

The Burger Court Opinion Writing Database

Brown v. Socialist Workers '74 Campaign Committee (Ohio)

459 U.S. 87 (1982)

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



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

CHAMBERS OF
THE CHIEF JUSTICE

November 19, 1982

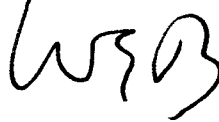
Re: 81-776 - Ted W. Brown, et al. v. Socialist Workers '74 Campaign
Committee (Ohio) et al.

Dear Thurgood:

Having written a concurring opinion on several aspects that troubled me, I now conclude my reservations perhaps relate more to Buckley v. Valeo than to your opinion.

Given that we have double or treble the number of concurring opinions of 30 or so years ago, I have concluded to drop my draft. Subject my seeing any revisions you may make, I will be joining you.

Regards,



Justice Marshall

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

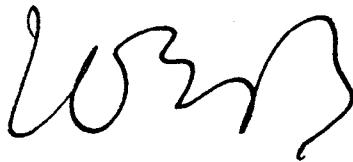
December 2, 1982

Re: No. 81-776 - Ted W. Brown, et al., v. Socialist
Workers '74 Campaign Committee (Ohio)
et al.

Dear Thurgood:

I join.

Regards,

A handwritten signature in dark ink, appearing to be "W. Marshall", written in a cursive, flowing style.

Justice Marshall

Copies to the Conference

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①

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

October 26, 1982

RE: No. 81-776 Brown v. Socialist Workers, etc.

Dear Thurgood:

I agree.

Sincerely,

Bill

Justice Marshall

Copies to the Conference



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

CHAMBERS OF
JUSTICE BYRON R. WHITE

October 27, 1982

Re: 81-776 - Brown v. Socialist Workers
'74 Campaign Committee (Ohio)

Dear Thurgood,

Please join me.

Sincerely yours,

Justice Marshall

Copies to the Conference

cpm

1, 2, 8

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

From: Justice Marshall

Circulated: OCT 22 1982

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-776

TED W. BROWN, ET AL., APPELLANTS *v.* SOCIALIST
WORKERS '74 CAMPAIGN COMMITTEE (OHIO) ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF OHIO

[October —, 1982]

JUSTICE MARSHALL delivered the opinion of the Court. ①

This case presents the question whether certain disclosure requirements of the Ohio Campaign Expense Reporting Law, Ohio Rev. Code Ann. § 3517.01 et seq., can be constitutionally applied to the Socialist Workers Party, a minor political party which historically has been the object of harassment by government officials and private parties. The Ohio statute requires every political party to report the names and addresses of campaign contributors and recipients of campaign disbursements. In *Buckley v. Valeo*, 424 U. S. 74 (1976), this Court held that the First Amendment prohibits the government from compelling disclosures by a minor political party that can show a "reasonable probability" that the compelled disclosures will subject those identified to "threats, harassment, or reprisals." *Id.* at 74. Employing this test, a three-judge District Court for the Southern District of Ohio held that the Ohio statute is unconstitutional as applied to the Socialist Workers Party. We affirm.

I

The Socialist Workers Party ("SWP") is a small political party with approximately sixty members in the State of Ohio. The party states in its constitution that its aim is "the abolition of capitalism and the establishment of a workers'

STYLISTIC CHANGES THROUGHOUT.

pp. 7, 8, 9, 10, 11, 12, 14, 15

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

From: **Justice Marshall**

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-776

TED W. BROWN, ET AL., APPELLANTS *v.* SOCIALIST
WORKERS '74 CAMPAIGN COMMITTEE (OHIO) ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF OHIO

[November —, 1982]

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minor changes, 1, 9, 10, 11, 15

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

From: **Justice Marshall**

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Recirculated: **DEC 2 1982**

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-776

TED W. BROWN, ET AL., APPELLANTS *v.* SOCIALIST
WORKERS '74 CAMPAIGN COMMITTEE (OHIO) ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF OHIO

[December —, 1982]

JUSTICE MARSHALL delivered the opinion of the Court.

