

# The Burger Court Opinion Writing Database

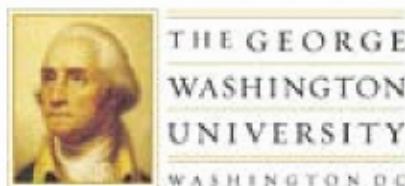
*Lindsey v. Normet*

405 U.S. 56 (1972)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



(7)

Supreme Court of the United States  
Washington D. C. 20530

CHAMBERS OF  
THE CHIEF JUSTICE

February 18, 1972

Re: No. 70-5045 - Lindsey v. Normet

Dear Byron:

Please join me.

Regards,

*[Handwritten signature]*

Mr. Justice White

cc: The Conference

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Rehnquist  
Mr. Justice O'Connor

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70-5045

Circulated: 2-2

Recirculated:

Donald Lindsey et al.)

Appellants.

Dorothea M. Normet  
et al.

On Appeal from the United  
States District Court for the  
District of Oregon.

[February —, 1972]

MR. JUSTICE DOUGLAS, dissenting in part.

I

I agree with the Court that the Oregon eviction statute denies tenants who are affected by forcible entry and wrongful detainer procedures (called FED) that Equal Protection guaranteed against state action by the Fourteenth Amendment insofar as the double-bond provision is concerned.

The ordinary or customary litigant who appeals must file a bond with one or more sureties covering "all damages, costs, and disbursements which may be awarded against him on the appeal."<sup>1</sup> To obtain a stay of execution pending the appeal the undertaking must also provide: (1) if the suit is for recovery of money or personal property (or its value), that the appellant will satisfy the claim if he loses the appeal and (2) if the judgment is for the recovery of possession of real property, for a partition or for the foreclosure of a lien, that during possession the appellant will not commit waste and that if he loses the appeal, he will pay the value of the use of the property during the appeal.

By contrast, if a tenant in an FED action appeals, he must give "in addition to the undertaking now required

<sup>1</sup> Ore. Rev. Stat. § 19.040 (1).

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70-5045

Donald Lindsey et al.,  
Appellants,  
v.  
Dorothea M. Normet  
et al.,  
On Appeal from the United  
States District Court for the  
District of Oregon.

[February —, 1972]

MR. JUSTICE DOUGLAS, dissenting in part.

1

I agree with the Court that the double bond provision in the Oregon eviction statute denies tenants who are affected by forcible entry and wrongful detainer procedures (called FED) that Equal Protection guaranteed against state action by the Fourteenth Amendment.

The ordinary or customary litigant who appeals must file a bond with one or more sureties covering "all damages, costs, and disbursements which may be awarded against him on the appeal."<sup>1</sup> To obtain a stay of execution pending the appeal the undertaking must also provide: (1) if the suit is for recovery of money or personal property (or its value), that the appellant will satisfy the claim if he loses the appeal and (2) if the judgment is for the recovery of possession of real property, for a partition or for the foreclosure of a lien, that during possession the appellant will not commit waste and that if he loses the appeal, he will pay the value of the use of the property during the appeal.

By contrast, if a tenant in an FED action appeals, he must give "in addition to the undertaking now required

<sup>1</sup> Ore. Rev. Stat. § 19.040 (1).

45

6th DRAFT

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SUPREME COURT OF THE UNITED STATES.

No. 70-5045

Recirculated: 2-14

Donald Lindsey et al.,  
Appellants,  
v.  
Dorothea M. Normet  
et al. } On Appeal from the United  
States District Court for the  
District of Oregon.

[February —, 1972]

MR. JUSTICE DOUGLAS, dissenting in part.

I

I agree with the Court that the double bond provision in the Oregon eviction statute denies tenants who are affected by forcible entry and wrongful detainer procedures (called FED) that Equal Protection guaranteed against state action by the Fourteenth Amendment.

The ordinary or customary litigant who appeals must file a bond with one or more sureties covering "all damages, costs, and disbursements which may be awarded against him on the appeal."<sup>1</sup> To obtain a stay of execution pending the appeal the undertaking must also provide: (1) if the suit is for recovery of money or personal property (or its value), that the appellant will satisfy the claim if he loses the appeal and (2) if the judgment is for the recovery of possession of real property, for a partition or for the foreclosure of a lien, that during possession the appellant will not commit waste and that if he loses the appeal, he will pay the value of the use of the property during the appeal.

