The Burger Court Opinion Writing Database

Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley

454 U.S. 290 (1981)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

0$0737A, 11-12-81. rev. DICK

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: The Chief Justice

Circulated: NOV 13 1981

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80–737

CITIZENS AGAINST RENT CONTROL/COALITION FOR FAIR HOUSING ET AL., *v.* CITY OF BERKELEY, CALIFORNIA ET AL.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

[November ——, 1981]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

The issue on appeal is whether a limitation of $250 on contributions to committees formed to support or oppose ballot measures violates the First Amendment.

I

The voters of Berkeley, California adopted the Election Reform Act of 1974, Ord. No. 4700–N.S., by initiative. The campaign ordinance so enacted placed limits on expenditures and contributions in campaigns involving both candidates and ballot measures.[1] Section 602 of the ordinance provides:

> "No person shall make, and no campaign treasurer shall solicit or accept, any contribution which will cause the total amount contributed by such person with respect to a single election in support of or in opposition to a measure to exceed two hundred and fifty dollars ($250)."[2]

[1] Section 217 of the ordinance defines "measure" as "any City Charter amendment, ordinance or other propositions submitted to a popular vote at an election, whether by initiative, referendum or recall procedure or otherwise, or circulated for the purposes of submission to a popular vote at any election, whether or not the proposition qualifies for the ballot."

[2] It was not clear in 1977 whether § 602 would be enforced. The prohibition on contributions to ballot measure campaign committees by corporations and labor unions, § 605, was invalidated in *Pacific Gas & Electric* v. *City of Berkeley*, 60 Cal. App. 3d 123, 131 Cal. Rptr. 350 (1976). Following *Buckley* v. *Valeo*, 424 U. S. 1 (1976), the City repealed a number of

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

CHAMBERS OF
THE CHIEF JUSTICE

November 16, 1981

Re: No. 80-737 - Citizens Against Rent Control v. Berkele

Dear John:

I have no problem about restating the two sentences you question, so as to read:

> "Contributions by individuals to support concerted action by a group or committee advocating a position on a ballot issue is beyond question a very significant form of political expression."

and

> "We need not concern ourselves with the question of the quantum of state interest or the tiers and levels of judicial scrutiny; the record before us discloses no legitimate public interest to be served by limits on the right to contribute to a committee favoring or opposing a ballot measure on rent control."

Regards,

WEB

Justice Stevens

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

November 17, 1981

Re: No. 80-737 - Citizens Against Rent Control v. Berkeley

Dear Lewis:

Thank you for your comments of November 17.

(1) My second draft, already at the printer, takes care of your point.

(2) The reality that expenditure limits in this context is a limit on speech is already covered at the top of page 9.

I tend to agree that the power of single interest groups is unduly enhanced in a referendum as history shows. Hence I will drop the last 10 lines; second paragraph, page 4. The "homily" was a valid generality but I do not want to encourage the process.

Regards,

WEB

Justice Powell

pp 4, 6, 8

0$0737A, 11-16-81. rev. DICK

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: The Chief Jus

Circulated: _____

Recirculated: NOV 17 81

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80–737

CITIZENS AGAINST RENT CONTROL/COALITION FOR FAIR HOUSING ET AL., *v.* CITY OF BERKELEY, CALIFORNIA ET AL.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

[November ——, 1981]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

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[1] Section 217 of the ordinance defines "measure" as "any City Charter amendment, ordinance or other propositions submitted to a popular vote at an election, whether by initiative, referendum or recall procedure or otherwise, or circulated for the purposes of submission to a popular vote at any election, whether or not the proposition qualifies for the ballot."

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To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

4, 6, 8, 9

From: The Chief Justice

Circulated: _____

Recirculated: DEC 7 1981

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80–737

CITIZENS AGAINST RENT CONTROL/COALITION FOR FAIR HOUSING, ET AL., APPELLANTS *v.* CITY OF BERKELEY, CALIFORNIA, ET AL.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

[December ——, 1981]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

The issue on appeal is whether a limitation of $250 on contributions to committees formed to support or oppose ballot measures violates the First Amendment.