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Footnote 21 omitted P. 15

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

From: **Justice Marshall**

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Recirculated: **DEC 6 1982**

4-2h.
3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-776

TED W. BROWN, ET AL., APPELLANTS *v.* SOCIALIST
WORKERS '74 CAMPAIGN COMMITTEE (OHIO) ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF OHIO

[December —, 1982]

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 7, 1983

file

MEMORANDUM TO THE CONFERENCE

Re: No. 82-198, Federal Election Commission v.
Hall-Tyner Election Campaign Committee, held
for No. 81-776, Brown v. Socialist Workers '74
Campaign Committee (Ohio)

The Court of Appeals for the Second Circuit held that the provisions of the Federal Election Campaign Act, 2 U.S.C. §431 et seq., requiring that the names of contributors be recorded and disclosed, could not be constitutionally applied to respondents.

Two questions are raised in the petition for certiorari. Question 1 concerns the sufficiency of the evidence. The Court of Appeals' reliance on evidence of past harassment to satisfy the Buckley test is consistent with Brown and Buckley. The Court of Appeals also found evidence of continuing government surveillance that may chill the associational activities of contributors. Finally, it relied on affidavits from contributors who stated that they gave their contributions only after assurances of anonymity. I will vote to deny.

Question 2 concerns the constitutionality of the record-keeping provision as applied to respondents. Because our decision in Brown is not directly pertinent to this issue, GVR would not be appropriate. I also do not think this issue merits review. On the one hand, if petitioner never seeks disclosure of the records, the government has no interest in compelling their maintenance.

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

October 27, 1982

Re: No. 81-776 - Brown v. Socialist Workers

Dear Thurgood:

I am generally with you, and I am certainly with you in the judgment. You may recall from my comments at conference that my approach on the expenditure side, in view of the state of the record, was somewhat different. I shall await the partial dissent and then decide whether to write separately.

Sincerely,



Justice Marshall

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

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-776

TED W. BROWN, ET AL., APPELLANTS *v.* SOCIALIST
WORKERS '74 CAMPAIGN COMMITTEE (OHIO) ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF OHIO

[November —, 1982]

JUSTICE BLACKMUN, concurring in part and concurring in
the judgment.

I join Parts I, III, and IV of the Court's opinion and agree with much of what is said in Part II. But I cannot agree, with the Court or with the partial dissent, that we should reach the issue whether a standard of proof different from that applied to disclosure of campaign contributions should be applied to disclosure of campaign disbursements. See *ante*, at 11, n. 16; *post*, at 1, n. 1. Appellants did not suggest in the District Court that different standards might apply. Nor was the issue raised in appellants' jurisdictional statement or in their brief on the merits in this Court. Consequently, I would merely *assume* for purposes of our present decision—as appellants apparently have assumed throughout this litigation and as the District Court clearly assumed—that the flexible proof rule of *Buckley v. Valeo*, 424 U. S. 1 (1976), applies equally to forced disclosure of contributions and to forced disclosure of expenditures. I would leave for another day, when the issue is squarely presented, considered by the courts below, and adequately briefed here, the significant question that now divides the Court.

This Court's Rule 15.1 (a) states: "Only the questions set forth in the jurisdictional statement or fairly included therein will be considered by the Court." Appellants' jurisdictional

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

From: Justice Blackmun

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-776

TED W. BROWN, ET AL., APPELLANTS *v.* SOCIALIST
WORKERS '74 CAMPAIGN COMMITTEE (OHIO) ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF OHIO

[November —, 1982]

JUSTICE BLACKMUN, concurring in part and concurring in
the judgment.

I join Parts I, III, and IV of the Court's opinion and agree with much of what is said in Part II. But I cannot agree, with the Court or with the partial dissent, that we should reach the issue whether a standard of proof different from that applied to disclosure of campaign contributions should be applied to disclosure of campaign disbursements. See *ante*, at 11, n. 16; *post*, at 1, n. 1, and 6, n. 7. Appellants did not suggest in the District Court that different standards might apply. Nor was the issue raised in appellants' jurisdictional statement or in their brief on the merits in this Court. Consequently, I would merely *assume* for purposes of our present decision—as appellants apparently have assumed throughout this litigation and as the District Court clearly assumed—that the flexible proof rule of *Buckley v. Valeo*, 424 U. S. 1 (1976), applies equally to forced disclosure of contributions and to forced disclosure of expenditures. I would leave for another day, when the issue is squarely presented, considered by the courts below, and adequately briefed here, the significant question that now divides the Court.

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pp. 1, 4, 5-6

pp. 1, 2, 3, 4, 5, 6

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

From: Justice Blackmun

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-776

TED W. BROWN, ET AL., APPELLANTS *v.* SOCIALIST
WORKERS '74 CAMPAIGN COMMITTEE (OHIO) ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF OHIO

[November —, 1982]

JUSTICE BLACKMUN, concurring in part and concurring in
the judgment.

