative, said that it is not the business of the Federal courts to entertain and resolve the controversy, the dispute, which is created by

these allegations which, for purposes of this review, are to be taken as true. And that disposition of the case was not based upon cynicism or indifference. The courts below in saying to the petitioners that: Your remedy is not in the courts of the United States, your remedy is to be found in the Alabama state legislature, which you say is the body which has denied you your constitutional rights—the opinions below demonstrate that this case has received the most careful and thoughtful consideration. And the decision below was based essentially upon three grounds.

One, as to the nature of the statute here, that this was a statute which defined municipal boundaries, and that such a statute, under the decisions of this Court in three cases, such a statute may be enacted by a state legislature wholly unrestrained by the provisions of the Constitution of the United States. The legislature, in drawing municipal boundaries, in expanding them or contracting them, as the case may be, acts entirely as it pleases.

The second ground is that this law on its face has not a word in it on race and color. It's neutral. And the absence of an express discrimination on race and color makes it wholly improper for the courts to inquire into the motives of the individual legislators. That was the second ground.

The third ground was as to the inability of the Federal courts to grant relief or the impropriety of granting relief, assuming effective relief could be given.

Now I hope to deal with each of these grounds. But I think the hypothetical case that Mr. Justice Black has put may illustrate the Government's position on this. I think, we think, that the Constitution of the United States serves as a complete obstacle to the establishment by law in America of any racial or religious ghettoes. If a State of the Union were to embark openly, avowedly, without any pretense, on the policy of geographical separation of the races into separate communities, a policy which is sometimes described as the policy of apartheid—if a state were to embark upon that policy, if it were to declare that, as a matter of policy, to avoid hostility between the races, to reduce racial tensions, the state considers it desirable that people of different races live in separate communities; that within each community they will have full rights, full voting rights, full rights to municipal services; but they shall have a mayor of their own race; they shall have a city council of their own race; they shall have judges of their own race; jurors of their own race.

If, in short, the State of Alabama, instead of drawing the line here [Indicating] which it has, had created two communities—white Tuskegee, black Tuskegee—we don't think this Court would

consider it a sufficient defense of such legislation that the people who lived in black Tuskegee had full voting rights, or had just as good police or better police or fire protection or health protection, or their garbage was being picked up with as much frequency as the people in white Tuskegee. It seems to us that in October of 1960 that kind of defense of a law establishing a ghetto in the United States need not, cannot be asserted in this Court.

Now the first ground of the decision below—

THE COURT: I assume that your argument is based upon the premise that we have to accept, from the allegations of the bill, that this was done for the purpose of excluding these people to see that none of them stayed in the City of Tuskegee.

MR. ELMAN: No, sir. In this respect, the United States does not agree with petitioners. The petitioners have assumed a burden which we don't think the decisions of this Court construing the Fourteenth Amendment as applied to racial discriminations requires them to assume. The petitioners need only show that this legislation, although cast in terms which do not reflect race and color, is in substance and effect a racial discrimination. They need not show that the purpose of the legislature was good or bad, that the motives were worthy or unworthy. This Court, in cases going back to *Fletcher* against *Peck*, has rejected that line of inquiry. As you have said in—the Chief Justice said, for example, in *Norris* against *Alabama*, Chief Justice Vinson, in the *Oyama* case:

> The inquiry is not whether constitutional rights have been denied in express terms. The question is whether they have been denied in substance and effect.

And in the jury cases for example, Your Honors have frequently heard arguments that the commissioner who puts his hand in the box which has yellow slips for Negroes and white slips for white people—he has testified without contradiction that the farthest thing from his mind was race; his purposes, his motives, were wholly admirable; he wasn't thinking of race at all. And this Court has said that it would have to be the blindness of indifference rather than the blindness of impartiality which would attribute to a systematic result such as the exclusion of Negroes from juries over a large period of time, whether the exclusion was total or not it would have to be caprice—

THE COURT: As I understand your argument, if I get the distinction, it is: When you have a situation like this, where a law has been passed which cuts out colored people from the area and puts

them—creates a—decreases the size of the city, leaves them on the outside of that city, so that you look at it and see that the effect of it is that they are deprived of the liberty of having the area in which they live inside the city so that they can get its advantages, that violates the Constitution, in effect.

MR. ELMAN: We are saying that any law which—if you look to the reality rather than appearance, if you look to what it is and what it does rather than to what it says—if that law in actuality draws a racial line, that is sufficient under the Fourteenth Amendment to establish its invalidity regardless of what may have been in the minds of the particular officials of the Government who are concerned with the drawing of that line. That is our position and we think that it's the position that this Court has—excuse me, Mr. Justice Brennan, I'm sorry.

THE COURT: May I ask you, Mr. Elman: In that connection, does this line do that? Is there a prohibition against a Negro owning, buying, now, today, any property inside the line?

MR. ELMAN: The question isn't as to whether there are prohibitions on the Negro. The question is whether this statute draws a racial line. If it draws a racial line, we think it is immaterial whether the result of the drawing of that racial line may result in burdens or not.

THE COURT: True, but—

MR. ELMAN: Class legislation—if I may continue, sir.

THE COURT: Yes.