I

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> "No person shall make, and no campaign treasurer shall solicit or accept, any contribution which will cause the total amount contributed by such person with respect to a single election in support of or in opposition to a measure to exceed two hundred and fifty dollars ($250)."[2]

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

HAB

CHAMBERS OF
THE CHIEF JUSTICE

December 23, 1981

Re: Cases being held for No. 80-737,
Citizens Against Rent Control v. Berkeley

MEMORANDUM TO THE CONFERENCE

No. 80-969, Firestone v. Dade Voters for a Free Choice
No. 80-970, Firestone v. Let's Help Florida

These cases are very similar to Citizens Against Rent Control v. Berkeley. In fact, the Fifth Circuit's consolidated opinion in these cases was cited approvingly in our Berkeley opinion, 50 U.S.L.W. 4071, 4073 (1981).

In No. 80-969, a party desired to contribute more than $1,000 to a political committee organized to oppose passage of an ordinance that would prohibit smoking in public places. The ordinance was to be considered in a county referendum. Fla. Stat. Ann. § 106.08(1)(e) prohibits contributions of more than $1,000 to committees favoring or opposing ballot measures in county elections. The committee and the contributor challenged § 106.08(1)(e), and the district court struck down the statute under the First Amendment. In No. 80-970, a party desired to contribute more than $3,000 to a politicial committee organized to favor passage of a constitutional amendment to legalize casino gambling in South Florida. The committee conducted an initiative drive to place the proposed amendment before the voters of the state. Fla. Stat. Ann. § 106.08(1)(d) prohibits contributions of more than $3,000 to committees favoring or opposing ballot measures in state-wide elections. The district court also struck down § 106.08(1)(d).

The Fifth Circuit consolidated the cases and affirmed. It rejected the contention that there was no case or controversy. The contributors desired to contribute more than was permitted by the statutes and the state election agencies had a duty to enforce the statutes. Nor did Younger v. Harris, 401 U.S. 37 (1971), require the federal courts to abstain from hearing the cases because there was no state prosecution pending when the suits were filed. On the merits, the court concluded that Buckley v. Valeo 424 U.S. 1 (1976), and First National Bank v. Bellotti, 435 U.S.

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 24, 1981

RE: No. 80-737 Citizens Against Rent Control v. Berkeley

Dear Chief:

I agree.

Sincerely,

Bill

The Chief Justice

cc: The conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

November 16, 1981

Re: No. 80-737 -- Citizens v.
City of Berkeley

Dear Chief,

As presently advised, I shall be circulating a dissent in this case.

Sincerely yours,

The Chief Justice

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice White

Circulated: 11/24/81

Recirculated: _____

No. 80-737, Citizens Against Rent Control/Coalition for Fair Housing, et al. v. City of Berkeley, et al.

Justice WHITE, dissenting.

In Buckley v. Valeo, 434 U.S. 1 (1976), the Court upheld restrictions on contributions but struck down limits on expenditures in campaigns for federal office that Congress, the body most expert in the matter, thought equally essential to protect the integrity of the election process. Two years later, a bare majority of the Court, substituting its judgment for that of the Massachusetts legislature, invalidated that state's prohibition on corporate spending in referendum elections. First

0$0737D—24-NOV-81—DICK

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice White

Circulated: _____

Recirculated: 25 NOV

PRINTED
1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80–737

CITIZENS AGAINST RENT CONTROL/COALITION FOR FAIR HOUSING, ET AL., APPELLANTS *v.* CITY OF BERKELEY, CALIFORNIA, ET AL.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA

[November ——, 1981]

JUSTICE WHITE, dissenting.

In *Buckley* v. *Valeo*, 434 U. S. 1 (1976), the Court upheld restrictions on contributions but struck down limits on expenditures in campaigns for federal office that Congress, the body most expert in the matter, thought equally essential to protect the integrity of the election process. Two years later, a bare majority of the Court, substituting its judgment for that of the Massachusetts legislature, invalidated that state's prohibition on corporate spending in referendum elections. *First National Bank* v. *Bellotti*, 435 U. S. 765 (1978). Disagreeing with the Court's assumption that those regulations inhibited the free interplay of political advocacy, I would have upheld the expenditure limitations at issue in *Buckley* and the restrictions contested in *Bellotti*.