I join Parts I, III, and IV of the Court's opinion and agree with much of what is said in Part II. But I cannot agree, with the Court or with the partial dissent, that we should reach the issue whether a standard of proof different from that applied to disclosure of campaign contributions should be applied to disclosure of campaign disbursements. See *ante*, at 7, n. 9; *post*, at 1, n. 1, and 6, n. 7. Appellants did not suggest in the District Court that different standards might apply. Nor was the issue raised in appellants' jurisdictional statement or in their brief on the merits in this Court. Consequently, I would merely *assume* for purposes of our present decision—as appellants apparently have assumed throughout this litigation and as the District Court clearly assumed—that the flexible proof rule of *Buckley v. Valeo*, 424 U. S. 1 (1976), applies equally to forced disclosure of contributions and to forced disclosure of expenditures. I would leave for another day, when the issue is squarely presented, considered by the courts below, and adequately briefed here, the significant question that now divides the Court.

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PP. 1,2,3,5-6

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

From: **Justice Blackmun**

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4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-776

TED W. BROWN, ET AL., APPELLANTS *v.* SOCIALIST
WORKERS '74 CAMPAIGN COMMITTEE (OHIO) ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF OHIO

[November —, 1982]

JUSTICE BLACKMUN, concurring in part and concurring in
the judgment.

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¹ Although the partial dissent agrees that this issue is not properly presented and therefore that the question should not be decided, *post*, at 6, n. 7, its result and reasoning endorse a different standard of proof. See n. 2, *infra*.

3

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

October 27, 1982

81-776 Brown v. Socialist Workers

Dear Thurgood:

Please join me.

Sincerely,

Lewis

Justice Marshall

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

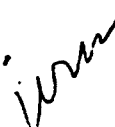
November 10, 1982

Re: No. 81-776 Brown v. Socialist Workers '74
Campaign Committee

Dear Sandra:

Please join me.

Sincerely,



Justice O'Connor

cc: The Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

October 28, 1982

Re: 81-776 - Brown v. Socialist Wkrs.
'74 Campaign

Dear Thurgood:

Since I was also troubled by the expenditure point, I shall wait for Sandra's partial dissent.

Respectfully,



Justice Marshall

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

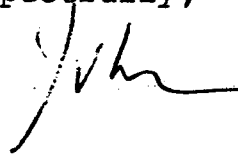
November 17, 1982

Re: 81-776 - Brown v. Socialist Workers
'74 Campaign Committee

Dear Sandra:

Please join me.

Respectfully,



Justice O'Connor

Copies to the Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

October 25, 1982

No. 81-776 Brown v. Socialist Workers '74
Campaign Committee (Ohio)

Dear Thurgood,

While I agree with your opinion insofar as it relates to contributions, I continue to believe the respondent did not meet its burden with respect to the expenditure reporting requirements. In due course, I shall try my hand at a partial dissent.

Sincerely,

Sandra

Justice Marshall

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PP. 4, 5

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

From: **Justice O'Connor**

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-776

TED W. BROWN, ET AL., APPELLANTS *v.* SOCIALIST
WORKERS '74 CAMPAIGN COMMITTEE (OHIO) ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF OHIO

[November —, 1982]

JUSTICE O'CONNOR, concurring in part and dissenting in
part.

I concur in the judgment that the Socialist Workers Party ("SWP") has sufficiently demonstrated a reasonable probability that disclosure of contributors will subject those persons to threats, harassment, or reprisals, and thus under *Buckley v. Valeo*, 424 U. S. 1 (1976), the state of Ohio cannot constitutionally compel the disclosure. Further, I agree that the broad concerns of *Buckley* apply to the required disclosure of recipients of campaign expenditures. But, as I view the record presented here, the SWP has failed to carry its burden of showing that there is a reasonable probability that disclosure of recipients of expenditures will subject the recipients themselves or the SWP to threats, harassment, or reprisals. Moreover, the strong public interest in fair and honest elections outweighs any damage done to the associational rights of the party and its members by application of the state's expenditure-disclosure law.¹

¹At oral argument, the question was raised whether appellees ever raised below the possible constitutional distinction between disclosing contributors and disclosing recipients of expenditures. The majority recognizes this problem, slip op., at 11, n. 16, but assumes without further discussion that the issue is before us. I agree that the issue is before us. The question at trial was the one presented in the jurisdictional statement:

