In the

Supreme Court of the United States

UNITED HOUSING FOUNDATION, INC., et al., Petitioners, v. MILTON FORMAN, et al., and STATE OF NEW YORK AND THE NEW YORK HOUSING FINANCE AGENCY, Petitioners, v. MILTON FORMAN, et al., Respondents.	)	No. 74-157 No. 74-647

Washington, D. C.
April 22, 1975

Pages 1 thru 51

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

UNITED HOUSING FOUNDATION, INC., et al., Petitioners, v. MILTON FORMAN, et al.; and STATE OF NEW YORK AND THE NEW YORK HOUSING FINANCE AGENCY, Petitioners, v. MILTON FORMAN, et al., Respondents.	No. 74-157 No. 74-647

Washington, D. C.

Tuesday, April 22, 1975

The above-entitled matter came on for argument at 10:35 a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

SIMON H. RIFKIND, Esq., 345 Park Avenue, New York, New York 10022, for the Petitioners in No. 74-157.

DANIEL M. COHEN, Esq., Assistant Attorney General for the State of New York, Two World Trade Center, New York, New York 10047, for the Petitioners in No. 74-647.

LOUIS NIZER, Esq., 40 West 57th Street, New York, New York 10019, for the Respondents.

PAUL GONSON, Esq., Associate General Counsel, Securities & Exchange Commission, Washington, D.C., 20549, as amicus curiae.

- - -

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in No. 74-157, United Housing Foundation against Forman, and in No. 74-647, New York against Forman.

Mr. Rifkind.

ORAL ARGUMENT OF SIMON H. RIFKIND ON BEHALF OF PETITIONERS IN No. 74-157

MR. RIFKIND: Mr. Chief Justice, and may it please the Court: This case is here by way of a petition for certiorari which brought up for review the decision of the Court of Appeals for the Second Circuit. That court has reversed a judgment dismissing the complaint filed herein for want of subject matter jurisdiction in the Federal court.

The respondents in this case, who were the plaintiffs in the court below, are a number of residents of a residential development called Co-op City located in the borough of the Bronx in the city of New York. These respondents purport to represent a class, to wit: all of the owners of apartments in Co-op City, which is a giant development and contains more than 15,000 homes.

The suit was generated by the sad circumstance to which we have all been recently exposed, namely, that there was an escalation in the costs of the maintenance of the apartments which the respondents had acquired, and the proffered basis for Federal jurisdiction was the allegation

that the petitioners had violated the securities laws to the respondents' detriment.

The complaint itself consisted, I believe, of 13 counts, of which 10 were State-related claims. One was a 1933 Act violation. The same facts were alleged as in 1934 violation, and then there was one claim against the State and the State agency, I believe under the civil rights law.

And the central question which the case brings up for review here is this: Did the Congress in the securities laws intend to reach the transaction which underlies this case? And that transaction I shall, of course, describe.

We assert the negative of that question. In other words, that Congress had no such intention, and our argument will rest on three pedestals, and I believe that each of them would support the conclusion we are here to contend.

First, that this transaction related to homes, not to securities and not to investments.

Secondly, that this is a transaction to which commercial considerations and profit possibilities are roughly alien, and therefore, not within the realm of congressional concern at all.

And, lastly, we are dealing here with a State created welfare plan in which the State selected and conferred upon a group of its beneficiaries, a group of its citizens, various benefits. And as far as I can read the history of

congressional intention, I find that Congress has indicated no interest in penetrating this field.

We start therefore in narrating our story with the State of New York. Acting through its legislature, the State of New York became concerned with the plight of the city -- this was in the early sixties-- the flight of the urban middle class, the blight of the inner city slum, the decay of the housing inventory in the big cities, the high cost of replacement of dwellings making safe and clean dwellings unattainable by wage earners and other people of low or modest income, certainly an area of governmental concern which I am sure this Court has heard of many times. And the State determined to make a massive contribution towards the alleviation of the conditions I have described. Its concern, the State's concern, was with homes and dwelling places for its residents and citizens, not securites and not investment opportunities.

New York passed a law called the Mitchell-Lama law which contained various provisions for a variety of possibilities, but with respect to the subject that we are concerned with, I will say that it created first a regulatory agency which as applied to Co-op City has provided a system of supervision and regulation vastly more pervasive than any system of regulation that we are familiar with, say, in the utility field or the banking field or the airplane field or

any of the normal objects of regulation. And I believe I state correctly that my learned adversaries agree with me that this was a very pervasive system of control. And, of course, there was a very good reason for it. The State was going to provide massive benefits to those who were going to be the beneficiaries of this law.

It provided the means for the obtaining of the money necessary or the bulk of the money necessary for the creation of this new housing which it contemplated. The State was offering to the prospective members of Co-op City who it selected the following benefits, among others:

First, savings realized from the availability of construction and acquisition costs at very low cost because the State agency could raise that money by tax-exempt obligation of the agency. I need hardly say that that represents an enormous fraction of the cost of housing, the cost of the money used in construction.

Then there were savings conferred upon the members of this cooperative by the reduction or abatement of real estate taxes to the extent of 80 percent thereof, again a very enormous benefit in the maintenance of these properties.

And then with the collaboration of a philantrophic foundation called the United Housing Foundation, which I shall describe later, savings became possible in Co-op City by the elimination of the promoter's profit, the entrepreneur's

profit, the builder's profit, and the manager's profit. All of those were eliminated.

And then the cost overall was spread over a period of 40 years, thus making the annual burden a very modest one indeed, plus other benefits some of which I mentioned in my brief but are relatively smaller in proportion.

It was all of these together that made it possible to do what seems like a miracle today, to be able to sell apartments at the price of $450 per room, a 4-room apartment for $1800. Anyone who has purchased a cooperative apartment knows that that is one of the miracles of the age.

Now, as I have said, Co-op City was sponsored by the United Housing Foundation. This foundation is composed of a group of labor unions, well known for their progressive policies, like the Amalgamated Clothing Workers, the International Ladies' Garment Workers Union, whose record of performance in this area is well known; housing cooperatives, civic workers, all volunteers, who furnished to this project the sense of community involvement, who furnished the enriching advice of knowledgeable, distinguished, and dedicated citizens, and whose standing in the community was such that they were able to add a little lubrication to the wheels of the bureaucracy, and perhaps more important than any of these, to insure the generating idea, the idealism behind this entire project, namely, the ideal of a community of

homeowning neighbors, democratically managed, nondiscriminatory in style, endowed with the humane amenities in the artistic and spiritual fields, a community of homes and a community of homes.