MR. ELMAN: Class legislation on the basis of race or color, we think, has been barred by the equal protection clause of the Fourteenth Amendment as it's been construed by this Court from cases starting with the *Slaughterhouse Cases* and *Strauder* and *West Virginia* and going through the line of cases exemplified by *Brown* against *Board of Education*. If people live in a ghetto, it doesn't make any difference if the houses in that ghetto are finer than the houses on the outside. The point is, you cannot in this country enact legislation which contains a racial classification.

Now in other areas—classifications between farmers and workingmen, for example, and tax legislation—this Court is always faced with a problem of scrutinizing classifications. And the classic formulation of the scope of your inquiry is: Is there a rational basis for such a classification?

But when it comes to race and color, you are spared that problem because the Constitution and the Fourteenth Amendment

have declared that race or color is an impermissible basis of classification.

THE COURT: I would assume that that was so, then ask you whether this line is a violation. Does it forbid in any way ownership by any race on either side?

MR. ELMAN: No, sir; the answer is no. But we think it is immaterial, because if this statute in express terms declared that the City of Tuskegee shall be redistricted or its boundaries shall be redrawn in such a way that as many Negroes as possible shall be removed from it, and if that duty were entrusted to an administrative officer or a city surveyor that would, I am very confident, present no problems to this Court or any court in the United States.

THE COURT: Even though the statute had a proviso: However, if they can they may buy new houses and move back.

MR. ELMAN: Exactly. Suppose this, for example—I may be straying from the issue here, but suppose for example, a municipality were bent upon avoiding the consequences of *Brown* against *Board of Education* and it redrew school attendance districts in terms of the existing residential pattern. Now surely the fact that the parents of a Negro child who wanted to attend some other school would have the right to see their house and try to find a house in another neighborhood—even if that right were expressly recognized by the statute, it's hard to see that that would constitute the kind of constitutional justification for violation of rights which this Court has said lie at the very basis of government.

Courts every day in the week are ascertaining the intent of the legislature. They're looking to the meaning of a statute. They're piercing corporate veils. They look to substance and not to form. They're doing it in the context of corporate reorganization cases.

This is a case where people are coming into court and saying: "We are being deprived of our most fundamental rights. We're being deprived of these rights because we're colored." And if a court—

THE COURT: Suppose that—the reach of this argument is pretty far historically—that the school districts had been redrawn with a view to separate school systems. Your argument would permit a parent to challenge those to have them redrawn by a different standard?

MR. ELMAN: My argument—

THE COURT: Your argument would allow redrawing of some municipal lines, perhaps.

MR. ELMAN: The argument that I'm presenting on behalf of the Government does not in any way imply that a Federal court will be redrawing municipal boundaries or redrawing school attendance districts. The question here is whether the Federal judicial power is available to consider and adjudicate a claim that a particular action, a particular governmental action, a state law—

THE COURT: I understand that.

MR. ELMAN: —is in violation of the Constitution. If it is—

THE COURT: It has something to do with the drawing of lines by someone.

MR. ELMAN: If it is, the question is whether a declaratory judgment will suffice; should the Court go further and enter an injunction against the enforcement of the law which it has declared invalid; should it allow a reasonable period for the state legislature to attempt to enact other laws? All those questions are going to be presented when the District Court, if he reaches it, has to decide what kind of relief should be granted. But they're not here.

The question here is whether this complaint should be dismissed for lack of jurisdiction and for lack of judicial power to consider it. That's the question. And unless the Court is prepared to say that there is nothing at all that any court can give by way of relief, then I think the question of relief would become relevant here. And I don't think it can be assumed, as it was in one of the opinions, the opinion of Judge Wisdom below, that no court can grant effective wisdom here because the day after its decision invalidating this law, the legislature of Alabama may enact a new law with slightly different variations; then there'll be new litigation, and there might be an endless series of lawsuits. Well, certainly the premise that a legislature of a state of the United States is not going to respect the determination of a court of the land which is charged with the duty of determining what the Constitution means—and you assume that its purpose will be to flout in every conceivable way that determination—I don't think that premise can be asserted or accepted by this Court.

THE COURT: My question wasn't—you misunderstood my question.

MR. ELMAN: I'm sorry.

THE COURT: Suppose this was the classic and historic pattern of the City of Tuskegee, and those who were out were trying to get in. What would you say to that? That's comparable to the school district case.

MR. ELMAN: No, the school districting case I suggested was a case of a specific action, drawn on the basis of race or color, not an existing fact—

THE COURT: Well those are existing facts in many communities.

MR. ELMAN: Well, it's hard offhand for me to think of an existing fact being in violation of the Fourteenth Amendment. I'd have to find some governmental action which violates the Fourteenth Amendment. What did the state do? And here the state did something.

THE COURT: Well every municipal line is drawn by some state authority, I suppose.

MR. ELMAN: Yes, sir. And if it's drawn, even though in terms without regard to race or color, if it is in substance and effect a racial line, we think the Constitution permits you to at least consider an allegation along those lines.

Now this isn't particularly unique in the field of racial discrimination. Your Honors have had cases like the *Grosjean* case coming from Louisiana; the tax on newspaper advertising: held unconstitutional as a violation of the First Amendment. Not a word in that statute about interferring with freedom of the press. The Court held that that statute burdened the exercise of the constitutional right of the free press. There was no suggestion that the Federal court should have made an inquiry into the motives of the members of the Louisiana legislature as to whether they intended to burden the press. Your Honors looked at the operative effects of this legislation. You looked to what it did, not to what it said; not to the image of the statute but to the reality.

