# The Burger Court Opinion Writing Database

## *Fisher v. Berkeley*

475 U.S. 260 (1986)

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

December 20, 1985

RE: No. 84-1538 - Fisher v. City of Berkeley

Dear Thurgood,

I have reviewed your opinion in this case and regret that I cannot join at this time. Though I agree that the decision should be affirmed, in my view this conclusion should be reached by holding that municipalities cannot be subject to § 1 of the Sherman Act unless they are actually participating in the marketplace.

I understand that John may have some further thoughts on this case. I will wait and see what he has to say.

Regards,

Justice Marshall

Copies to the Conference

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

January 7, 1986

Re: No. 84-1538 - Fisher v. City of Berkeley

Dear Thurgood:

I join your second draft, January 2nd.

Regards,

WEB

Justice Marshall

Copies to the Conference

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

From: **Justice Brennan**

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1st DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 84-1538

ALEXANDRA FISHER, ET AL., APPELLANTS *v.* CITY OF BERKELEY, CALIFORNIA, ET AL.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

[February ——, 1986]

JUSTICE BRENNAN, dissenting.

Since *Parker* v. *Brown*, 317 U. S. 341 (1943), the Court has wrestled with the question of the degree to which federal antitrust laws prohibit state and local governments from imposing anticompetitive restraints on trade. Laws which impose such restraints have been held to be exempt from antitrust scrutiny if they constitute action of the state itself in its sovereign capacity, or state-authorized municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy. See *Community Communications Co.* v. *City of Boulder*, 455 U. S. 40, 52 (1982). Today, the Court holds that a municipality's price-fixing scheme is not preempted by the federal antitrust laws whether or not the scheme is state-authorized, or furthers or implements a clearly articulated and affirmatively expressed state policy. Because today's decision discards over forty years of carefully considered precedent, I respectfully dissent.

## I

### A

Berkeley's Rent Stabilization Ordinance effectively fixes prices for rental units in the City of Berkeley. In *Rice* v. *Norman Williams Co.*, 458 U. S. 654, 661 (1982), we held that a state statute:

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

From: **Justice Brennan**

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STYLISTIC CHANGES THROUGHOUT.



2nd DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 84-1538

ALEXANDRA FISHER, ET AL., APPELLANTS *v.* CITY OF BERKELEY, CALIFORNIA, ET AL.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

[February ——, 1986]

JUSTICE BRENNAN, dissenting.

Since *Parker* v. *Brown*, 317 U. S. 341 (1943), the Court has wrestled with the question of the degree to which federal antitrust laws prohibit state and local governments from imposing anticompetitive restraints on trade. Laws which impose such restraints have been held to be exempt from antitrust scrutiny if they constitute action of the State itself in its sovereign capacity, or state-authorized municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy. See *Community Communications Co.* v. *Boulder*, 455 U. S. 40, 52 (1982). Today, the Court holds that a municipality's price-fixing scheme is not pre-empted by the federal antitrust laws whether or not the scheme is state-authorized, or furthers or implements a clearly articulated and affirmatively expressed state policy. Because today's decision discards over 40 years of carefully considered precedent, I respectfully dissent.

## I

### A

Berkeley's Rent Stabilization Ordinance (hereafter Ordinance) effectively fixes prices for rental units in the city of Berkeley. In *Rice* v. *Norman Williams Co.*, 458 U. S. 654, 661 (1982), we held that a state statute:

> "may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily consti-

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 19, 1985

84-1538 - Fisher v. City of Berkeley, CA

Dear Thurgood,

Please join me.

Sincerely yours,

Justice Marshall

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 30, 1985

84-1538 - Fisher v. City of Berkeley

Dear Thurgood,

Narrowing your draft opinion is all right with me.

Sincerely yours,

Justice Marshall

Copies to Justice Rehnquist
Justice O'Connor

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 3, 1986

84-1538 - Fisher v. City of Berkeley, CA

Dear Thurgood,

I am still with you.