This case poses a less encompassing regulation on campaign activity, one tailored to the odd measurements of *Buckley* and *Bellotti*. Precisely because it reflects these decisions, the ordinance regulates contributions but not expenditures and does not prohibit corporate spending.[1] It is

[1] As originally passed by the voters, the Berkeley ordinance restricted expenditures as well as contributions to ballot measure campaigns. Following *Buckley* v. *Valeo*, 424 U. S. 1 (1976), and the California Supreme Court's invalidation of statewide expenditure limitations in ballot measure

To: The Chief Justice
Justice Brennan
Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Marshall

Circulated: 11 DEC 198

Recirculated: _____

Citizens Against Rent Control v. City of Berkeley

No. 80-737

JUSTICE MARSHALL, concurring in the judgment.

The Court today holds that a local ordinance restricting the amount of money that an individual can contribute to a committee organized to support or oppose a ballot measure violates the right to freedom of speech and association guaranteed by the First Amendment. In reaching this conclusion, however, the Court fails to indicate whether or not it attaches any constitutional significance to the fact that the Berkeley ordinance seeks to limit contributions as opposed to direct expenditures. As JUSTICE WHITE correctly notes in dissent, beginning with our decision in Buckley v. Valeo, 424 U.S. 1 (1976), this Court has always drawn a distinction between restrictions on contributions, and direct limitations on the amount an individual can expend for

SUPREME COURT OF THE UNITED STATES

No. 80–737

CITIZENS AGAINST RENT CONTROL/COALITION FOR FAIR HOUSING, ET AL., APPELLANTS *v.* CITY OF BERKELEY, CALIFORNIA, ET AL.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

[December 14, 1981]

JUSTICE MARSHALL, concurring in the judgment.

The Court today holds that a local ordinance restricting the amount of money that an individual can contribute to a committee organized to support or oppose a ballot measure violates the right to freedom of speech and association guaranteed by the First Amendment. In reaching this conclusion, however, the Court fails to indicate whether or not it attaches any constitutional significance to the fact that the Berkeley ordinance seeks to limit *contributions* as opposed to direct *expenditures*. As JUSTICE WHITE correctly notes in dissent, beginning with our decision in *Buckley* v. *Valeo*, 424 U. S. 1 (1976), this Court has *always* drawn a distinction between restrictions on contributions, and direct limitations on the amount an individual can expend for his own speech. As we noted last term in *California Medical Assn* v. *Federal Election Commission*, —— U. S. ——, —— (1980) (MARSHALL, J., joined by BRENNAN, WHITE, and STEVENS, JJ.), the "speech by proxy" that is achieved through contributions to a political campaign committee "is not the sort of political advocacy that this Court in *Buckley* found entitled to full First Amendment protection."

Because the Court's opinion is silent on the standard of review it is applying to this contributions limitation, I must assume that the Court is following our consistent position that

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Blackmun

Circulated: NOV 23 19

Recirculated: _____

No. 80-737 - Citizens Against Rent Control/Coalition For Fair Housing, et al. v. City of Berkeley, California, et al.

JUSTICE BLACKMUN, concurring in the judgment.

My view of this case follows from my earlier positions. In Buckley v. Valeo, 424 U.S. 1 (1976), I dissented in part because I was not persuaded that the Court had drawn a principled constitutional distinction between expenditure limitations and contribution limitations. Id., at 290. Last Term, I voted to uphold certain contribution limitations against a First Amendment challenge, but only because the Government had demonstrated a sufficiently important interest and employed means closely drawn to avoid unnecessary abridgment of associational freedoms. See California Medical Assn. v. Federal Election Comm'n, ____ U.S. ____, ____ (1981) (opinion concurring in part and concurring in the judgment). Applying the same rigorous standard of review to the contribution limitation contested here, I would hold that the city of Berkeley has not demonstrated a genuine threat to its asserted interests.

I would not deny, as the Court appears to do, ante, at 6, that the city may assert a legitimate public interest in maintaining voter confidence in government. To the contrary, in First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978),

0*0737F 24-NOV-81 Drb

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80–737

CITIZENS AGAINST RENT CONTROL/COALITION FOR FAIR HOUSING, ET AL., APPELLANTS *v.* CITY OF BERKELEY, CALIFORNIA, ET AL.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

[November ——, 1981]

JUSTICE BLACKMUN, concurring in the judgment.