"Whether, under the standards set forth by this Court in *Buckley v. Valeo*, 424 U. S. 1 (1976), the provisions of Sections 3517.10 and 3517.11 of the Ohio Revised Code, which require that the campaign committee of a

PP. 1, 6, 7, 9

Stylistic Changes Throughout

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

From: Justice O'Connor

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-776

TED W. BROWN, ET AL., APPELLANTS v. SOCIALIST
WORKERS '74 CAMPAIGN COMMITTEE (OHIO) ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF OHIO

[November —, 1982]

JUSTICE O'CONNOR, with whom JUSTICE REHNQUIST joins, concurring in part and dissenting in part.

I concur in the judgment that the Socialist Workers Party ("SWP") has sufficiently demonstrated a reasonable probability that disclosure of contributors will subject those persons to threats, harassment, or reprisals, and thus under *Buckley v. Valeo*, 424 U. S. 1 (1976), the state of Ohio cannot constitutionally compel the disclosure. Further, I agree that the broad concerns of *Buckley* apply to the required disclosure of recipients of campaign expenditures. But, as I view the record presented here, the SWP has failed to carry its burden of showing that there is a reasonable probability that disclosure of recipients of expenditures will subject the recipients themselves or the SWP to threats, harassment, or reprisals. Moreover, the strong public interest in fair and honest elections outweighs any damage done to the associational rights of the party and its members by application of the state's expenditure-disclosure law.¹

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pp 1, 4, 6, 7

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

From: Justice O'Connor

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-776

TED W. BROWN, ET AL., APPELLANTS *v.* SOCIALIST
WORKERS '74 CAMPAIGN COMMITTEE (OHIO) ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
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[November —, 1982]

JUSTICE O'CONNOR, with whom JUSTICE REHNQUIST and
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I concur in the judgment that the Socialist Workers Party
("SWP") has sufficiently demonstrated a reasonable probabili-
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the state's expenditure-disclosure law.

I

Buckley upheld the validity of the Federal Elections Cam-
paign Act of 1971, which requires the disclosure of names of
both contributors to a campaign and recipients of expendi-

1 n 1 eliminated 2 parts
incorporated in n. 7.

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stylistic changes on
pp. 7, 8, 9

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

From: Justice O'Connor

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4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-776

TED W. BROWN, ET AL., APPELLANTS *v.* SOCIALIST
WORKERS '74 CAMPAIGN COMMITTEE (OHIO) ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF OHIO

[December —, 1982]

JUSTICE O'CONNOR, with whom JUSTICE REHNQUIST and
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record presented here, the SWP has failed to carry its bur-
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cipients themselves or the SWP to threats, harassment, or
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11.7.9

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

From: **Justice O'Connor**

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5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-776

TED W. BROWN, ET AL., APPELLANTS *v.* SOCIALIST
WORKERS '74 CAMPAIGN COMMITTEE (OHIO) ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF OHIO

[December —, 1982]

JUSTICE O'CONNOR, with whom JUSTICE REHNQUIST and
JUSTICE STEVENS join, concurring in part and dissenting in
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To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

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6th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-776

TED W. BROWN, ET AL., APPELLANTS *v.* SOCIALIST
WORKERS '74 CAMPAIGN COMMITTEE (OHIO) ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF OHIO

[December —, 1982]

JUSTICE O'CONNOR, with whom JUSTICE REHNQUIST and
JUSTICE STEVENS join, concurring in part and dissenting in
part.

I concur in the judgment that the Socialist Workers Party
("SWP") has sufficiently demonstrated a reasonable probabili-
ty that disclosure of contributors will subject those persons
to threats, harassment, or reprisals, and thus under *Buckley*
v. Valeo, 424 U. S. 1 (1976), the state of Ohio cannot constitu-
tionally compel the disclosure. Further, I agree that the
broad concerns of *Buckley* apply to the required disclosure of
recipients of campaign expenditures. But, as I view the
record presented here, the SWP has failed to carry its bur-
den of showing that there is a reasonable probability that
disclosure of recipients of expenditures will subject the re-
cipients themselves or the SWP to threats, harassment, or
reprisals. Moreover, the strong public interest in fair and
honest elections outweighs any damage done to the associa-
tional rights of the party and its members by application of
the state's expenditure-disclosure law.

I

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