June 2, 1975

Re: No. 74-157 - United Housing Foundation v. Forman
No. 74-647 - New York v. Forman

Dear Lewis:

Please join me.

Sincerely,

[Signature]

Mr. Justice Powell

cc: The Conference

Dear Lewis:

In due course I shall circulate a dissent in the above.

Sincerely,

Mr. Justice Powell

cc: The Conference
June 2, 1975

Re: Nos. 74-157 and 74-647 - United Housing v. Forman

Dear Lewis:

Please join me.

Sincerely,

Mr. Justice Powell

Copies to the Conference
June 2, 1975

Re: Nos. 74-157, United Housing Fd., Inc. and 74-647, New York v. Forman

Dear Lewis,

I am glad to join your opinion for the Court in these cases.

Sincerely yours,

Mr. Justice Powell

Copies to the Conference
No. 74-157 -- United Housing Foundation, Inc. v. Milton Forman
74-647 -- State of New York and the New York State Housing Finance Agency v. Milton Forman

Dear Lewis:

Please join me.

Sincerely,

T.M.

Mr. Justice Powell

cc: The Conference
June 3, 1975

Re: Nos. 74-157 & 74-647 - United Housing Foundation, Inc. v. Forman

Dear Lewis:

I shall await Bill Brennan's dissent.

Sincerely,

Mr. Justice Powell

Copies to Conference
June 6, 1975

Re: 74-157 - United Housing Foundation v. Forman
74-647 - State of New York v. Forman

Dear Lewis:

I join you.

Regards,

Mr. Justice Powell

Copies to the Conference

P.S. (LFP only)
This is an excellent job and I particularly welcome the addition of note 15.
June 10, 1975

Re: Nos. 74-157 & 74-647 - United Housing Foundation, Inc. v. Forman

Dear Bill:

Please add my name to your dissenting opinion in these cases.

Sincerely,

Byr

Mr. Justice Brennan

Copies to Conference
June 11, 1975

Re: United Housing Foundation v. Forman, No. 74-157
State of New York v. Forman, No. 74-647

Dear Bill:

Please join me in your dissenting opinion.

Sincerely,

WILLIAM O. DOUGLAS

Mr. Justice Brennan

cc: The Conference
June 11, 1975

No. 74-157 United Housing v. Forman
No. 74-647 New York v. Forman

Dear Mr. Putzel:

The line-up in the above case is as follows:

Powell, J., delivered the opinion of the Court, in which Burger, C.J., Stewart, Marshall, Blackmun and Rehnquist, JJ., joined. Brennan, J., filed a dissenting opinion, in which Douglas and White, JJ., joined.

Sincerely,

Mr. Henry Putzel, Jr.

1fp/ss

cc: Mr. Cornio
This case, here on certiorari to the Court of Appeals for the Second Circuit, involves a large cooperative housing project in New York known as Co-Op City. This nonprofit project was financed and constructed under a New York Law designed to provide low-cost cooperative housing for low income tenants. The project was heavily subsidized by long-term, low-interest mortgage loans and tax exemptions.

Co-Op City solicited prospective tenants by an Information Bulletin which described the project, and included estimates of construction costs and monthly rental charges. To acquire an apartment, the prospective tenant had to buy prescribed shares of stock in the project.

Construction costs greatly exceeded estimates, resulting in substantial increases in the rental charges. The plaintiffs in this suit are tenants who claim that the Information Bulletin contained false and misleading statements. The defendants are the various parties that sponsored, constructed and now operate the project.
Suit was brought in the federal court on the theory that sale of the shares was subject to the anti-fraud provisions of the federal Securities Acts. The sole issue in this case is whether these shares constitute securities within the meaning of the federal Acts.

The shares at issue cannot be transferred to a non-tenant; they cannot be bequeathed except to a surviving spouse; they cannot be encumbered; and voting rights are limited to one vote per apartment. More important, there can be no capital appreciation on the shares, and they carry no dividend rights.

Plaintiffs, nevertheless, contend that profits may be derived indirectly in terms of low-cost housing, possible reduction in rental charges from the operation of shops and services within the co-op, and from certain tax benefits.

The Court of Appeals agreed with the plaintiffs, and held that these shares are securities within the meaning of the federal Acts.
We take a different view. The plaintiffs were not investing in stock with the view to making a profit thereon; they were acquiring the right to occupy housing on exceptionally favorable terms. These shares possessed none of the characteristics of instruments commonly known as securities. Accordingly, we concluded that they are not within the purview of the federal Securities Acts, and we reverse the judgment of the Court of Appeals.

Mr. Justice Brennan has filed a dissenting opinion, in which Mr. Justice Douglas and Mr. Justice White have joined.
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Co-Op Shares Held Notto-Be Securities

By Margaret Gentry

The Supreme Court yesterday refused to extend the protection of the federal securities laws to hundreds of thousands of owners of cooperative apartments.

In a 6-to-3 decision, the court ruled that stock purchased in cooperative housing projects does not qualify as a security subject to federal regulation.

The decision reversed a U.S. circuit court ruling in a case involving the 50,000 tenants of Co-Op City in The Bronx, N.Y., the largest housing cooperative in the nation.

The appellate court in New York had ruled that federal regulations apply, partly because tenants purchased what was called stock.

Writing for the Supreme Court majority, Justice Lewis F. Powell said that calling something stock does not make it so.

The ownership shares purchased by the tenants offered no prospect of profit and have most of the other features common to securities laws, Powell said.

The Co-Op City residents filed a class action suit to challenge increases in their monthly maintenance costs.

They argued that the project sponsors, United Housing Foundation, and its operating arm, Riverbay, were bound by a 1965 information bulletin which said the average monthly cost would be about $82 for a four-room apartment.