Sincerely yours,

Justice Marshall

Copies to the Conference

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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1st DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 84-1538

ALEXANDRA FISHER, ET AL., APPELLANTS *v.* CITY OF BERKELEY, CALIFORNIA, ET AL.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

[December ——, 1985]

JUSTICE MARSHALL delivered the opinion of the Court.

The question presented here is whether a rent control ordinance enacted by a municipality pursuant to popular initiative is unconstitutional because pre-empted by the Sherman Act.

I

In June 1980, the electorate of the City of Berkeley, California, enacted an initiative entitled "Rent Stabilization and Eviction for Good Cause Ordinance." Section 3 of the Ordinance stated the measure's purpose:[1]

> "The purposes of this Ordinance are to regulate residential rent increases in the City of Berkeley and to protect tenants from unwarranted rent increases and arbitrary, discriminatory, or retaliatory evictions, in order to help maintain the diversity of the Berkeley community and to ensure compliance with legal obligations relating to the rental of housing. This legislation is designed to address the City of Berkeley's housing crisis, preserve the public peace, health and safety, and ad-

[1] In 1982, while this case was pending in the California Court of Appeal, the Berkeley electorate enacted the "Tenants' Rights Amendments Act of 1982," revising certain sections of the 1980 Ordinance. Like the California Supreme Court, we review the Ordinance as amended, see —— Cal. 3d ——, ——, n. 2 (1984); all reference herein will therefore be to the 1982 version of the Ordinance.

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 23, 1985

Re: No. 84-1538-Fisher v. City of Berkeley

Dear Byron, Sandra and Bill:

To cut down on the number of opinions in what seems to be a rather easy case, I am leaning toward changing my draft along the narrower lines suggested by John in his letter of December 20. Although I would prefer to leave out any reliance on the fact that Berkeley is not a market participant, the opinion's unilateral action analysis might easily be confined to cases where a local government is acting in a purely regulatory capacity. No mention of the Colgate line of cases is needed.

Would such a narrowing of the analysis cause you to reconsider your joins?

Sincerely,

T.M.
T.M.

Justice White
Justice O'Connor
Justice Rehnquist

STYLISTIC CHANGES THROUGHOUT

3, 4, 6, 7, 9-10

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. 84–1538

ALEXANDRA FISHER, ET AL., APPELLANTS *v.* CITY OF BERKELEY, CALIFORNIA, ET AL.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

[December ——, 1985]

JUSTICE MARSHALL delivered the opinion of the Court.

The question presented here is whether a rent control ordinance enacted by a municipality pursuant to popular initiative is unconstitutional because pre-empted by the Sherman Act.

I

In June 1980, the electorate of the City of Berkeley, California, enacted an initiative entitled "Ordinance 5261-N. S., Rent Stabilization and Eviction for Good Cause Ordinance," (Hereafter Ordinance). Section 3 of the Ordinance stated the measure's purpose:[1]

> "The purposes of this Ordinance are to regulate residential rent increases in the City of Berkeley and to protect tenants from unwarranted rent increases and arbitrary, discriminatory, or retaliatory evictions, in order to help maintain the diversity of the Berkeley community and to ensure compliance with legal obligations relating to the rental of housing. This legislation is designed to address the City of Berkeley's housing crisis,

[1] In 1982, while this case was pending in the California Court of Appeal, the Berkeley electorate enacted the "Tenants' Rights Amendments Act of 1982," revising certain sections of the 1980 Ordinance. Like the California Supreme Court, we review the Ordinance as amended, see 371 Cal. 3d 644, 654, n. 2, 693 P. 2d 261, 270, n. 2 (1984); all reference herein will therefore be to the 1982 version of the Ordinance.