By contrast, if a tenant in an FED action appeals, he must give "in addition to the undertaking now required

<sup>1</sup> Ore. Rev. Stat. § 19.040 (1).

To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Powell  
Mr. Justice Rehnquist

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

From: \_\_\_\_\_  
Circulated: 2-11-1972

No. 70-5045

Recirculated: \_\_\_\_\_

Donald Lindsey et al.,  
Appellants,  
v.  
Dorothea M. Normet et al. } On Appeal from the United  
States District Court for the  
District of Oregon.

[February —, 1972]

MR. JUSTICE BRENNAN, dissenting.

In my view the District Court erred in declining to apply the doctrine of abstention with respect to the availability of defenses in FED actions.\* The issue is whether Oregon would violate the Fourteenth Amendment if its substantive law in some circumstances recognized tenants' rights to withhold rent and retain possession based on the landlord's breach of duty to maintain the premises, but its procedural law would not permit assertion of those rights in defense of an FED action. This constitutional issue is ripe for decision if, and only if, Oregon law (1) recognizes substantive rights of the tenant based on the landlord's breach of duty; (2) recognizes, because of such breach, that a tenant may withhold rent during the term, or hold-over after expiration of the term, and (3) excludes the assertion of these rights to continued possession as a defense to an FED action.

The Court's opinion exposes the fallacy of the District Court's conclusion that Oregon law is "clear" and that "[i]t is unlikely that an application of state law

\*Abstention as respects the double-bond requirement is not required in light of the Oregon Supreme Court's decision in *Scales v. Spencer*, 246 Ore. 111, 424 P. 2d 242 (1967). I agree with the Court that this provision violates the Equal Protection Clause.

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Stewart  
Mr. Justice White  
✓ Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

From: Brannan, J.

circulated:

Recirculated: 2-14-7 ✓

No. 70-5045

**SUPREME COURT OF THE UNITED STATES**

Donald Lindsey et al.,  
Appellants,  
v.  
Dorothea M. Normet  
et al.,  
On Appeal from the United  
States District Court for the  
District of Oregon.

[February —, 1972]

MR. JUSTICE BRENNAN dissenting.

In my view the District Court erred in declining to apply the doctrine of abstention with respect to the availability of defenses in FED actions.\* The issue is whether Oregon would violate the Fourteenth Amendment if its substantive law in some circumstances recognized tenants' rights to withhold rent and retain possession based on the landlord's breach of duty to maintain the premises, but its procedural law would not permit assertion of those rights in defense of an FED action. This constitutional issue is ripe for decision if, and only if, Oregon law (1) recognizes substantive rights of the tenant based on the landlord's breach of duty; (2) recognizes, because of such breach, that a tenant may remain in possession while withholding rent during the term or may hold over after expiration of the term, and (3) excludes the assertion of these rights to continued possession as a defense to an FED action.

The Court's opinion exposes the fallacy of the District Court's conclusion that Oregon law is "clear" and that "[i]t is unlikely that an application of state law

\*Abstention on the double-bond provision is not required in light of the Oregon Supreme Court's decision in *Scales v. Spencer*, 246 Ore. 111, 424 P. 2d 242 (1967). I agree with the Court that this provision violates the Equal Protection Clause.

60

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

February 3, 1972

70-5045 - Lindsay v. Normet

Dear Byron,

I think this is a fine job and am glad to join it in toto. Because I think you have done a particularly good job with the double bond provision, and because I agree with it, I hope you will keep it in the opinion.

I do have one very minor request: In footnote 23 on page 16, I should much appreciate your moving the "Cf." one case to the left, i.e., before Harper. (I have never been persuaded that the right to vote is a constitutional right.)

Sincerely yours,

P. S.

Mr. Justice White

Copies to the Conference

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

February 2, 1972

MEMORANDUM TO THE CONFERENCE

Re: No. 70-5045 - Lindsay v. Normet

A proposed opinion in this case is attached. I have included my view of the double bond provision in Part III. Whether we should decide that question is another matter. If the Court rejects the other challenges to the FED statute as this circulation suggests, appellants, if they remain in possession, will face a FED action (not yet begun) in which the issue will be nonpayment of rent, a fact they have already admitted. Whether they would defend what would seem to be a hopeless case or press an apparently frivolous appeal from an adverse judgment, we do not know. Perhaps case and controversy requirements are met here but the pressures to reach the issue at this time are *de minimis*. Cf. Sanks v. Georgia, 401 U.S. 144. Nevertheless, the District Court's judgment approving the double bond remains on the books.