THE COURT: What it does—when we look merely to what it does without thinking about why they did it—what it does, according to the allegation as I understand it, it recreates the boundaries of Tuskegee in such a way that it eliminates nearly all of the colored voters so that they were no longer in that area. But they were put outside that area. And the state claims it had a right to do it according to its power to change the boundaries of its cities and counties.

MR. ELMAN: The state is claiming more, sir—

THE COURT: Well that's one of them.

MR. ELMAN: They're claiming you have no right to inquire into that, the constitutionality of that statute, because it is a statute redrawing the boundaries.

THE COURT: I gather that you're also saying that it creates a burden on the right to vote because of color?

MR. ELMAN: Yes, sir. In this case there is a Fifteenth Amendment argument which, on the allegations of the complaint, is a perfectly valid argument: Prior to this Act these people, these petitioners, had the right to vote in municipal elections. Now, that right could have been taken away from them by a valid law redefining the boundaries. They had no vested right to live in Tuskegee, obviously. But they did have a right under the Fifteenth Amendment not to have their voting rights taken away because of their color. They could have been taken away for other reasons, but not for that reason.

THE COURT: The trouble I have with that—I'm not talking about the ultimate conclusion of what happens--the trouble I have with that is the difficulty I have in drawing the conceptual distinction between an argument that you don't have to think at all about what is done, but you just look to see its effect. And of course in each instance the voting rights of people are changed when they take in some new territory or cut out some territory. This case illustrates a new phase of the fight that's been going on. Most of us are familiar with the fight from those who lived on the outside and were brought in and were protesting it deprived them of their vested right not to be in the municipality. This is a new phase of it brought on by this kind of controversy.

I can't see, myself, how you can go wholly on the basis that you don't have to have evidence. In your judgment, would it be admissible to show that the author of the bill stated that was his purpose?

MR. ELMAN: I think, Mr. Justice—

THE COURT: Is that something like the evidence we had in some of the other cases?

MR. ELMAN: —Black, the question of proof, of course, technically speaking, is not really here.

THE COURT: But actually it is.

MR. ELMAN: Actually it is. And I will not duck the question on that ground. So far as what kind of proof is concerned, why should petitioners in this kind of case have a greater burden than was put upon the plantiff in the case, for example, in *United States*, last year in the case of *United States* against *Thomas*, a voting case where Judge Wright found that there were challenges to 1,377 Negro voters and only to 10 white voters, and he said: "As a matter of statistics, just looking at the numbers, somehow

or other the Negroes were challenged and the whites weren't; and from that I infer that this was a racial action."

Now we think that in this case the maps, the population, in themselves establish a prima facie case. It's enough to shift the burden of going forward to the state. If there is a rational justification for this other than race or color, surely the state can come forward with it and should be compelled to come forward with it. In cases, for example, like the *Bates* case that was before you last year, Your Honors have said: "On the face of it we see no discernible justification for this that enables this to stand. If it can be—if there is such a discernible justification that we don't know about, let's hear from the state."

THE COURT: As I understand it, though, you finally get to purpose, or whatever you call it. It seems to me it has to be met. What you get to is—I'm not saying how it has to be met—what you get to is this: that you explain here that if a state exercises its general power to change the boundaries of municipalities the way this has, in such a way that it bars a great many people remaining in the city in that area who have lived there before, who are actually all colored, that that's enough to say that the state has changed the boundaries of its municipality on the basis of color, and they can't do it.

MR. ELMAN: Well Judge Wisdom in his opinion below, the concurring opinion below, held that this complaint had to fail because it required an inquiry into motives. He used the word "motives"; motives of the legislators. He referred to psychoanalysis, prying into the subconscious of the legislators. We think that that puts up a straw man. No one suggests that when a court is seeking to ascertain the meaning of legislation or the, quote "intent" unquote, of the legislature, that you take affidavits, you subpoena the members of the legislature and ask them: Well just what did you have in mind when you voted for this, or when you voted against it? That's not the process of judicial inquiry into the meaning of legislation. And we think that that's all that you have to do here.

THE COURT: I didn't make it close enough to what I was trying to get. What I was trying to get from you was this: Is this the point that we have to reach, that you have legislation here which has reduced the size of the city in a way that takes practically all the colored people out of there, moves them into a different area, and keeps the others in there. That, you say, is forbidden to the state and see that it was done on the basis of color, and the Fourteenth Amendment forbids it.

MR. ELMAN: If you can see that, if you can see that, then it's within it. If it's done to them because they are colored—

THE COURT: You say that they can't change the area of the city at all—

MR. ELMAN: And you don't look at the statute—

THE COURT: You can't change the area of the city at all on the basis of color?

MR. ELMAN: That's right.

MR. CHIEF JUSTICE WARREN: Mr. Carter?

ORAL ARGUMENT OF JAMES J. CARTER, ESQ., ON BEHALF OF RESPONDENTS

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

If I may, before getting into the main part of my argument, answer a few questions that were asked yesterday that were not cleared up. Mr. Justice Frankfurter asked when Tuskegee Institute was organized. It was in 1881.

You also asked, I believe, Mr. Justice Frankfurter, about the previous boundaries of Tuskegee. Tuskegee was first organized in 1866, with a boundary of two and a half miles on each side, the boundaries being equidistant from the then courthouse. In 1868, by an Act of the legislature, those boundaries were pulled in to an area one mile square. History gives us some very interesting sidelights as to why that was done. Later on they were expanded again. There have been several Acts, and I believe the last Act that really touched the boundaries in any significance was an Act of 1898, which again placed them in this position [Indicating], two and a half miles square.