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

STYLISTIC CHANGES THROUGHOUT

From: **Justice Marshall**

Circulated: _____

Recirculated: FEB 13 1986

3rd DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 84-1538

ALEXANDRA FISHER, ET AL., APPELLANTS *v.* CITY OF BERKELEY, CALIFORNIA, ET AL.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

[February ——, 1986]

JUSTICE MARSHALL delivered the opinion of the Court.

The question presented here is whether a rent control ordinance enacted by a municipality pursuant to popular initiative is unconstitutional because pre-empted by the Sherman Act.

I

In June 1980, the electorate of the City of Berkeley, California, enacted an initiative entitled "Ordinance 5261-N. S., Rent Stabilization and Eviction for Good Cause Ordinance," (Hereafter Ordinance). Section 3 of the Ordinance stated the measure's purpose:[1]

> "The purposes of this Ordinance are to regulate residential rent increases in the City of Berkeley and to protect tenants from unwarranted rent increases and arbitrary, discriminatory, or retaliatory evictions, in order to help maintain the diversity of the Berkeley community and to ensure compliance with legal obligations relating to the rental of housing. This legislation is designed to address the City of Berkeley's housing crisis,

[1] In 1982, while this case was pending in the California Court of Appeal, the Berkeley electorate enacted the "Tenants' Rights Amendments Act of 1982," revising certain sections of the 1980 Ordinance. Like the California Supreme Court, we review the Ordinance as amended, see 37 Cal. 3d 644, 654, n. 2, 693 P. 2d 261, 270, n. 2 (1984); all reference herein will therefore be to the 1982 version of the Ordinance.

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 3, 1986

Re: No. 84-1538, Fisher v. City of Berkeley

Dear Thurgood:

I join your second draft circulated January 2.

Sincerely,

HAB.

Justice Marshall

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 18, 1985

84-1538 Fisher v. City of Berkeley

Dear Thurgood:

I have now had an opportunity to read your opinion circulated on December 12. It is very well written and persuasive. But, given my view as to the extent to which the Sherman Act may preempt actions of municipal governments, I presently think I will be unable to join you.

As I read your opinion, it holds that no government-compelled action (as opposed to private actions that a municipal government authorizes) can be preempted by Section 1 of the Sherman Act, unless the action resulted from bribery or fraud of some sort. The implication of this holding could be broad indeed. Berkeley apparently will be free to fix minimum as well as maximum prices of goods sold in the city, and it may also be free to forbid entry by new businesses into the city's markets. Because Berkeley, unlike private businesses that seek monopoly power, has the power to compel obedience to its wishes, it can in effect outlaw competitive behavior that the Sherman Act seeks to promote.

I do not think our cases support such a narrow view of antitrust preemption, and I am concerned as to where your reasoning will leave our prior Sherman Act decisions involving municipalities. When we have sought to shield municipalities from antitrust liability, the means adopted has been the doctrine of Parker v. Brown, not a narrowing of preemption principles.

This case does not require a broader holding. As I recall, there were others at Conference who shared the view that Berkeley's ordinance is exempted from the antitrust laws under the reasoning of Town of Hallie v. City of Eau Claire. The California Legislature expressly ratified Berkeley's earlier rent control charter provision, and subsequent legislation did not alter the scope of cities' authority in this area. In my view, these facts satisfy the "clearly articulated state policy" requirement of Town of Hallie. The preemption issue need not be decided.

For the foregoing reasons, I now expect I will join in the judgment but write separately.

Sincerely,

Lewis

Justice Marshall

lfp/ss

cc: The Conference

01/31

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

From: **Justice Powell**

Circulated: FEB 6 1986

Recirculated: _____

1st DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 84-1538

ALEXANDRA FISHER, ET AL., APPELLANTS *v.* CITY OF BERKELEY, CALIFORNIA, ET AL.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

[January ——, 1986]

JUSTICE POWELL, concurring in the judgment.