Now, this was not the first experience of the United Housing Foundation in this field. It had a long record of success in promoting and creating housing projects similarly endowed with this spiritual concept. And in my brief I cite quite a number of famous ones that are extant in the city of New York.

And so it was that a city housing something like 50,000 people was built on what had previously been a playground in the northern part of the borough of the Bronx, and it took a very considerable period to do it, from 1964 to 1972. And during that period I need hardly say that costs were climbing. Every other index of our economy showed a similar climb in the sense of inflationary costs.

Ultimately the project cost $422 million, considerably in excess of the original estimates. And of this $420 million, the State agency furnished 92.26 percent. And I want to emphasize again that not only did the law specify the classes of members who might live in this cooperative, namely, the applicants had to show that their earnings were not in excess of six times the estimated maintenance charges, but the very individuals who were accepted for membership in this co-op had

to be approved by the State authorities, certainly not an aspect which is normally found in the sale of investment securities or speculations.

QUESTION: What were the criteria for approval by the State authorities in addition to the income levels of the applicants?

MR. RIFKIND: There were benefits conferred upon the aged, upon veterans, upon the disabled and things of that kind. Those were given preference.

QUESTION: By regulation or statute?

MR. RIFKIND: By the practices of the regulatory agency and under its regulations.

Now, I come to a central feature of this entire transaction. There was one concept that was excluded from every phase of this enterprise, the concept of commercialism and the corollary concept of profit. This applied at all stages of the transaction and not only to the one which is most directly relevant to the question before this Court.

For instance, members of Co-op City could receive no dividends. Now, I know that my learned friend says that they could under a section of the law. He misreads the law. That section deals with rental properties by private builders, but who have the right to have limited profit return, not to Co-op City.

The court below said that there might be a rebate on

the rental if the cost of maintenance was less than was estimated. That is true since the cost of maintenance in a cooperative is shared by all the members of the cooperative and is based on an estimate. If at the end it turned out that the estimate was excessive, the excess is turned back to those who had provided it. I don't call that a dividend.

They could sell the homes that they had acquired, but for no more than the cost at which they paid for them, $450 a room. Not a dollar more could they get for their homes, no matter how much land values or building values may have escalated in the city of New York. And not only that, they had to sell their homes if they moved from the premises. It was only a home for their personal residence and that of their surviving spouse. But if for any reason they wanted to move out of Co-op City, they had to offer their apartments, their homes, for sale to the corporation, to the co-op corporation or to a qualified new buyer at the price at which they bought it.

Not only were they not promised any profits, in the literature which announced this project, they were told in words loud and clear that there could not be any.

Now, I move up the scale away from the cooperatives upward. The United Housing Foundation, which was the sponsor of the project, was formed under a statute in New York called the Not-For-Profit Corporation law. It could make no profit

because under the statute of its creation it was forbidden to do so. The construction was done by a wholly-owned subsidiary of United Housing Foundation, and while that was organized as an ordinary corporation, since its stockholders could make no profit, namely, the United Housing Foundation, there would be no point in the subsidiary earning any profit.

The subscribers were not offered tax deduction as an inducement in the sense that tax shelters are marketed around the street as this Court well knows where tax shelters are offered as a form of investment. That was not the approach here, because there were no such possibilities except for the modest tax deduction which is available to every homeowner on the interest on his mortgage and on the taxes which he contributes to his community.

They were not offered any significant outside income, that is, this was not a project where in addition to homes there was a vast shopping center attached to it from which the people could hope to derive substantial speculative profits because had that happened, the law would not have permitted this project to be financed under the statute to which I have referred.

All they were offered, and all that these people received, was the opportunity to own a home, and that only so long as they lived in it. And if they had to part with it, they could enjoy no form of capital appreciation.

Now, membership in this cooperative was memorialized in two instruments, two writings: One, an occupancy agreement, so-called, but actually reads very much like an ordinary lease. And, secondly, an instrument which was called a share of stock, but differing in many ways from the conventional one, especially in the very fact that it could not be sold, could not be hypothecated, couldn't be transferred, couldn't be given away, and with which you had to part once you ceased being the occupant of the apartment that you had bought.

Now, both the district court and the court of appeals have very meticulously expressed their avoidance of entertaining any opinion on the underlying merits of the controversy between the plaintiffs and defendants or between the petitioners and respondents.

I have observed that my good, learned friends have extensively argued the merits of the case in their brief. But I shall not do so. I shall rely on the proposition that the only question before this Court is whether this controvery belongs in a Federal forum under the securities laws or whether it belongs in a State forum under laws adequate for that purpose in the State of New York.

The district judge made this comment: It is well to note at the outset of this inquiry that it is the fundamental nonprofit nature of this transaction which in this court's view is the insurmountable barrier to plaintiff's claim in the

Federal court. And we agree with that expression and hope to win favor for it.

Our claim is a very narrow one,actually. Our central point is that Congress did not intend to bring within the ambit of the securities law an enterprise devoted to the purchase of homes, a State-dominated enterprise with philanthropic and community participation to which the notion of profit is utterly foreign, a project pursued without a profit motive, promoted without profit inducement, and shared by its beneficiaries without any expectation of gain. And the legislative history suggests to me that that is not what Congress had in mind, because the evils against which these securities laws were written are still sufficiently vivid so that most of us can remember them from actual experience: Predatory financial practices in the securities markets, stock market price manipulation, luring of small investors by false promises of easy wealth. In short, I submit the realm of congressional concern was to speculation and investment realm, and its identifying flag was the promise or expectation of profit, and one cannot read in my opinion the legislative history of either the '33 or the '34 Act without coming to that conclusion.

The district court read that history accurately when it concluded that Congress did not intend to sweep into the ambit of the Federal securities laws State-encouraged,

nonprofit transactions made pursuant to a State emergency housing law -- all three elements that I have mentioned -- available only to State residents.

Now, in reaching a contrary conclusion, I believe that the court of appeals was in error, and I should like to identify its errors into three categories:

First, it was -- I will finish this sentence -- it was moved by a literal application. It misread this Court's illumination of the meaning of investment contract, and I believe it misread the securities guidelines.