The question was asked as to the fire and police jurisdiction. That's a general statute of Alabama applicable to all towns and cities. In towns having a population of 6,000 people according to the last Federal census, the police limits are three miles beyond the corporate limits; and in towns of less than 6,000, it's one and a half. Tuskegee at the present time has police jurisdiction three miles beyond the new city limits, by reason of the fact that we haven't had the official 1960 census yet announced, nor have we had a legislature meet, as it will next year, after the announcing of that. If the population of Tuskegee is less than 6,000 with our next legislature, then of course we'll revert back to the one and a half mile limit.

THE COURT: Yours is a biennial legislature, isn't it?

MR. JAMES CARTER: Yes; it meets next May.

THE COURT: So that's a little ahead of the game. So that if this statute, if 140 is invalidated and the old boundaries revert, unless there is a special session of the legislature, it will take some time to do what Judge Wisdom feared might be done. Is that right?

MR. JAMES CARTER: And you have this, too: You have the United States census being out of kilter, because as I understand it they're going by these boundaries.

Now, within the police—

THE COURT: Mr. Carter, before you proceed, what's the meaning of this extraterritorial police jurisdiction? Is it a power to arrest, or is it a day to day—

MR. JAMES CARTER: They have the power to arrest, to answer calls, and to actually patrol the area. Most cities do, as a matter of fact. They furnish police and fire protection to the entire area. As a matter of fact, in this entire area here they have water and electricity. They have a municipal electric plant which furnishes this entire area. None of that's been withdrawn.

THE COURT: Now, do they pay—of course, I assume they pay for the water.

MR. JAMES CARTER: They pay for the water and electricity. But these people that have been on the outside of this city pay no city taxes. In other words, since 1957 no city taxes. The only taxes levied within the police jurisdiction are for businesses. Now business organizations pay one-half the license that people within the city limits would pay, and that is based on the theory that they do get police and fire protection and these health services.

THE COURT: By health services you mean what? Garbage collection?

MR. JAMES CARTER: Well no, they don't have garbage collection as such. But I mean they have the advantage of coming into the city health department and any of that. And of course they have the water and the sewage lines, which of course are available there and are used.

Now we also point out here as to the population of this area and the way it was drawn—with a little larger map, you will see here, for example, [Indicating] a rather heavily populated neighborhood. That's a Negro neighborhood there, which begins right here [Indicating] and goes way over. Now are we in a position

here in drawing lines, as we must if those people want us to, to say: "You must come in the city; you're discriminating against us because we're colored." That's another point.

Now, I believe Mr.—

THE COURT: Mr. Carter, I didn't take in what you just said.

MR. JAMES CARTER: I'm saying here that that gets back to the point that I believe one of the Justices, Mr. Justice Whittaker or someone, asked, that if you have people on the outside of the city in an area, if you would be discriminating against them if you didn't take them in. I said that would illustrate that particular point, if these people in, say, Greenwood over here [Indicating], wanted to come into the city.

THE COURT: That's never been a part of the city?

MR. JAMES CARTER: Never been, no sir.

I believe yesterday there was some question asked about the procedure for changing boundaries. The Constitution of Alabama provides—and this Act was not, as the first counsel suggested, a private Act; it was a local law passed after notice and proof according to our Constitution. To pass such a law you have to advertise it four weeks. That's to give the people affected an opportunity to come in and protest if they desire to do so. As far as I know, there was no—this was advertised; no protest was ever made.

Now this is perfectly legal. It's been upheld by our State Supreme Court as being the proper way to change boundaries. In fact, nearly all boundaries in Alabama are changed that way. Hardly a session of the legislature meets that you won't have 50 to 100 boundary line changes. There've probably been thousands since our Constitution of 1909.

Now there are other ways of changing boundaries. For example, in a city the city may initiate its own proceeding. The council may propose it and present it to the probate judge, and then by popular election bring in additional territory. You can also contract a city the same way. The city here could have initiated it. This was state action, however, not city action. This was done by the state legislature.

Also I point out the fact that people, 75 or more people, may form a municipality. In other words, the people outside here may form their own municipality if they care to do so, and may initiate the action and carry it right through simply by a popular vote.

I believe that probably gets us down, except for one thing that Mr. Justice Stewart mentioned yesterday, that the district judge characterized this as a seadragon. That was the plaintiff,

that characterized it as a seadragon. He put it in quotes in his opinion. Now when we look at it, it might be a bit of a—it's a descriptive term. It would tax one's imagination. But it's not too unusual-looking an outfit, when we look at some of the cities of the United States. Last night I happened to pick up a Rand-McNally Road Atlas, and of course we [Inaudible] all the way through, so we might just mention some of them: Allentown, Pennsylvania. I suppose it looks more like a cloud. As boys we used to lay on the grass and watch the clouds and figure what they looked like. Concord, New Hampshire; Stanford, Connecticut; Scranton, Pennsylvania, looks like a jigsaw puzzle sitting something on top of the other; Cincinnati, Ohio, about as bad. Even Sacramento, California, and a number of others.