The Court today reaches out to decide a difficult preemption question when a straightforward and well-settled ground for decision is available. In my view, Berkeley's ordinance plainly falls within the "state action" exemption of *Parker* v. *Brown*, 317 U. S. 341 (1943), and its progeny. I therefore concur in the judgment, but on grounds different from those discussed in the Court's opinion.

When a municipal government engages in anticompetitive activity pursuant to a clearly articulated state policy to displace competition with regulation, the "state action" exemption removes the conduct from the coverage of the antitrust laws. *Town of Hallie* v. *City of Eau Claire*, 471 U. S. ——, —— (1985); *Community Communications Co.* v. *City of Boulder*, 455 U. S. 40, 54 (1982). In *Town of Hallie*, we found such a policy embodied in a state statute that "delegated to [municipalities] the express authority to take action that foreseeably will result in anticompetitive effects." *Id.*, at ——. See also *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389, 415 (1978) (opinion of BRENNAN, J.) ("an adequate state mandate for anticompetitive activities . . . exists when it is found 'from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of'") (citation omitted). Thus, the question in this case is whether California has expressly delegated to Berkeley regulatory

2nd DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 84-1538

ALEXANDRA FISHER, ET AL., APPELLANTS *v.* CITY OF BERKELEY, CALIFORNIA, ET AL.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

[February 26, 1986]

JUSTICE POWELL, concurring in the judgment.

The Court today reaches out to decide a difficult pre-emption question when a straightforward and well-settled ground for decision is available. In my view, Berkeley's ordinance plainly falls within the "state action" exemption of *Parker* v. *Brown*, 317 U. S. 341 (1943), and its progeny. I therefore concur in the judgment, but on grounds different from those discussed in the Court's opinion.

When a municipal government engages in anticompetitive activity pursuant to a clearly articulated state policy to displace competition with regulation, the "state action" exemption removes the conduct from the coverage of the antitrust laws. *Town of Hallie* v. *City of Eau Claire*, 471 U. S. ——, —— (1985); *Community Communications Co.* v. *City of Boulder*, 455 U. S. 40, 54 (1982). In *Town of Hallie*, we found such a policy embodied in a state statute that "delegated to [municipalities] the express authority to take action that foreseeably will result in anticompetitive effects." *Id.*, at ——. See also *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389, 415 (1978) (opinion of BRENNAN, J.) ("an adequate state mandate for anticompetitive activities . . . exists when it is found 'from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of'") (citation omitted). Thus, the question in this case is whether California has expressly delegated to Berkeley regulatory

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

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

December 16, 1985

Re: 84-1538 - Fisher v. City of Berkeley, California

Dear Thurgood:

Please join me.

Sincerely,

Justice Marshall

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 23, 1985

Re: No. 84-1538 Fisher v. City of Berkeley

Dear Thurgood,

I have been in the same boat in other cases as you now are in this. If your present draft hasn't succeeded in gaining a majority, you probably have to do some sort of narrowing of the sort you describe in your letter of December 23rd. I will not withdraw my "join" for this reason -- though of course I reserve the right to appraise anew whatever revisions you come up with, and to object to any insidious footnotes that you may drop.

Sincerely,

WHR

Justice Marshall

cc: Justice White
Justice O'Connor

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 8, 1986

Re: No. 84-1538 Fisher v. City of Berkeley

Dear Thurgood,

I am still with you on your second draft.

Sincerely,

Justice Marshall

cc: The Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

December 20, 1985

Re: 84-1538 - Fisher v. City of Berkeley

Dear Thurgood:

While I agree with your conclusion that no concert of action or conspiracy has been alleged, I am concerned that your draft opinion makes the case seem harder than it is. It is not necessary, in my opinion, to place any reliance on the vertical price-fixing cases, such as Monsanto, or to assume that a private firm with economic power could impose its will on an entire market without violating Section 1. I therefore plan to write separately, unless you would be willing to consider some fairly substantial revisions in your present draft.

I am sorry that I did not communicate my concern to you more promptly.