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I would not deny, as the Court appears to do, *ante*, at 6, that the city may assert a legitimate public interest in maintaining voter confidence in government. To the contrary, in *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765 (1978), the Court explicitly recognized that "[p]reserving the integrity of the electoral process, preventing corruption, . . . 'sustain[ing] the active, alert responsibility of the individual

December 8, 1981

Re: No. 80-737 - Citizens Against Rent Control
v. City of Berkeley

Dear Sandra:

It seems to me that we share the same discomfort with the principal opinion proposed for this case and that, except for the personalized first paragraph of my concurrence, say about the same thing in our separate writings.

Our clerks have visited about this and, as a result, we have formulated the enclosure which, I think, incorporates what you have said and what I have said, without my first paragraph.

I know I am presumptuous in doing this, but what do you think? If, by chance, this meets with your approval, I suggest that we head it "JUSTICE BLACKMUN and JUSTICE O'CONNOR, concurring in the judgment" and circulate it. We could then withdraw our separate concurrences.

Do not feel at all obligated. I would be delighted to do it this way, but if you do not wish to go along, I shall fully understand.

Sincerely,

HAB

Justice O'Connor

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 10, 198

Re: No. 80-737 - Citizens Against Rent Control/Coalition For Fair Housing, et al. v. City of Berkeley, California, et al.

Dear Chief:

In view of the enclosure, I am withdrawing my separate concurrence circulated in printed form on November 24.

Sincerely,

HAB.

The Chief Justice

cc: The Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Blackmun

Circulated: DEC 10 1981

Recirculated: _____

No. 80-737 - Citizens Against Rent Control/Coalition For Fair Housing, et al. v. City of Berkeley, California, et. al.

JUSTICE BLACKMUN and JUSTICE O'CONNOR, concurring in the judgment.

The contribution limitations at issue here encroach directly on political expression and association. Thus, Berkeley's ordinance cannot survive constitutional challenge unless it withstands "exacting scrutiny." First National Bank of Boston v. Bellotti, 435 U.S. 765, 786 (1978). To meet this rigorous standard of review, Berkeley must demonstrate that its ordinance advances a sufficiently important governmental interest and employs means "closely drawn to avoid unnecessary abridgment" of First Amendment freedoms. Ibid. (quoting Buckley v. Valeo, 424 U.S. 1, 25 (1976)).

We would hold that Berkeley has neither demonstrated a genuine threat to its important governmental interests nor employed means closely drawn to avoid unnecessary abridgment of protected activity. In Buckley, this Court upheld limitations on contributions to candidates as necessary to prevent contributors from corrupting the representatives to whom the people have delegated political decisions. But curtailment of speech and

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-737

CITIZENS AGAINST RENT CONTROL/COALITION FOR FAIR HOUSING, ET AL., APPELLANTS *v.* CITY OF BERKELEY, CALIFORNIA, ET AL.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

[December ——, 1981]

JUSTICE BLACKMUN and JUSTICE O'CONNOR, concurring in the judgment.

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We would hold that Berkeley has neither demonstrated a genuine threat to its important governmental interests nor employed means closely drawn to avoid unnecessary abridgment of protected activity. In *Buckley*, this Court upheld limitations on contributions to candidates as necessary to prevent contributors from corrupting the representatives to whom the people have delegated political decisions. But curtailment of speech and association in a ballot measure campaign, where the people themselves render the ultimate political decision, cannot be justified on this basis.

Nor has Berkeley proved a genuine threat to its interest in maintaining voter confidence in government. We would not

November 17, 1981

80-737 Citizens Against Rent Control v. Berkeley

Dear Chief:

I am generally in accord with your opinion, and suggest - for your consideration - the following:

1. On page 6, in the second full paragraph, you say that there is no occasion to be concerned "with the question of the quantum of state interest or the tiers and levels of judicial scrutiny; no legitimate public interest is served" by the limitation in this ordinance. My concern is that this sentence may create some doubt as to whether the Court is receding from the standard of strict scrutiny (or equivalent terminology) that the Court has consistently applied in First Amendment cases.