So you just don't know why a city has the boundary lines it has. But let's go down now to what I consider, if Your Honors please, the meat in the coconut in this case, and that is this: And finally after being in the lower court and the Court of Appeals, finally for the first time, on page eleven of the petitioners' brief, did we ever get them to admit there were such cases as *Hunter* versus *Pittsburgh* and *Laramie County* versus *Albany County*. Now *Hunter* versus *Pittsburgh*, and *Laramie County* versus *Albany County*, and *Mount Pleasant* versus *Beckwith*, are the cases upon which we stood in the lower court on the fundamental merits here, and that is the power of a state acting through its legislature as a sovereign right to extend corporate limits, to draw them in, to consolidate cities, or to abolish them. That's true of counties; it's true of cities.

The first case on the subject was the old *Laramie County* versus *Albany County*, which involved county lines. The Court said a county is just a political subdivision of the state. It's a creature of the state, created for the convenient administration of government.

Shortly we came to *Mount Pleasant* versus *Beckwith*, where they again pointed out that corporations are composed of all the inhabitants of the territory, only the people who live within the territory; and they say that the organization of the territory may be modified—and I'm now quoting from this Court—"by the mere will of the legislature." Now, that goes back, if the Court pleases, to other quotations. We look in Cooley's 'Constitutional Limitations,' we find Professor Cooley saying that they may; it's a political matter, the drawing of boundary lines for cities and subdivisions, peculiarly vested in the state. And it says: If the legislative action in these cases operates injuriously to the municipalities or to individuals, the remedy is not with the courts. The

courts have no power to interfere and the people must be looked to to right through the ballot box all these wrongs.

THE COURT: Mr. Carter, what were the exact issues in any one of those cases? Take *Hunter* against *Pittsburgh*, or *Mount Pleasant*. What exactly was done that was complained of?

MR. JAMES CARTER: All right, sir. In—

THE COURT: Not in general language; but what was it? Whose toes were stepped on?

MR. JAMES CARTER: Which? Either one, or do you want me to take all three of them?

THE COURT: Take any one of them.

MR. JAMES CARTER: All right, sir. Let's take *Mount Pleasant* versus *Beckwith*. That was a question of creating municipal corporations out of parts of other corporations. In that case the main issue involved was the question of—

THE COURT: Who complained of what, is what I want to know.

MR. JAMES CARTER: There it was a city; the city was complaining about having to take on debts of another city. Now, that was a city action.

Now, *Hunter* versus—*Kelly* versus *Pittsburgh*, if we take that one, was where the city—or rather, the state—increased the limits and brought in Mr. Kelly's farm land. They brought in about eighty acres of farm lands. And Mr. Kelly, an individual, came in and said: You are depriving me of my property without due process of law. Now, this is what you're doing to me: I've got farm lands. You've increased my tax rate. I've got to come in and pay for all the citizens of Pittsburgh. You're charging me 2,100 dollars a year taxes; I've only got 800 dollars income. And that case went all the way to the Supreme Court of the United States, and that case said that that didn't make any difference. It said:

> What portion of a state shall be within the limits of a city and governed by its authorities and its laws has always been considered to be a subject of proper legislation.

THE COURT: He complained that he was quite happy when he was outside Pittsburgh—

MR. JAMES CARTER: Yes.

THE COURT: —and now he's going to be inside of Pittsburgh and the tax rate's going to be higher.

MR. JAMES CARTER: Yes, he was most unhappy.

THE COURT: That's all that was involved.

MR. JAMES CARTER: That's all, yes, sir. I might be frank and say: None of these cases involve a racial situation.

Now, in *Hunter*—

THE COURT: Well, fundamentally, they involve complaints by citizens of a smaller unit annexed to a bigger city, or *vice versa*, a big city having things tacked onto it.

MR. JAMES CARTER: Yes, that's correct.

THE COURT: In short, they involve the relations of the municipalities to the state, is that right?

MR. JAMES CARTER: And the people in that municipality to the state and the municipality.

THE COURT: All of them having been originally created and their boundaries having been defined by the state.

MR. JAMES CARTER: Yes, just as in Tuskegee the City of Tuskegee was originally organized by, its boundaries defined by the State, and most recently defined by the State.

Now, in *Hunter*—

THE COURT: The analogue would be if some neighboring little village had been annexed to Tuskegee, or a division had been made of which no such calculation regarding population distribution could be made, as was made in this case. Isn't that right?

MR. JAMES CARTER: It would be true, if you want to get something directly analogous. I'll admit that I don't have a white horse case on this. But I do have the law which has been followed and affirmed and reaffirmed by every state in this Union.

THE COURT: Can we agree that you have language?

MR. JAMES CARTER: Language, if you please, yes, sir. I think it's the law, because I believe it's been repeated and I think it's been followed by this Court Just because I don't agree with Judge Brown in his dissent, who said: You've only got one case that's been decided in this century—well, I don't think that because a case is old that makes it bad law.

But in *Hunter*, they said this—and they go back to it, and I agree with you there, it was a question of bringing Allegheny into Pittsburgh. Well, Allegheny had a nice little town and they had all their debts paid and they had all their facilities; and Pittsburgh

was trying to do everything and going into debt. But they said this:

> We have nothing to do with the policy, wisdom, justice, or fairness of the Act under consideration. Those questions are for the consideration of those to whom the state has entrusted its legislative power.