Respectfully,

John Paul Stevens / sjm

Justice Marshall

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

December 20, 1985

Re: 84-1538 - Fisher v. City of Berkeley

Dear Thurgood:

In my letter to you earlier today I suggested that some changes in the circulating draft would be needed for me to be able to join. To identify my concerns more clearly, I would like to make a number of specific suggestions for your consideration.

To reiterate, although I agree with much you have written, I think your reliance on Monsanto as a predicate for the conclusion that no conspiracy has been alleged makes the case seem a good deal harder than it is. I also think you have included some footnote material that is unnecessary and may cause us some problems in other cases. Here are my proposals:

(1) Revise the first sentence on page 4 to read as follows: "While that court was correct in noting that consideration of state action is not necessary unless an actual conflict with the antitrust laws is established, we find ..."

(2) Omit footnote 2 on page 4.

(3) On page 6 revise the last sentence of the full paragraph and add another sentence reading something like this: "What distinguishes the operation of Berkeley's Ordinance from the activities of a benevolent landlords' cartel is not that the Ordinance will necessarily have a different economic effect, but that the rent ceilings imposed by the Ordinance and maintained by the Stabilization Board have been unilaterally imposed upon landlords by a public agency and will be enforced with civil and

criminal sanctions. That agency has not authorized or required any private regulation of the rental market."

(4) Delete the first sentence in the next paragraph on page 6. (In my opinion it is not the distinction between unilateral and concerted action that is critical, but rather the fact that restraint is not the product of any private agreement of any kind.)

(5) On page 7 delete everything after the quotation from appellants' reply brief as well as the first paragraph on page 8 and substitute something like the following: "In so arguing, appellants misconstrue the concerted action requirement of Section 1. A restraint imposed by government does not become concerted action within the meaning of the statute simply because it has a coercive effect upon parties who must obey the law. There must be an agreement between two or more market participants which retrains competition in the relevant competitive market. The ordinary relationship between the government and those who must obey its regulatory commands whether they wish to or not is not enough to establish a conspiracy. Similarly, the mere fact that all competing property owners must comply with the same provisions of the ordinance is not enough to establish a conspiracy among landlords."

(6) On page 8, delete footnote 3 as well as the first paragraph on the page and revise the first sentence of the next paragraph to read something like this: "This case presents an ordinary example of a government regulatory scheme." On page 11 delete the third sentence, as well as footnote 4.

(7) On pages 11 and 12, instead of Part III, I would be inclined simply to include a footnote recognizing that appellants have weakly suggested that Berkeley's rent control constitutes attempted monopolization and to point out that this suggestion is completely without merit because there is no allegation that Berkeley is a significant participant

in the rental market, or that there is even the remotest possibility that it may achieve monopoly power, let alone establish the "dangerous probability of success" that is required before violating the attempt provision of § 2.

(8) Omit the sentence at the bottom of page 12 and top of page 13.

I hope you will forgive me for erring on the side of making too many comments, but I think most of them stem from my thought that it really is not necessary to rely on the tenuous distinction between the kind of vertical price-fixing that was involved in Parke, Davis and the holding of the Colgate case in order to conclude that the exercise of legitimate government regulatory power is quite different from the private regulation of an economic market.

Respectfully,

John Paul Stevens / lpm

Justice Marshall

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 3, 1986

Re: 84-1538 - Fisher v. City of Berkeley

Dear Thurgood:

Please join me.

Respectfully,

Justice Marshall

Copies to the Conference

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

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

December 18, 1985

No. 84-1538 Fisher v. City of Berkeley, Calif.

Dear Thurgood,

Please join me.

Sincerely,

Sandra

Justice Marshall

Copies to the Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

December 30, 1985

No. 84-1538 Fisher v. City of Berkeley

Dear Thurgood,

I have no objection to narrowing your opinion along the lines suggested by John.

Sincerely,

Sandra

Justice Marshall

cc: Justice White
Justice Rehnquist