2. I hope you will emphasize the point that the contribution/expenditure distinction is meaningless in a single issue ballot campaign. In this context, the size of permitted contributions do determine the amount of speech. Moreover, contributors will know what the committee will advocate, and make contributions only for that specific speech purpose. Thus, the situation is different from the contribution to a multi-issue campaign or candidate.

* * *

The foregoing are suggestions that may merit consideration. The only portion of your opinion that I would find difficult to join is the second full paragraph on page 4. It can be read as a ringing endorsement of the use of initiative and referendum "to resolve public issues". I am aware of the popularity of this method in California and, increasingly, in other states. In my view, however, this method of "legislating" is incompatible with our constitutional scheme of representative government. The combination of special interest groups, and the bypassing of the legislative branch process to resolve important issues, could seriously weaken our form of government.

Consider, for example, the relatively simplistic issue involved in this case: whether there should be rent control. As experience has demonstrated, this is not as simple an issue as one might think. The adoption of such control may produce results quite contrary to those anticipated by its adovcates. It is an issue that properly should be resolved by the legislative body after public hearings at which evidence can be introduced and weighed. At the national level, this trend toward deciding issues by popularity contests, would be more than a little disquieting.

We need not criticize the vogue in California, but I am not disposed to bless it with such generous language. Is this really necessary?

Sincerely,

The Chief Justice

lfp/ss

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

November 18, 1981

80-737 Citizens Against Rent Control v. Berkeley

Dear Chief:

Please join me.

Sincerely,

Lewis

The Chief Justice

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

November 18, 1981

Re: No. 80-737 Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, California

Dear Chief:

Please join me.

Sincerely,

The Chief Justice

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: Justice Rehnquist

Circulated: NOV 19 1981

Recirculated: _____

0$0737H 11/18/81 spw

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80–737

CITIZENS AGAINST RENT CONTROL/COALITION FOR FAIR HOUSING, ET AL., APPELLANTS *v.* CITY OF BERKELEY, CALIFORNIA, ET AL.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

[November ——, 1981]

JUSTICE REHNQUIST, concurring.

I agree that the judgment of the Supreme Court of California must be reversed in this case. Unlike the factual situation in *First National Bank* v. *Bellotti*, 435 U. S. 765 (1978), the Berkeley ordinance was not aimed only at corporations, but sought to impose an across-the-board limitation on the size of contributions to committees formed to support or oppose ballot measure referenda. While one of the petitioners here, Mason-McDuffie, is a California corporation, there is no indication that the Berkeley ordinance was aimed at corporations as opposed to individuals. Therefore, my dissenting opinion in *First National Bank* v. *Bellotti*, *supra*, which relied on the corporate shield which the state had granted to corporations as a form of *quid pro quo* for the limitation does not come into play. *Buckley* v. *Valeo*, 424 U. S. 1 (1976), holds that in this situation there is no state interest which could justify a limitation on the exercise of rights guaranteed under the First and Fourteenth Amendments to the United States Constitution.

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

November 16, 1981

Re: 80-737 - Citizens Against Rent Control v. City of Berkeley

Dear Chief:

Apart from two minor problems, I am prepared to join your opinion. On page 6, there are two sentences that seem to me to be somewhat broader than necessary.

First, I wonder if you could change the sentence which now reads: "Contributions by individuals to support concerted action by a group or committee advocating a position on a ballot issue is one of the highest forms of political expression" to say, instead, something like "... is unquestionably a significant form of political expression." I find it a little difficult to equate the donation of money with the kind of political expression that we find in the Federalist Papers, for example.

Also, in the same paragraph, instead of making the categorical statement that "no legitimate public interest is served by limits ...," could you not tone it down a little and say something like "the record in this case discloses no legitimate public interest." It seems to me that there might be cases, such as the "Let's Help Florida" case referred to on page 8, in which an interest in avoiding deception or possibly some other interest might conceivably be served by a contribution limit.

Respectfully,

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

November 16, 1981

Re: 80-737 - Citizens Against Rent Control
v. City of Berkeley

Dear Chief:

Please join me.

Respectfully,

JPS

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

November 19, 1981

No. 80-737 Citizens Against Rent Control
v. City of Berkeley

Dear Chief:

I am in general agreement with your opinion apart from one point which I hope you will consider.