The Court goes on to discuss what a municipal corporation is, that they are simply political subdivisions; then says:

> The State may, at its pleasure, modify or withdraw those powers, extend or contract the territorial area.
>
> In all these respects the State is supreme, and its legislative body, conforming its action to the State Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.

Now, we take flatfootedly the position in this case that this is a case within the competence of the State of Alabama to fix the boundaries of its municipalities.

THE COURT: You're really resting, are you not, Mr. Carter, on a legal dogma—and I don't mean to use the word derogatorily—but you're resting on a legal absolute that the creation or destruction or modification of municipalities is a political function of the state not subject to judicial review?

MR. JAMES CARTER: If Your Honor please, I think that would be a fair statement of my position. That's one of my positions. There are three. But I take that. I take it, yes, sir. As a legal absolute, and one that's become so firmly embedded in the jurisprudence of this country that I think we'd be getting into a real thicket if we ever got beyond it.

Now, as Your Honor pointed out—

THE COURT: Could this lawful power be used to accomplish an illegal, unconstitutional objective?

MR. JAMES CARTER: Of course, to that extent, Mr. Justice Whittaker, I won't say that there is no possible situation that it might not be abused. But I do think this: I think it's a matter even then, that the states themselves should have an opportunity to correct by going to the state courts to do it, if they do get off base or something like that. For example, there are many things that the courts have said—and I believe Mr. Justice Frankfurter point-

ed out in *Colegrove* versus *Green*—that courts just can't do. To some extent, he pointed out, for example, that we have some constitutional guarantees that can't be enforced. For example, the guarantee of a republican form of government; the control of foreign relations; the control of civilian and military appointing power. When we get to civilian and military appointing power, just can't touch it. This Court has decided that recently. The inherent wisdom of any legislative or executive policy; the duty to see that laws are faithfully executed. And then we go on beyond the fact they fix boundary lines. We've got the old cases of this Court, like *Benson* versus *United States*, where there a man was on trial for his life and the issue in that case was: Did this occur on Fort Levenworth Military Reservation or didn't it? And he took the position that it was on land owned by the Government, but they had never used it for a reservation, and the short answer to it was: The Executive has determined that these are the boundary lines of Fort Levenworth Reservation, and that is it. And that case went off on the proposition that there were things within the legislative and executive field—and throughout the cases and all of them, that every state in the country has followed *Hunter* and *Laramie* and the others; they have consistently held that the drawing of boundary lines in cities is a legislative and not a judicial function.

We come back to this propostion in this case, to get to the racial angle—of course, we would have to go back and see what the legislature meant. Of course, we speak of intent and the reaching of intent and construction of legislation, and that's true. But of course, that's an ambiguous legislation, where we always go back to committee reports. Here there are none. There's nothing in the Act. There is nothing to construe in this statute from that end. These are the boundary lines, period. That's the only boundary line.

Now, when we come to motive, and motive is really what we're talking about—we can fence around whether it's purpose or intention. Purpose or intention, I believe, is *South* versus *Peters*. There the contention was made that the purpose or effect of the Act was the words that were used. But this Court still went off there and didn't go into that; they didn't go to the proof angle. But this Court has said repeatedly—we go back to the *Duplex Printing Company* case—even with Acts of Congress. You can't take what legislators say and read into that the motive behind it. It just can't be done.

And we go back to the very beginning of this country, *Fletcher* versus *Peck*. Now, that was a case where it was alleged that the

legislators of the State of Georgia had been bribed to pass certain legislation to make land grants. And Mr. Chief Justice Marshall refused in the case to even inquire into it, saying that the motives could not be inquired into.

The Court's consistently followed that line. Mr. Justice Holmes in *Calder* versus the *People of Michigan* said that the knowledge, manners or motives of legislators will not be inquired into. *Tenney* versus *Brandhove* reaffirmed the principle. *Arizona* versus *California*, again by the Supreme Court of the United States, where it was alleged that the members of Congress had some ulterior motives in trying to pass that act, that somebody was trying to do it for personal reasons and to make a lot of money, and they said: Motives which induced members of Congress to pass the Boulder Canyon Act will not be inquired into. They are things with which the Court may not inquire.

And we say we can talk about motive or purpose. That's what they're talking about. They want to go here to something—they want to quote, for example, from what the newspapers said that the author of this Act said when he first advertised it before it was introduced in the legislature. They even go so far in their record as to cite an article from *The New York Times*, and *Time* magazine.

If it please the Court, if we ever get to the point of determining motive or what people mean by what people say about us or about our courts or about our legislature, we're in pretty bad shape, because we just can't always determine motives at will.

Now, to my third point, and to me, I think it is an important point, and that is the question of judicial restraint in cases of this kind. We have a number of cases—

THE COURT: Mr. Carter, could I ask you a question on your first argument?

MR. JAMES CARTER: Yes, sir.

THE COURT: Supposing this statute on its face said that the policy of the State of Alabama is to preserve segregation in its cities, and therefore Tuskegee will be redistricted; so we divide it up. Would you still say that that was beyond the power of the federal courts to touch?

MR. JAMES CARTER: No, sir. I think that the decisions of this Court have made it very plain that when you have a statute such as that it will be stricken down. I think you've done that in the school segregation cases. As a matter of fact, in Alabama we do have a constitutional provision on segregation. But we're not here relying upon that. We realize that there's been a change of climate, and that the recent decisions have clarified those points.