I will stop at this moment, and if I have some time later, I will answer in rebuttal.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Cohen.

ORAL ARGUMENT OF DANIEL M. COHEN IN BEHALF OR PETITIONERS IN No. 74-647

MR. COHEN: Mr. Chief Justice, and may it please the Court: Let me emphasize at the outset that we support completely the position of the petitioners in No. 157, that the Congress did not contemplate including within the purview of the 1933 and 1934 Securities Acts shares in the membership of a publicly aided cooperative housing corporation whose primary objective was the furnishing of housing accommodations to persons of limited income who were prohibited under the

general terms of the statute authorizing the construction of Mitchell-Lama housing from selling those shares for a profit or for the expectation of a profit.

I shall confine my argument, however, to the point upon which the State and the State Housing Finance Agency obtained certiorari, that neither the State nor the State's Housing Finance Agency are subject to suit in the Federal courts for the relief demanded in this complaint.

Now, just as a matter of fact, there had been references in Judge Rifkind's argument to supervision by the State. Supervision by the State has been through the State Commissioner of Housing. The State Commissioner of Housing has been the agency of the State that supervised the construction and supervises the management of this project. The State Financing Agency is an agency which has supplied the money to the extent of the 92 percent that was necessary by the sale of bonds to the public. It is a different agency.

As to the State itself, we submit that its claim of immunity and the same claim would be applicable to the State Commissioner of Housing, if that State agent had been made a party defendant to this litigation,and the State Commissioner of Housing has never been sued or named as a defendant in this litigation, we submit that this claim of immunity from suit is sustainable and should have been sustained under this Court's decisions in Edelman v. Jordan and Employees v.

Missouri Public Health Department.

QUESTION: If we should be persuaded by Judge Rifkind's arguments, would we get to your point?

MR. COHEN: I don't think you need to. You can do what the court did in the district court. It did not reach our argument because it was not necessary to do so.

QUESTION: And really, if Judge Rifkind is correct, there is no Federal jurisdiction.

MR. COHEN: Yes, your Honor.

QUESTION: And there being no Federal jurisdiction, the 11th Amendment argument falls out of the case because, after all, the 11th Amendment is a jurisdictional statute, is it not?

MR. COHEN: Yes, your Honor.

QUESTION: Having to do with Federal courts.

MR. COHEN: Yes, your Honor.

We have a back-up argument so far as the State is concerned, but if you are persuaded by Judge Rifkind's argument, you need not reach our portion of the case at all.

QUESTION: One part of, one count of the complaint, though, was posited not on Securities Act jurisdiction but on section 1343, wasn't it, which was derived from 1983?

MR. COHEN: One cause of action directed against the State Housing Finance Agency is so posited. But the difficulty with that particular complaint is that it is directed against

an agency which is purely a financing agency, an agency which has supplied the money with which this particular project was built. And so far as I can imagine, I don't see how any sort of reasonable construction could lead to a cause of action against an agency -- and this is something that goes to the merits; because it goes to the heart of the case as against this agency, no possible cause of action, it seems to me, could be reasonably predicated against the State agency which furnished the money which made this project feasible. These plaintiffs would have no place to live in if this money had not been furnished despite the increases in costs that occurred that compelled the furnishing of more money by the State Housing Finance Agency than had been contemplated or expected in the first instance.

That applies only to this single cause of action against the Agency.

Now, the opinion by Judge Rehnquist in the Edelman case came down on a period that was just shortly after the briefs had been submitted in this case by counsel before the Circuit Court of Appeals. The Edelman opinion was not noticed at all in the opinion by the Circuit Court of Appeals, and we feel that so far as the State itself is concerned, so far as the State supervising agency is concerned, the Commissioner of Housing, there would be no basis for assuming that there had been either any waiver of immunity or any consent by the

action of the State in sponsoring this project. Housing was a field in which the State of New York was intensely interested long before the Securities and Exchange Act was passed. Actually, one of the limited dividend projects that is connected in some way with this same sponsoring agency, Amalgamated Houses,was set up in 1928. People actually were living in Amalgamated Houses in 1927, Christmas of 1927.

There is not here the factor which was present in the Parden case of the State going into a proprietary enterprise. The State was here simply as a regulator. The State did not own. These people did not contemplate that they were going into a project that was State owned or that might be deemed to be State owned.

QUESTION: It was more than a regulator; it was a great financial backer as well, was it not?

MR. COHEN: It was a financial backer, and it derived no financial benefit from its financial backing. It did not provide any money except to people who had limited income by way of various types of subsidies, and it had no proprietary interest in those subsidies. It furnished housing, it furnished the benefit in the nature of a welfare benefit.

QUESTION: No monetary profit.

MR. COHEN: No monetary profit.

QUESTION: Just social profit.

MR. COHEN: Social profit, yes, your Honor.

Now, we have, I think, no need to make any extended argument as to the State's immunity, as your Honor has indicated, it's not necessary to reach that portion of the case if you agree with Judge Rifkind's argument. And I think I can save the time of the Court by resting here and asking that the judgment of the court of appeals be reversed and that the complaint in this action be dismissed.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Cohen.

Mr. Nizer.

ORAL ARGUMENT OF LOUIS NIZER ON BEHALF OF THE RESPONDENTS

MR. NIZER: Mr. Chief Justice, and may it please the Court: The sole securities issue on this appeal is whether 1,312,128 shares of common stock publicly offered by wide distribution through the mails to 15,372 separate purchasers for more than $32,800,000 in cash paid by these purchasers constitutes securities under the Federal laws.

Of the thousands of decisions involving alleged frauds in the sale of stock which had been rendered by the Federal courts during the past 40 years, there is not a single case which supports the defendants' contention that common stock does not come under the protection of the anti-fraud provisions of the securities laws.

The reason that the defendants cannot cite a single case in which common stock was held not to be a security is

that this court as far back as 1943 settled this issue in the Joiner case. It mandated that the specific term "stock" as a matter of law is a security. And it also held that where, as here, the case involved "a share of stock, the plaintiff need only offer" the document itself to prove that it is a security and thereby establish jurisdiction under the Federal secutities act.