The opinion states on page 6 that "[w]e need not concern ourselves with the question of ... the tiers or levels of judicial scrutiny" because "the record before us discloses no legitimate public interest" served by Berkeley's ordinance, however, the opinion notes that regulation of First Amendment rights is always subject to "exacting judicial scrutiny." In fact, something more than a rational basis standard must be applied here, since Berkeley does advance at least one legitimate state interest, as you implicitly acknowledge on page 8, where you discuss Berkeley's claim that § 602 is necessary to ensure that the identities of supporters and opponents of ballot measures not be concealed behind seductive committee names. Therefore, I cannot agree--and your wording suggests that you really do not claim--that under "any degree of scrutiny" the ordinance must fall.

I suggest making the seemingly uncontroversial concession that something stricter than a rational basis test is being applied here. Doing so will make it unnecessary to make the unsupported claim that there is "no risk" that the great mass of Berkeley voters will be ignorant of the true identity of contributors to ballot measure campaigns, when the present disclosure provisions can ensure only that alert and interested voters have the means to find out whose money is doing the talking.

Sincerely,

Sandra

The Chief Justice

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: Justice O'Connor

Circulated: DEC 17 1981

Recirculated: _____

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80–737

CITIZENS AGAINST RENT CONTROL/COALITION FOR FAIR HOUSING, ET AL., APPELLANTS *v.* CITY OF BERKELEY, CALIFORNIA, ET AL.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

[December ——, 1981]

JUSTICE O'CONNOR, concurring in the judgment.

The contribution limitations at issue in this case encroach on the core First Amendment rights of political expression and association. As a result, Berkeley's ordinance can survive constitutional challenge only if it withstands "exacting scrutiny," *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 786 (1978). To meet this standard, Berkeley must demonstrate that the ordinance advances a compelling governmental interest by means "closely drawn to avoid unnecessary abridgment." *Ibid.* (quoting *Buckley* v. *Valeo*, 424 U. S. 1, 25 (1976)).

Berkeley has failed to shoulder this heavy burden. In *Buckley*, this Court upheld limitations on contributions to candidates for the reason that such limitations prevent contributors from corruptly influencing the representatives to whom the people have delegated political decisions. But in a referendum, the people themselves decide. Therefore, curtailment of expression during a ballot measure campaign cannot be justified on this basis, because the notion that the government may shield its citizenry from eloquent, persistent speakers is foreign to the First Amendment.

Like JUSTICE BLACKMUN, however, I cannot agree with the Court's suggestion, *ante*, at 6, that "the record before us discloses no legitimate public interest to be served" by

HAB

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

December 10, 1981

No. 80-737 Citizens Against Rent Control v. City of Berkeley

Dear Chief,

Your revised draft and my separate concurrence were circulated on the same day. In the meantime, Harry has revised his separate concurrence in a way which fully and accurately expresses my views of this case.

Accordingly, I shall withdraw my separate concurrence and join Harry's.

Sincerely,

Sandra

The Chief Justice

cc: Justice Blackmun

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

December 10, 1981

No. 80-737 Citizens Against Rent Control v. City of Berkeley

Dear Harry,

You have expressed my thoughts better than I could have in your concurring opinion. I would be pleased to be joined in it.

Sincerely,

Sandra

Justice Blackmun

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

October 14, 1981

MEMORANDUM TO JUSTICE STEVENS

Re: 80-737 - Citizens Against Rent Control/
Coalition for Fair Housing, et al.
v. City of Berkeley, California, et al.

During the argument of the above case this morning counsel for appellee indicated that she had called the Clerk's attention to a typographical error in footnote 24 on page 11. I have examined the file and Miss West did notify the Clerk's staff that there were two typographical errors in her brief, but she also indicated she was having a Washington attorney come to the Court in order to make these changes in the brief. It appears her representative never showed up and never effected the changes in the brief.

In cases where the briefs have been circulated and time does not permit counsel to make changes, I have circulated errata sheets if there were only a few changes to be made. In light of counsel's representation that she would make the changes her letter was not duplicated and transmitted.

A. L. Stevas

Alexander L. Stevas
Clerk

Copies of the Conference