And what I'm saying here—I'm standing flatfootedly upon the proposition that in a case of this kind, where there's simply been a boundary change, that the State has the right to do it. There's nothing here, as was pointed out before—Negroes live within Tuskegee. Negroes live without Tuskegee. They may change boundaries. Nobody's been removed from Tuskegee. Simply, some territory has been detached from the municipal corporation. Not a single—it doesn't affect the schools; it doesn't affect the services at all. It's simply a question of drawing lines. The territory which was once within certain limits, metes and bounds, are now no longer there; the metes and bounds are different and they are different because the people who have a right to draw them drew them.

THE COURT: Mr. Carter, if you were here in this lawsuit formally to admit the purpose to be as alleged, you'd have then, would you not, the same situation hypothesized by Mr. Justice Harlan?

MR. JAMES CARTER: Yes, sir, I probably would.

THE COURT: But the question you raise now is that there can be no proper proof of motive; that's not a judicial inquiry, is that it?

MR. JAMES CARTER: Yes, sir. Yes, sir, I say that.

THE COURT: In other words, this is an exception to the rule that facts well pleaded are admitted for jurisdictional purposes?

MR. JAMES CARTER: Of course, Your Honor, to have something well pleaded, you must have something that's susceptible to proof by evidence.

THE COURT: Well, that's your point, isn't it?

MR. JAMES CARTER: Yes, sir.

THE COURT: Mr. Carter, your answer to Mr. Justice Harlan's question makes inroads upon your proposition that you are standing on an absolute.

MR. JAMES CARTER: I am.

THE COURT: Suppose the legislature of Alabama said: Whereas the Supreme Court of the United States has said, and then quoted the things you've quoted from *Laramie County*, from *Beckwith*, from *Hunter* and *Pittsburgh*—therefore, exercising the right to do what we have judicially unreviewable power to do, namely, to redistrict municipalities, we redistrict it because, for the wellbeing of the State we think it's good for colored people to talk together and for white folks to talk together. If that is bad—did I understand you to say that would be bad?

MR. JAMES CARTER: I say this—of course, I'm not in a position to speak for the State of Alabama, now. I don't represent the State of Alabama in this case. But I would say this: If any legislature was ever foolish enough to put that in a law, I think it should be knocked down.

[Laughter]

THE COURT: Well, on that basis a lot of laws ought to be knocked down.

[Laughter]

MR. JAMES CARTER: But let me say this on the absolute: I would say this, that if purpose was admitted, if purpose was admitted, I think that without overruling *Hunter* and *Lassiter County* and the others, that the states would have the power to draw their boundary lines regardless of the purpose. What I'm saying is—

THE COURT: I don't use the word "purpose," because I don't believe in it.

MR. JAMES CARTER: Yes. But if that is the proposition—in other words, I say that purpose is not a proper inquiry in this case as to what the statute means.

THE COURT: No, I'm not talking about this case. I'm talking about whether you can say those appropriately quoted things from those three cases are some of the generalities, unqualified generalities, which courts give expression to in deciding a concrete case which can't stand scrutiny when a different case arises.

MR. JAMES CARTER: I would say this, Mr. Justice Frankfurter: If I was put to the choice, I would take the position that even with that language we would uphold this.

THE COURT: Well, Mr. Carter, you've said that the motive cannot be judicially inquired into. Can the results of the statute be inquired into judicially?

MR. JAMES CARTER: You may look, of course, and see what a statute does. But I don't think—it's an awfully shady line and I don't know that anybody's ever defined, really, the difference between motive and ultimate purpose. Of course, you can look at effect.

THE COURT: Not ultimate purpose, but ultimate results.

MR. JAMES CARTER: Well, of course you can look at any statute and see what it does. You look at this statute and see what it

does, where the line is. Now, the effect of that line of saying who lives on one side or the other, I don't think is a pertinent inquiry in this case.

THE COURT: Well, is it a proper judicial inquiry?

MR. JAMES CARTER: Well, I don't think so, because I think we get back again to the proposition that the legislature has the right to draw lines. Somebody's put that power in them. The courts can't draw the lines. Nobody else can draw that line, and they have drawn it; and they've drawn it in a way that is compatible with the Constitution of the State of Alabama, and I say it should hold.

THE COURT: Well, suppose it's incompatible—the result that it achieves is incompatible with the Constitution of the United States.

MR. JAMES CARTER: Of course there, again, Your Honor, I don't see how we could determine that, when we have the power to draw a line, without going back and saying, really, what is the motive of this thing, which the courts have said you cannot inquire into.

THE COURT: I'm not talking about motive. I'm talking about the ultimate effect of the statute on the people who live in that city. Suppose that the Act says nothing of a discriminatory nature, but in effect it does substantially affect the constitutional rights of the people who live there. Is there no judicial inquiry at all?

MR. JAMES CARTER: If Your Honor please, I fail to see here the constitutional rights that have been—

THE COURT: I didn't say you had to see them here. I'm talking about absolutes. All I'm trying to ask you is if it's a proper subject matter for judicial inquiry.

MR. JAMES CARTER: I think of course it would be, in the proper case. The courts always find a way to look into matters if you could come in and say now, we've got a case of absolute violation of the Constitution. But we have constitutional provisions that correlate that mesh in together; and we have one, we have the Tenth Amendment, which says the states are supreme in certain fields, that they have a sovereign power in their own government, and here they can exercise it in creating a political subdivision in carrying out their own policies.