Now, the defendants concede here that the common stock is so designated, par value $25 a share. That appears at the UH brief, page 11. But they urge that these shares denominated as common stock are something different than what they are represented to be, and even this in the Joiner case this Court disposed of such convoluted reasoning. This Court held that in the enforcement of the securities laws offerings "will be judged as being what they were represented to be."

QUESTION: Mr. Nizer, in Tcherepnin didn't the Court -- which is a later case than Joiner -- the Court does talk about looking at substance rather than form, doesn't it?

MR. NIZER: Sure. And I will discuss that in full, your Honor, in a moment, but there they were talking of an investment contract. That's the second string to our bow. When it is stock you don't have to go to the question of whether it constitutes an investment contract without being stock.

QUESTION: The language I am thinking of is this language on page 336 where they say, "Finally, we are reminded

that in searching for the meaning and scope of the word 'security' in the Act, form should be disregarded for substance and the Act's emphasis should be on economic reality." They were talking about the full definition of the security.

MR. NIZER: Yes, and I think the economic realities here, as I shall soon develop, clearly indicate that this is a stock transaction on its face and in the economic realities. I do not agree with the learned counsel that this is distinguished from other cases. We have had cases that this Court has decided. In the Sobieski case, for example, that a membership in a club is sufficient --

QUESTION: That was the Supreme Court of California decision, that's not from this Court.

MR. NIZER: That's right.

QUESTION: I thought you said decided by this Court.

MR. NIZER: No. I said that the Sobieski case -- I was mistaken in referring to this Court. In the California Ninth Circuit there is the case --

QUESTION: That's not the Ninth Circuit; it's the Supreme Court of California.

MR. NIZER: State court by Judge Trainer, I believe, of the State court.

QUESTION: Yes. Interpreting a State law.

MR. NIZER: That's right.

But I think since I have limited time, I would like

to come to the economic realities here. I think that will be better addressed to your Honor's question.

The court below has been chastised by the defendants for being literal because it followed the instruction of this Court in the Joiner case, and the statute fortunately is explicit and lucid. And in this admirable sense it is literal. Stock is a security. And so it is. To cavel with such legislative clarity is unwittingly or otherwise to distort the statute's true meaning in order to avoid its clear application to this case.

Now, 24 years later this Court reexamined and reaffirmed the Joiner case, and that was of course in the Tcherepnin case that your Honor referred to, which provides a rare instance of a case remarkably similar in fact to our case and in which the Court rejected the same contention as the defendants make here. In Tcherepnin the plaintiffs bought shares in a savings and loan association and the defendants there contended that the shares purchased were not stock because, looking at the realities, one, they were not publicly traded, as here, they didn't fluctuate in value, they were redeemable at par only, the shares represented memberships rather than an investment -- I notice this constant use of the word "membership" here -- that the shares lacked many customary attributes, such as preemptive rights, right to inspect the books, although we have that right in our case. And there were restrictions

on assignability. Those all the same issues. And these arguments were held by this unanimous Court to be irrelevant to the question of whether Federal security laws were applicable. And this Court held that the shares in that case were includable in the statute as stock because there was a stock certificate and,as the Court pointed out there, also the possibility of surplus, which is of course the dividends, even though, mind you, in that case, as your Honors will recall, it was brought in the receivership, the defendant was Knight, the receiver. Yet they talked of the potential of surplus,which is sufficient, the very possibility of it.

Now, clearly in our case these elements exist. Above all, this Court in Tcherepnin pronounced the policy consideration and philosophy of these statutes which provide special insight, we submit, and a large view of the present case. There the Court pointed out that the purpose of the statute was to protect particularly the many small investors. I think there was a quotation that they repeated from Joiner, remedial legislation should be construed broadly to effectuate its purpose, the reach of the Act does not stop with the obvious commonplace.

In our case, the plaintiffs were eligible to buy the stock which would give them a four-room apartment with a monthly carrying charge of $23.02 as represented in the prospectus. If they earned more than $6,600, they weren't

eligible, $6,600 a year. So that the class that purchased the stock and put up $32,800,000 in this case were the same type of small investors as in the Tcherepnin case, indeed, much more so, obviously people living on pensions, old people, welfare, and so on. And yet without these people who collectively put up over $32 million in cash there could be no Co-op City because the Mitchell-Lama Act mandated that the venture or risk capital had to come from the public, unlike the other housing acts. That's section 21 of the Private Housing Finance Law. The jurisdictional facts demonstrating that this stock transaction was within the securities statutes are spelled out in the complaint.

First, we have a prospectus called an information bulletin, which was widely distributed through the mails. That's paragraph 15. And this bulletin has a heading. It appears at 178-A of the record, which reads as follows: "Stock and Other Equity Obligations Offer." And there follows: "The Housing Company" -- that's the Riverbay Corporation whose stock we bought -- "invites offers for shares of its capital stock...all in accordance with the terms of the subscription agreement." And that's at 178-A of the record.

Now, the subscription agreement, which was attached to the prospectus and was intended to be torn out and returned with a check for part payment of the stock, read at 104-A, "I hereby subscribe to" so many "shares of Class B capital

stock," and the par value was $25 a share.

I may say now in answer to a contention made here, all of the money, all of the $432 million instead of $289 million as was represented in the prospectus upon which these poor people put up their savings, all of that money had to be provided by the public. The only thing the State did -- this is not like the subsidized housing at all -- all that the State gave was the advantage of a low-interest mortgage, valuable indeed, which had to be paid off in full with interest in the 40 years, and all that the State did otherwise was the city gave a tax rebate, which is done for other housing projects, even commercial projects. But 100 percent of the money to construct this enormous structure for 60,000 people had to be paid by this 60,000 people, and they weren't eligible even to own the stock unless they earned only $6,600 a year.