1) 2) 3)  
B.R.W.

Please find enclosed  
my opinion  
B.R.W.

Febr

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Stewart  
~~Mr. Justice Marshall~~  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

From: White, J.

2nd DRAFT

Circulated: 2-2-7

Recirculated: \_\_\_\_\_

**SUPREME COURT OF THE UNITED STATES**

No. 70-5045

Donald Lindsey et al. }  
Appellants. }  
v. } On Appeal from the United  
Dorothea M. Normet et al. } States District Court for the  
District of Oregon.

[February —, 1972]

MR. JUSTICE WHITE delivered the opinion of the Court.

This case presents the question of whether Oregon's judicial procedure for eviction of tenants after nonpayment of rent violates either the Equal Protection Clause or the Due Process Clause of the Fourteenth Amendment.

The material facts were stipulated. Appellants were the month-to-month tenants of appellee<sup>1</sup> and paid \$100 a month for the use of a single family residence in Portland, Oregon. On November 10, 1969, the City Bureau of Buildings declared the dwelling unfit for habitation

<sup>1</sup> The original complaint was filed on behalf of Donald and Edna Lindsey, seven other named plaintiffs (one of whom was an intervenor), and all other persons similarly situated. Permission to maintain the suit as a class action was granted, R., at 33, but the class was not further defined. The other named plaintiffs raised claims essentially similar to the Lindseys, who were the only two plaintiffs to appeal and who are hereafter termed "appellants." Appellee Normet was the owner of the seller's interest in the property rented to the appellants and held the legal title to secure the purchaser's performance of the contract of sale. An assignee of the purchaser's interest in the contract had rented the residence to appellants. The trial court found, however, that there was a landlord-tenant relationship between appellee and appellants at the time the suit was filed. R., at 71.

3/14  
You have joined  
ppd 5, 6, 10, 18, 19

To: The Chief Justice  
Mr. Justice Douglas  
Mr. Justice Brennan  
Mr. Justice Black  
Mr. Justice Harlan  
Mr. Justice Frankfurter  
Mr. Justice Minton  
Mr. Justice Sutherland  
Mr. Justice Stone

3rd DRAFT

From: White, J.

SUPREME COURT OF THE UNITED STATES

Capital: TESS

No. 70-5045

Recirculated 8/16/01

[February —, 1972]

MR. JUSTICE WHITE delivered the opinion of the Court.

This case presents the question of whether Oregon's judicial procedure for eviction of tenants after nonpayment of rent violates either the Equal Protection Clause or the Due Process Clause of the Fourteenth Amendment.

The material facts were stipulated. Appellants were the month-to-month tenants of appellee<sup>1</sup> and paid \$100 a month for the use of a single family residence in Portland, Oregon. On November 10, 1969, the City Bureau of Buildings declared the dwelling unfit for habitation

<sup>1</sup> The original complaint was filed on behalf of Donald and Edna Lindsey, seven other named plaintiffs (one of whom was an intervenor), and all other persons similarly situated. Permission to maintain the suit as a class action was granted, R., at 33, but the class was not further defined. The other named plaintiffs raised claims essentially similar to the Lindseys, who were the only two plaintiffs to appeal and who are hereafter termed "appellants." Appellee Normet was the owner of the seller's interest in the property rented to the appellants and held the legal title to secure the purchaser's performance of the contract of sale. An assignee of the purchaser's interest in the contract had rented the residence to appellants. The trial court found, however, that there was a landlord-tenant relationship between appellee and appellants at the time the suit was filed. R., at 71.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

February 3, 1972

Re: No. 70-5045 - Lindsay v. Normet

Dear Byron:

Please join me in your opinion  
"as is."

Sincerely,

  
T.M.

Mr. Justice White

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

February 4, 1972

Re: No. 70-5045 - Lindsay v. Normet

Dear Byron:

This is a good opinion and I am glad to join it. I understand your concern about Part IV, but I am not averse to its inclusion in the opinion.

Sincerely,

H. A. B.

Mr. Justice White

cc: The Conference