They haven't taken away anybody's right to vote.

THE COURT: Well, isn't that all they're asking for here, to have an inquiry made by the court below?

MR. JAMES CARTER: Yes, sir.

THE COURT: They're not asking us to decide anything here.

MR. JAMES CARTER: But this decision of itself, what they ask, if Your Honor please, is to go into motive, to go into purpose, and to tell the court below—and, as he pointed out, this case has been very carefully considered by two courts. I was encouraged to note that they realized that. It's been studied on several theories, not only the constitutional issues themselves, but from the question of judicial restraint and abstention.

The court below looked, and Judge Wisdom did—that this is about as highly political a thing as anybody can get into, is where boundary lines go. If we start drawing boundary lines as such for every ward and every precinct and everything, there's going to be question after question.

Now, in *Colegrove*, to get back to that, and that case of course was your congressional redistricting. It's not exactly this case, and I wouldn't say that it pronounced any absolutes. But it did point out that the courts generally refrain from getting into the political thicket of districting. Now, this is not, as I say, a congressional district. But it does draw lines of a political subdivision of a state.

And in *South* versus *Peters*, where again we had the question of the Georgia unit vote, and there the Court simply went off on the proposition that it was a political question. The Court wouldn't get into it. Now, there were some dissents in that case, and the argument in that case was very much as it was here. The argument in that case being that the effect and purpose of the Georgia unit system—its purpose and effect was to dilute and to cut down on the vote of Negroes and, I believe, labor. But this Court nevertheless, with Mr. Justice Black and Mr. Justice Douglas dissenting, held in that case that it was not a matter for judicial concern.

We say that this is a matter of local policy. We say, as the cases have pointed out, that it's a question of local policy and purely political; that the courts have, nearly all the way back, not only as a matter of equity but as a matter of judicial extension, if you please—or perhaps judicial self-limitation, if you please, would be the better word—have refused to go into cases of this kind which pose the line-drawing political questions that this would.

And someone said: What's the remedy? They said the only remedy we could have would be to declare this Act unconstitutional. Of course, there we go back to a proposition that you've got intervening rights that have come up in the meantime. This Act was passed in 1957. It was advertised two or three months

before that. Nobody felt that they were discriminated against or did anything until almost 14 or 15 months later. And then they decided they were, which makes you wonder sometimes if people would rather have a lawsuit than to try to use their right of petition under the Constitution to say: Well, I don't think this law is right, and I wish you wouldn't do it.

Are we to assume that legislators will not listen to anyone? Are we to assume that the right of petition, to go down and discuss this thing, and to say: Don't go this far, but go somewhere else; you're not doing right by us. But no, the matter's gone on. They accept the benefit of no taxes. They accept the benefits of their police and fire protection. But now we come back at this late date—even an intervening election—and they say, oh no, let's get into this thing now and tell us really where the law should be drawn, and say: Oh, the court's not drawing a line.

Well, of course you can say it in this case. But if we draw another one, somewhere, some court, sometime, has got to tell us how far we can go. What percentage of colored and white there must be. Of course, somewhere, sometime, if that goes on, somebody has to draw the line.

THE COURT: Are there biennial elections in Tuskegee?

MR. JAMES CARTER: Every four years, sir.

THE COURT: Every four years, is it?

MR. JAMES CARTER: Yes.

THE COURT: Was this year one?

MR. JAMES CARTER: This year, September was the election. In fact, they elected a new mayor. He hasn't taken office yet.

THE COURT: There won't be another municipal election until?

MR. JAMES CARTER: For four years, unless somebody dies and they have a special election—that's correct.

So we have numerous questions: Are the elections void, the ones we've already had? Has the government in the meantime been in a state of limbo? Or just what is the situation? So we respectfully submit, if it please the Court, in this case, that for the courts below to have granted the relief that these petitioners asked, they would have had to have ignored precedents that have been established, re-established, affirmed, and re-affirmed throughout the history of American jurisprudence. And we go back and we say again in the terms of Judge Wisdom, and we think he put it very wisely—he agreed with the majority opinion and he wrote a concurring opinion on this question of judicial

self-limitation. As a matter of fact, the opinion of the majority and the opinion of the minority—as well as the dissent—could well make the briefs in this case. My brief is brief because they have covered the field, practically. But he did point this out, that if we come back to a situation in this case—if the courts are to enter this field, the cure is going to be much worse than the disease, if the disease really exists.

Thank you.

MR. CHIEF JUSTICE WARREN: Mr. Carter?

REBUTTAL ARGUMENT OF ROBERT L. CARTER, ESQ., ON BEHALF OF PETITIONERS

MR. ROBERT CARTER: I just have one word, Your Honors. I just want to point out to the Court again what we think the propositions are before it:

We have alleged and made allegations that Act 140 accomplishes disenfranchisement based upon race and a denial of residence because of race. It is our position, if the Court please, that we are entitled to have those claims heard in court. The abatement of racial discrimination has always been the business of the courts, and particularly of the Federal courts, certainly since the Civil War.

The fact that this was done by virtue of boundary lines and so forth, we think makes no difference. The question we think we're entitled to is to go into court, to have a hearing, and to submit proof that racial discrimination which we allege has been accomplished. And we think that—that this is our case, and that this case is governed, as we said before, by the race discrimination cases where this thing has been allowed.

Thank you.

[Whereupon, argument in the above-entitled matter was concluded.]