And the plain practical situation, when my friend talks of profits and all these general commercial propositions, the plain practice that through fraudulent representations which appear in allegations of the complaint -- I am not discussing the merits; I am showing that there is a proper complaint here under the statute -- in their representations they said that the cost above $289 million to construct this would be borne by the contractor, which is the C.S.I., and he would take any excess. That was the basis on which these

people put up their money. And yet when inflation came and the costs went up, by fraudulent ignoring of the direct representation that the contractor would bear that cost if there was an inflation, not maintenance increase, that we have to pay, that kind of inflation, or operation, but construction. They increased it $30 million one year, $40 million another year, and loaded it onto these people who had taken it on the representation that not one cent of that money would be paid by them; it would be paid by the contractor. And why was this possible? Because the contractor, the C.S.I. and the U.H.F., this fine organization -- incidentally, we have not joined as defendants the heads of these unions and so on, they were figureheads; we sued the operating company. They had interlocking directors, precisely the same directors and officers as the contractor was in the U.H.F., and even of Riverbay Company, the company whose stock these people bought had the same directors and officers. So that this was an interlocking situation in which even the State Commissioner waived a requirement of bonds for the construction of this property, and he waived the liquidity requirement, a liquidity requirement in the contract which said that the contractor must have $13 million liquidity, and he waives that, and the contractor has $100,000 liquidity.

So that it seems to us that not only have we a clear stock transaction sold in the market to these people, but that

all the elements of a fraud action exist here under the statutes, and it was intended that the people who build that kind of structure should not be immune any more than the man who invests for large profits,as they call it, collectic profits in Wall Street. I don't see why this statute, which is remedial, should be limited to the large investor, legitimate though he be. Why should it not apply to these people who put up their life's earnings and probably made the only investment they ever made in stock in their lives?

The Riverbay Company, our company, was, as the complaint says, the captive of the contractor and the sponsor, and $81 million was loaded onto the Riverbay stockholders improperly. And there is a claim, since I will not have a chance to rebut again, that there was notice of this. We deny the notice. The notice didn't even refer to all these increases; it saysthere will be an increase. But, as your Honors know, you cannot waive under the Securities Act the provisions and protections of the Act. Even if they had given us notice, it would be ineffectual.

Now, what is sufficient for affirmance, that in this case we have this widely distributed shares of par value common stock bought for tens of millions of dollars and represented to be stock in a prospectus and a subscription agreement. Clearly this alone warrants application of the Federal securities law and jurisdiction in the Federal courts.

There are two additional grounds for affirmance. The shares are also an investment contract. They qualify as such clearly. And that they are an instrument commonly known as security, another definition of the Securities Act.

In view of the argument to be made by counsel for the SEC and the time elements, I shall leave these two alternative grounds to our brief at pages 48 to 60. And I turn to the 11th Amendment question because I think I would like to deal with that.

With respect to the 11th Amendment issue, only the State of New York is involved. The Agency is not involved and clearly may be sued in the Federal court for two reasons: It is a separate legal entity, and it is not a division or department of the State of New York.

QUESTION: May it be sued under 1983 as well as under the Securities law in view of cases like Monroe v. Pape and Bruno v. Kenosha?

MR. NIZER: Yes, I think it can be.

QUESTION: Why?

MR. NIZER: An agency is a person, and under the interpretation that this Court has given to the Securities Act, a definition of person includes a State governmental agency of any kind.

QUESTION: I would have thought a 1983 cause of action would have turned on the definition of person in 1983

rather than in the Securities Act.

MR. NIZER: Well, it's a person under the Civil Rights Act, as I suppose the other aspect of the question. But under the Securities Act we also have a definition which defines person as any State,which is to me one of the reasons why there is authority to sue here and the waiver does take effect.

The fact that there is a separate legal entity in the agency is conceded by the Attorney General of the State of New York in his opinion No. 56, which we have cited.

But second, and determinative, is the fact that any judgment against the agency is not enforceable against the State. They are two separate entities and there is no link of liability by statute or otherwise for each other's obligation. Indeed, your Honors, there is a specific disclaimer of liability in section 46 of division 8 of the Private Housing Finance law. And the bonds of the agency are not the debt of the State.

Therefore, like any other corporation, the agency is subject to Federal jurisdiction.

Now, with respect to the State, it has waived its immunity in two ways: First, by special statute quoted at page 67 of our brief, the white document. It's section 32(5) of the Private Housing Finance law. And, secondly by its conduct in this very case.

Now, first, as to the statute. You have been told that the statute waives immunity only in a suit in the State court. There is nothing in the language of the statute which would justify any such limitation, however strict the construction. On the contrary, the statute reads that the State "may be sued in the same manner as a private person." Surely a private person can be sued in a Federal court. Indeed, a private person cannot be sued in the State court of claims.

Furthermore, there is a conclusive indicator in the language of the waiver that it was not intended to limit jurisdiction in the State court. That language refers to the scope of the waiver. It reads: "With regard to liabilities arising out of the Mitchell-Lama Act, the State may be sued in the same manner as a private person."

Now, what term could be more generic and more conclusive than the word "liabilities"? Case law, which we set forth on page 68 of our brief, demonstrates that the unqualified use of the word "liability" encompasses Federal as well as State claims. And the supervisory duties of the State through the Commissioner with respect to cooperative housing are all pervasive. The Commissioner is charged with responsibility to see that Riverbay complies with "the law." That's section 32(1). So Riverbay stock sold in violation of the anti-fraud provisions of the security law certainly brings

into definition what do we mean by compliance with law? And that has been interpreted even by the New York courts as the laws of the land.

The second sentence of the waiver which prohibits the recovery of costs has been raised in the brief though not argued orally, prohibits recovery of costs against the State does not alter the right to sue in the Federal court. It merely means the plaintiff cannot recover costs because he has accepted the condition of the waiver.

Now, in its reply brief, the State cites five cases, all dealing with refunds of State taxes, and these cases are not applicable to our case because there the statute set forth a comprehensive scheme involving procedures before State administrative agencies, the final step of which was judicial review of the State agency's determination in the State court. Furthermore, all that was involved there in these five cases were State tax law, not as here, federally created right. I stress the fact that this is not a case of diversity of citizenship. We belong here under the right of the statute.

In addition to statutory waiver, there is the State's conduct. This Court set forth a test composed of two elements to determine when the State's conduct constitutes a waiver, the Edelman case. And incidentally that was argued in the court of appeals. It came down late, but it was argued there,

briefs -- we admit that State's regulation does not subject it to the Federal jurisdiction. Here we have the State participating pervasively in every fact. Indeed, under the Mitchell-Lama Act, not a shovel of earth could have been turned until public put up this $32 million. In other words, the State from the beginning to the end, not only supervises, there is no regulation merely, it organized the entire construction in every way.