By July 1974, the average monthly rate had exceeded $125 for the same space.

The Co-Op City residents argued that the 1965 prediction amounted to a solicitation to buy stock and that the project operators were bound by it by federal securities law.

"If that position had prevailed, it could have set off similar suits to force rental reductions in many other cooperatives, housing projects across the country," Powell wrote.

"Common sense suggests that people who intended to acquire only a residential apartment in a state-subsidized cooperative for their personal use, are not likely to believe that in reality they are purchasing investment securities simply because the transaction is evidenced by something called a share of stock," Powell wrote.

Despite the name, he continued, shares in Co-Op City lack "the most common feature of stock," the right to receive dividends from the company's profits.

"In short, the inducement to purchase was solely to acquire a subsidized low-cost living space; it was not to invest for profit," he concluded.

Powell said the court paid little attention to rulings from the Securities and Exchange Commission supporting the application of federal securities laws to cooperative housing.

The SEC has taken the opposite position with effect to condominiums and "this inexplicable contradiction" diminished its influence with the court in this case, Powell said.

Joining him in the majority were Chief Justice Warren E. Burger and Justices Potter Stewart, Thurgood Marshall, Harry A. Blackmun and William H. Rehnquist.

WASHINGTON, June 16—The Supreme Court ruled today that stock purchased by prospective tenants in cooperative housing projects to qualify for apartments was not subject to Federal regulation that might have held monthly carrying charges down to originally advertised figures.

Dividing 6 to 3, the justices held that 50,000 tenants of Co-Op City in the Bronx, the largest cooperative in the country, were not entitled to Federal court trial of their request for a ban on many of their carrying-charge increases above the 1965 level. They had also sought more than $30 million in damages.

Had the high court decided otherwise, hundreds of thousands of other tenants across the country, in cooperatives and perhaps in condominiums, might have been able to hold the developers of those projects to their original estimates of monthly carrying charges, independent of subsequent construction-cost inflation.

In concluding that shares in a cooperative are not stock subject to Federal regulations, the majority rejected the views of the Securities and Exchange Commission and the United Court of Appeals for the Second Circuit.

The Supreme Court majority left open the possibility that Co-Op City tenants might be able to pursue their claims of

Continued on Page 22, Column...
Continued From Page 1, Col.4

TENANTS OF CO-OP
LOSE COSTS SUIT

fraud in the state court.

Associate Justice William J.
Brennan Jr. maintained for the
minority that stock bought by
cooperative tenants represented
"securities" subject to Federal
oversight because it was called
"stock" and involved an "agreement that cooperative shares
investment contract" from which
came not stock. But the Court
the tenants might profit just like
speculators, holding the stock
for an uncertain time in various
ways.

Joining in the dissent were Associate Justice
Douglas and Byron R. White.

To get an apartment in the Coolidge
City project, which opened in part in 1968, a tenant had to buy 18
shares of $25 stock for each
room, or $1,800 worth for a
four-room apartment. In a cir-
cuit in 1965, the operating
corporation said the average rent
monthly carrying charge would be
$23 a room.

The stock requirement re-
mained steady, but the monthly
use by financial returns
carrying charge, with inflation in
their investment.

Driving up construction costs Franchise income, from stock
by $125 million, rose to
more than $420 million.
The tenants filed suit in Federal
District Court.

They contended the stock, the majority
decided, was not stock. Such cooperative stock, Justice Powell said, does not
give the stockholder the right
to dividends based on profit, is
not negotiable, cannot be
pledged against a debt and
cannot appreciate in value un-
der the terms of the purchase
contract.

"What distinguishes a securi-

ty transaction and what is ab-

sent here," the majority said,"is
an investment where one
appreciates in value from rising operating and main-

tenance costs, state officials
say. The request has led to a
withholding of carrying charges and a state take-over of the
management of the project.

Prominent Counsel

The Federal suit pits two prominent lawyers against each
other—Louis Nizer for the su-
ing cooperators, and former
Federal judge Simon H. Rifkind
for the project's sponsor, the
United Housing Foundation,
and its builder, Community
Service, Inc.
June 16, 1975

MEMORANDUM TO THE CONFERENCE:

No. 74-1190 MacKethan v. Virginia

I will vote to deny this petition. The basic issue is whether a state can be held liable under the federal Securities Acts for activities that it undertakes while regulating a savings and loan institution. USDC and CA4 found the action barred by the Eleventh Amendment. Although a vaguely similar issue was presented in the state's petition in Forman, our disposition there made it unnecessary to consider the immunity question.

L.F.P., Jr.
July 9, 1975

No. 74-157, United Housing v. Forman

MEMORANDUM TO MR. PUTZEL

Although the change from "purchasers" etc. to "tenants" may clarify things, on balance I think the present arrangement is preferable.

Joel Klein
Respondents are referred to herein variously as "purchasers", "owners", or "tenants". Respondents do not hold legal title to their respective apartments, but they are purchasers and owners of the shares of Riverbay which entitle them to occupy the apartments. By virtue of their right of occupancy, Respondents are usually described as tenants.

Justice Powell perhaps put this in after 1st sentence in first full TP on page 3, or after word "respondents" in second line of first full TP on page. This will require remembering footnotes. Which can readily be done. If placed in fn. 4 it will be a bit awkward. Nonetheless OK.
4. Respondents are referred to herein variously as "purchasers", "owners", or "tenants". Respondents do not hold legal title to their respective apartments, but they are purchasers and owners of the shares of Riverbay which entitle them to occupy the apartments. By virtue of their right of occupancy, Respondents are usually described as tenants.
July 14, 1975

Memorandum to Mr. Putzel:

Please insert this footnote at page 3, first paragraph, line 2, and renumber the following footnotes, including the infra and supra cites.

Joel Klein