Also, the State of New York in 1955 passed the Mitchell-Lama Act, and this was 20 years after the Securities Act, so that the State with full knowledge that it was in the realm of Federal regulation went ahead, and the Mitchell-Lama Act itself represents a decision by the State to furnish housing by obtaining venture or risk capital from the public through sale of co-op stock.

To be brief, and in conclusion, since my time is running out, the State under the statute is the major participant in planning the project, raising the venture capital from the public, construction, and operation. The project, for which it received a fee from the plaintiffs of $3,510,000, obviously no mere filing fee under the Blue Sky Laws. And no other State has a statute of waiver of immunity similar to section 32(5). I say this because I don't think we are enlarging. There have been alarms called in this brief that this will cause interference with State issuance of financing.

Nothing of the kind. On neither side of the issue is there an extension here. We are asking that the Court not delimit the rights that have always existed in this case. Even as to New York this would be extremely limited because this waiver only applies in the Mitchell-Lama law, not any other provisions of the State. So we are dealing here with an exceedingly restricted area, but the rights of these plaintiffs ought to be tested.

We have waited three years, your Honors, to get a trial in this case while we have been bandied around through the courts on this alleged jurisdictional question. I think it's time that these people had a day in court.

MR. CHIEF JUSTICE BURGER: Mr. Gonson.

ORAL ARGUMENT OF PAUL GONSON ON BEHALF
OF THE SECURITIES AND EXCHANGE COMMISSION
AS AMICUS CURIAE

MR. GONSON: Mr. Chief Justice, and may it please the Court: In this case we have, as has been noted, 15,000 persons who have paid over $32 million to purchase over 1 million shares of stock in a cooperative housing corporation. The funds, the $32 million, were utilized by the corporation in the construction of that apartment project.

The Securities and Exchange Commission submits that their allegations of fraud, which are based upon documents that were given to them in connection with that project, should

be heard under the Federal securities laws.

Now, these persons executed essentially two documents, as I understand. One was a subscription agreement to buy stock. The other was an occupancy agreement, which was in effect a lease.

QUESTION: You couldn't have one without the other, could you?

MR. GONSON: That is correct, your Honor. But it's important that there were two of them. And in this case we wish to emphasize that one of them talks about stock, and that is very important. And while it has been noted that, of course, substance should prevail over form, the fact that stock is involved here is not merely a question of form, as perhaps was implicit in that suggestion. On the other hand, I think that it is fair to say that the fact that there is stock itself connotes substance. Stock has certain attributes, and these are the attributes of the security. And that is what is involved in this case. Persons who are asked to buy stock may reasonably expect that they are going to be protected by the laws which apply to stock. And why shouldn't they be? It was sold to them as stock. It wasn't sold to them as anything else.

This Court has said on several occasions that it is not unreasonable that a promoter's offering be judged on what he represents it to be.

QUESTION: Well, you say stock has certain attributes, and I assume we are not talking about livestock, we are talking about shares in a corporation.

MR. GONSON: Yes, sir, we are talking about --

QUESTION: And those attributes generally are the possibility of dividends if the corporation has profits; they are the possibility of appreciation or depreciation in value, depending upon how well the corporation prospers; and they are generally, with exceptions, freely alienable. Those are three rather well-known attributes generally of shares in a corporation, aren't they?

MR. GONSON: Yes, your Honor. But as this Court noted in the Tcherepnin case --

QUESTION: Well, your point was stock has certain attributes. Which of those attributes does this stock, this so-called stock have? And if it hasn't any of those, what other attributes does this so-called stock have that stock as generally understood has?

MR. GONSON: The stock here entitled the purchasers to an interest in a corporation, chartered under New York law. It gave those persons a right to vote on who was going to manage the corporation. It gave those persons a right to dividends, or surplus, if there was any.

QUESTION: Wait just a minute. Will you amplify on that before you proceed? What dividends?

MR. GONSON: Well, the Mitchell-Lama Act provides that limited profit housing corporations may issue dividends.

QUESTION: Does this corporation come under that provision of that Act?

MR. GONSON: It is my understanding, your Honor, that it does. The record at 167-A, 188-A describes this as a limited profit housing corporation.

QUESTION: Did either one of the courts below recognize the possibility of dividends under that section?

MR. GONSON: Yes, your Honor, the court of appeals recognized that possibility. We refer to that in our brief at page 15.

QUESTION: Where is it in the court of appeals' opinion?

MR. GONSON: I believe it's on page 16 of the appendix, your Honor, or thereabouts.

I have been handed the by-laws of the corporation, your Honor, which also indicate that there is a possibility of dividends, Article V, which is found at 130-A of the record. This is the record of the court of appeals.

QUESTION: The court of appeals, as I read the opinion, stated that there were expectations of income in three ways, and none of the three involved the possibility of any dividends.

MR. GONSON: Yes, the court of appeals, I believe, spoke of surplus income, your Honor, and I believe that one

possibility of their surplus income as provided in the Mitchell-Lama Act is the payment of dividends.

QUESTION: Do you understand that those dividends would be paid in cash on these shares?

MR. GONSON: I believe that they could be paid under the New York law in cash, but I believe they probably would be paid in the form of reduction of rentals if there is a surplus from operations.

QUESTION: If the rentals were reduced in that way, is it your opinion that that's income?

MR. GONSON: It is our opinion, your Honor, that that is an economic benefit which when taken with other economic benefits constitute a sufficient inducement to purchase the security.

QUESTION: But we were talking about dividends and profits. Would you advise any one of the plaintiffs in this case to pay income taxes on the type of benefit you are talking about?

MR. GONSON: Possibly not, your Honor. I am not sufficiently familiar with the consequence of the application of the income tax laws to the situation to answer that question fully. It may very well be the kind of return that a cooperative pays to its members when in effect it collects more from it than it needs for operations. I suppose essentially it is not income, although it could very well be in the nature

of a dividend.

QUESTION: Did I understand you to say that the only prospect of dividend is if the operating costs go down?

MR. GONSON: I believe --

QUESTION: Because if that's true, I doubt that anybody assumes that as of today that operating costs will go down.

MR. GONSON: Well, your Honor, it would come from a combination of what is collected as against what it costs to run the project. The surplus, as distinguished from dividends, also may come from the rentals which are obtained from commercial properties which I understand in the aggregate came to more than $4 million in this project.

QUESTION: They go to the Riverbay, or whatever it is, toward operations?

MR. GONSON: Yes, they do, your Honor. And then they are used in effect to offset the monthly carrying charges that these persons have to pay.

In addition, in terms of what attributes were there, the stock also entitled the holder to a right to participate in assets upon liquidation or dissolution. And, finally, in response to the question, and it is not necessary, this Court has said, that stock have all of the attributes that any other kind of stock might possibly have. There is voting stock, there is nonvoting stock, there is, of course,

stock that has cumulative dividends and stock that doesn't. Nonetheless, they may all still be understood to be stock.

QUESTION: Making perhaps not the same, but a similar, argument, if some different pieces of paper were issued that weren't called stock but had the attributes that these pieces of paper have --

MR. GONSON: Your Honor, we might be making a somewhat different argument, if that were the case.

QUESTION: I said maybe not the same, but you would still be here, wouldn't you?

MR. GONSON: We might still be here.

QUESTION: The ultimate argument,however, that this was a security you could still be making, couldn't you?

MR. GONSON: We might still be making that, yes, your Honor.

QUESTION: .. making the investment contract, are you?

MR. GONSON: Yes, but I would like to emphasize once again, your Honor, if I may, that the issue here is not whether an interest which on its face does not purport to be a security is nevertheless to be a security,rather it is the contrary, it is the issue of whether something which purports to be a security, a stock, should nonetheless be held not to be a security.

QUESTION: Mr. Gonson, you are not taking the

position, are you, that any piece of paper that is called a share of stock is necessarily per se a share under the Securities Act, are you?

MR. GONSON: No, sir. We are not taking the position that if you received a certificate that said, "In consideration of the contribution to the Boy's Club, you have a share of stock in the youth of America," that that would be a share of stock. But if you receive or subscribe to stock which you know is going to be an undivided interest in a corporation and which is going to carry certain benefits, then we say there is a very strong presumption at the outset that what you have received is in fact a security.

QUESTION: But in the end you look to the economic reality, we are in agreement on that, aren't we?

MR. GONSON: Yes. I think in the end you would look to the economic reality. And as this Court said in the Tcherepnin case, in searching for the meaning and scope of the word "security" the emphasis should be on economic reality. And in this case the basic economic reality of the transaction here is the coming together of a number of factors, significant economic inducements are given to persons, they make an investment at the outset --

QUESTION: Isn't it an economic reality that you can't get the lease without the stock?

MR. GONSON: The economic reality, your Honor, is

that the stock is a passkey to the apartment. But as this Court noted in the United Benefit case, it may be very possible to have both a security and an insurance contract in the same document. And there this Court reversed the court of appeals which had looked at the transaction as a whole, found that it was substantially insurance and concluded that it was an insurance contract and not subject to the Federal securities laws. And this Court reversed it, said that the error had been that it was severable, even though it was one document, part of it was a security subject to the securities laws; the other part of it was insurance properly subject to State insurance regulatory laws.

And so here, too, you have housing. We are not contending that housing is subject to the securities laws whatsoever. But in order to obtain the housing one must buy stock, a security, which has certain attributes. We think that that stock separately ought to be subject to the Federal securities laws.

Finally, I would note that the dark forebodings of the future which have been uttered here as to what would happen to the real estate industry if the securities law were to apply is not well taken. We are not urging that all multiple housing firms be subjected to securities regulation. On the contrary, we believe that our position here is a modest one. We are not asking this Court to enlarge the coverage of the

securities laws. We are asking that this Court not diminish it. Thousands of persons have bought stock on the basis of economic inducements and, simply put, we believe that they are entitled to the protections of those laws that apply to stock.

Thank you.

QUESTION: Mr. Gonson, in the section of your brief that argues that this type of housing would not be seriously interfered with if required to comply with the Securities Act, the first suggestion your brief makes is that section 3(a)(11), the provision for intrastate offerings, would be available. Do you suggest seriously that an offering of 15,000 people could be accomplished under 3(a)(11)?

MR. GONSON: Your Honor, in this very case the subscription agreement stated that it was offered only to residents of the State of New York.

QUESTION: Correct. But suppose there had been a single offeree who was not a resident of New York, what would have been the consequences?

MR. GONSON: There would have been, of course, some danger that the exemption might not have been available, but the statute requires, as I understand it, your Honor, that the residents be actually residents of the State of New York. And I suppose when we talk about State-supported housing, that such housing is going to be constructed essentially, if not exclusively, for the State's own residents. And so when

we offer the possibility in our brief that the registration requirements of the Securities Act might not be applicable, I think that it is a reasonable suggestion to make.

QUESTION: The difference between the people who buy and the people to whom a security is offered and the 3(a)(11) exemption relates to offerees as well as to buyers. And if you make one mistake in an offer to a person outside of the State, your Commission will require a rescission offer.

MR. GONSON: That is correct, your Honor. That exemption, like other exemptions, are strictly construed. We offer that as one of a number of possibilities to indicate that there may be ways available to not have to comply with registration or prospectus requirements of the Act.

QUESTION: I am not sure what, if any, significance there was or is about the residency requirement, but under the Shapiro case, wouldn't any person who had come to New York and been there one day been eligible to get into this enterprise?

MR. GONSON: I would assume so if the residence were a bona fide one, your Honor.

QUESTION: Well, if they could collect welfare, then they could get into this enterprise.

MR. GONSON: I would assume so.

QUESTION: Frequently, the determination of whether or not that exemption is available will turn on the trial of

the issue of fact of the residence of a particular offeree.

MR. GONSON: I suppose that's correct, your Honor, but I think that that probably is so with respect to the utilization of almost any exemption.

QUESTION: That's why hardly anybody uses that intrastate offering, because if you make one mistake, you're through.

MR. GONSON: That's correct, your Honor. We refer, however, to other possible exemptions that may be available. And may I note that even if no exemption were available, we are not talking about an especially onerous burden. We are not talking about guarantees of any kind. We are merely saying that then what would be required is that information would have to be filed and a prospectus would have to be given to prospective purchasers. And a project of this massive size, we submit that that would not appear to be on its face an insurmountable obstacle.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Rifkind, you have about 10 minutes remaining.

REBUTTAL ARGUMENT OF SIMON H. RIFKIND

ON BEHALF OF PETITIONERS IN No. 74-157

MR. RIFKIND: Thank you.

May it please the Court, my learned friend, Mr. Nizer, opened by an impressive set of figures which were

designed, I think, to impress with their size. He spoke of the large number of shares, the large number of residents, and the large amount of money.

But I take it that questions of jurisdiction are not measured by that kind of a yardstick, and the same principles would be applied if this was a 20-room house in Olean, New York, and was financed by a very much smaller transaction. So I think we can disregard this jury appeal and address ourselves to the question as to whether we are talking about a security.

Of course, my learned friend keeps on saying that they bought stock, and I kept on saying that they bought homes. And the economic reality which the case which Mr. Justice Rehnquist referred to compels us to listen to is what was the business transaction that this home buyer was interested in.

He said, of course, it's called a share of stock. Well, Mr. Justice Stewart referred to livestock is also stock and not all trees are trees, some are whiffletrees and some are hat trees. The mere fact that you hang your label on it of stock, because this is the conventional mechanism by which the general public is approached this way, doesn't necessarily lead to the conclusion that it is stock. I am not suggesting for a minute that when you call something stock you shouldn't examine whether it isn't stock. Of course, you start out by

saying he called it stock, maybe it is. But the statute doesn't say every stock is a security. The statute says every stock is a security unless the context otherwise directs. And the context takes us back to the purposes of the statute, to the legislative object. And the legislative object under the Securities laws was to control the market place in securities, the market place in investments, the market place in speculations in that kind of money-making enterprises, and not in a social welfare scheme of the kind we are talking about here.

Mr. Nizer referred to the cash contribution of 7 percent which the subscribers here furnished. Well, it is in the aggregate a very large amount of money, but the comparison that I would make would be more to the fact that a Medicare participant, an age group to which I now belong, pays a small percentage of his medical bill when he goes to the hospital. That doesn't mean that it is not a social welfare program that we are talking about.

On the question of rescindability which was mentioned, I should say that every contract here was rescindable. Thousands of them were rescinded. And even the plaintiff below, Mr. Milton Forman, rescinded their contract recently when they moved out of the apartment and got their money back.

On one question I must take issue with my learned friend, and that is on the definition of person as given in

the Securities Act. The 1934 Act does not define the State as a person. The 1934 Act, as I read it, says the term "person" means an individual, a corporation, a partnership, an association, a joint stock company, a business trust, or an unincorporated organization. So it can't be the '34 Act in which the fraud statute appears. It's the '33 Act which deals with registration which includes a government or political subdivision thereof. But nobody claims that we should have registered in this case. We didn't, of course, and nobody claims we should have.

QUESTION: It's the '33 Act, too, that expressly confers the right of a purchaser to sue, isn't it?

MR. RIFKIND: That may well be.

Now, on the question of dividends, no cooperative pays dividends. Essentially a cooperative is ten couples going to the theater together and contributing $25 apiece; if when they return from the theater there is $10 left in the kitty they pay it back to the subscribers. That doesn't mean that that theater party declared a dividend in a business venture for which the people invested their $25.

QUESTION: The dividend in the same sense that a dividend on a life insurance policy might be called a dividend, isn't it?

MR. RIFKIND: Even that might be more of a dividend than the actuality, because there it derives from the earnings

of the insurance company.

QUESTION: If the costs turn out to be lower than --

MR. RIFKIND: If the costs turn out to be less.

Now, this court of appeals must have been troubled by this very question. If it weren't troubled by the question as to whether this was really security, they wouldn't have reached out for what I most respectfully say the trivia which they identified as the profit features of this transaction.

Just look at them. They said that there was reduced carrying charges resulting from the rentals received out of commercial spaces. Now, I think this Court ought to know what we are talking about. In this community of 15,000 homes and 15,000 people there had to be some grocers.

Incidentally, this is quite remote from the center of town. There had to be some butchers. There had to be some barbers. There had to be some people who are rendering that kind of normal neighborhood service. And naturally you have to make space available for them and some income was generated that way. Does that make this a shopping center investment? It's to me comparable if the management of this cooperative had said we are going to charge every householder for his bathwater, that would generate some money, but that doesn't make the housing cooperative a business venture in the sense of earning dividends.

The second thing they said was that these homeowners enjoy tax deductibility for their share of the interest and the mortgage and their share of the taxes that they paid to the city. And, of course, that is true; as this Court well knows, every homeowner is entitled to that deduction. Every owner of a cooperative apartment is entitled to that deduction. Every owner of a condominium apartment is entitled to that deduction. It has nothing to do with the securities business at all, it has nothing to do with the investment aspect of this thing at all, it is an aspect of homeownership, not of security ownership. Moreover, it doesn't depend upon the efforts of others, it depends upon the taxpayer's personal status. If he has no reportable income, this tax deduction doesn't do him any good. It's only if he has some income against which he can take this deduction that he confers any benefit upon it.

And the third item, that really was reaching. They said, well, this is a bargain. It's going to cost them less to live. That's the benefit that the State conferred upon him. That's like saying that Medicare is a profitable enterprise. This just doesn't add up, to my way of thinking of it. Of course, there were -- cooperative ownership means that the people who run the property don't make a profit. So you don't have to pay the profit to the man who runs it. It also imposes some obligations. It means you have got to see

that the snow is shoveled, and so on. But to call this bargain a profit aspect of this enterprise goes beyond what I think is rational elucidation of the statute.

Now, as far as the SEC is concerned, I can say very little. Their brief was only delivered to me within -- the final brief I didn't get until yesterday, I think. And we have put in a typewritten answer which we will furnish a printed brief on. I am baffled by the position of the SEC, because until recently they certainly wanted to keep hands off the sale of cooperatives and the sale of condominiums and all this business and they wrote rules which excluded them and wrote no-action letters which excluded them, and wrote guidelines in the release which is in the record in which all the identifying marks that are attributed to this project, exclude them from the field of security regulation.

QUESTION: Well, they just changed their mind, Judge. Maybe. Maybe. Maybe.

MR. RIFKIND: If they have changed their mind, all I can say is they appeared on the scene very, very late. Indeed, they were not in the district court, they were not in the court of appeals, and didn't get here until a couple of days ago.

I think I have taken all the time I should.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Thank you, gentlemen. The case is submitted.

[Whereupon, at 11:56 a.m. the oral arguments in the above-entitled matter was concluded.]