

# The Burger Court Opinion Writing Database

## *Friedman v. Rogers*

440 U.S. 1 (1979)

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 11, 1978

Memorandum to the Conference

Re: 77-1163) Friedman v. Rogers  
77-1164) Rogers v. Friedman  
77-1186) Texas Opt. Assn. v. Rogers

✓  
Reverse  
affirm  
Reverse

I voted to affirm on 77-1164, reverse  
on 77-1186. I now vote to reverse on 77-1163.

Regards,

WRB

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

CHAMBERS OF  
THE CHIEF JUSTICE

February 14, 1979

Re: (77-1163 - Friedman, et al. v. Rogers, et al.  
(77-1164 - Rogers, et al. v. Friedman, et al.  
(77-1186 - Texas Optometric Assoc. v. Rogers, et al.

Dear Lewis:

I join.

Regards,



Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

January 2, 1979

RE: Nos. 77-1163, 1164 and 1186 Friedman, et al. v.  
N. Jay Rogers, et al.

Dear Lewis:

I agree.

Sincerely,



Mr. Justice Powell

cc: The Conference

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

CHAMBERS OF  
JUSTICE POTTER STEWART

January 2, 1979

Re: Nos. 77-1163, 77-1164, and 77-1186,  
Friedman v. Rogers

Dear Lewis,

I am glad to join your opinion for the  
Court.

Sincerely yours,

Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

December 27, 1978

Re: 77-1163) Friedman v. Rogers  
77-1164) Rogers v. Friedman  
77-1186) Texas Optometric Ass'n,  
Inc. v. Rogers

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Dear Lewis:

Please join me.

Sincerely,



Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

January 17, 1979

Re: Nos. 77-1163, 77-1164, and 77-1186  
Friedman v. Rogers

Dear Harry:

Please join me.

Sincerely,

*T.M.*  
T.M.

Mr. Justice Blackmun

cc: The Conference

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To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: 12 JAN 1979

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 77-1163, 77-1164, AND 77-1186

E. Richard Friedman et al.,  
77-1163 v.

N. Jay Rogers et al.

N. Jay Rogers et al., Appellants,  
77-1164 v.

E. Richard Friedman et al.

Texas Optometric Association,  
Inc., Appellant,  
77-1186 v.

N. Jay Rogers et al.

On Appeals from the  
United States District  
Court for the Eastern  
District of Texas.

[January —, 1979]

MR. JUSTICE BLACKMUN, concurring in part and dissenting in part.

I join Part III of the Court's opinion and its judgment of affirmance with respect to No. 77-1164 (the § 2.02, or Texas Optometry Board composition, issue). I dissent, however, from Part II of the Court's opinion and from its judgment of reversal with respect to Nos. 77-1163 and 77-1186 (the § 5.13 (d), or trade name, issue).

I do not agree with the Court's holding that the Texas Optometry Act's § 5.13 (d), which bans the use of a trade name "in connection with" the practice of optometry in the State, is constitutional. In my view, the Court's restricted analysis of the nature of a trade name overestimates the potential for deception, and underestimates the harmful impact of the broad sweep of § 5.13 (d). The Court also ignores the fact that in Texas the practice of "commercial" optometry is legal. It has never been outlawed or made illegal. This inescapable conclusion is one of profound importance in the



pp. 3, 5, 8

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Blackmun

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3rd DRAFT

## SUPREME COURT OF THE UNITED STATES

Nos. 77-1163, 77-1164, AND 77-1186

E. Richard Friedman et al.,  
77-1163 v.

N. Jay Rogers et al.

N. Jay Rogers et al., Appellants, On Appeals from the  
77-1164 v. United States District

E. Richard Friedman et al. Court for the Eastern  
District of Texas.

Texas Optometric Association,  
Inc., Appellant,  
77-1186 v.

N. Jay Rogers et al.

[January —, 1979]

with whom Mr. Justice  
Marshall joins,

MR. JUSTICE BLACKMUN, concurring in part and dissenting  
in part.

I join Part III of the Court's opinion and its judgment of affirmance with respect to No. 77-1164 (the § 2.02, or Texas Optometry Board composition, issue). I dissent, however, from Part II of the Court's opinion and from its judgment of reversal with respect to Nos. 77-1163 and 77-1186 (the § 5.13 (d), or trade name, issue).

I do not agree with the Court's holding that the Texas Optometry Act's § 5.13 (d), which bans the use of a trade name "in connection with" the practice of optometry in the State, is constitutional. In my view, the Court's restricted analysis of the nature of a trade name overestimates the potential for deception, and underestimates the harmful impact of the broad sweep of § 5.13 (d). The Court also ignores the fact that in Texas the practice of "non-traditional" optometry is legal. It has never been outlawed or made illegal. This inescapable conclusion is one of profound importance in the

To: The Chief Justice-  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Powell

1st DRAFT

Circulated: 26 DEC 1978

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**SUPREME COURT OF THE UNITED STATES**

Nos. 77-1163, 77-1164, AND 77-1186

E. Richard Friedman et al.,  
77-1163 v.

N. Jay Rogers et al.

N. Jay Rogers et al., Appellants,  
77-1164 v.

E. Richard Friedman et al.

Texas Optometric Association,  
Inc., Appellant,  
77-1186 v.

N. Jay Rogers et al.

On Appeals from the  
United States District  
Court for the Eastern  
District of Texas.

[January —, 1979]

MR. JUSTICE POWELL delivered the opinion of the Court.

Texas law prohibits the practice of optometry under a trade name. It also requires that four of the six members of the State's regulatory board, the Texas Optometry Board, be members of the Texas Optometric Association, a professional organization of optometrists. A three-judge District Court sustained the constitutionality of the statute governing the composition of the Texas Optometry Board against a challenge based on the First and Fourteenth Amendments. But it held that the prohibition of the practice of optometry under a trade name ran afoul of First Amendment protection of commercial speech. 438 F. Supp. 428 (ED Tex. 1977). These appeals and cross-appeal bring both of the District Court's holdings before the Court.<sup>1</sup>

<sup>1</sup>The District Court also sustained a constitutional challenge to the statute prohibiting price advertising by optometrists, but upheld the

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Powell

2nd DRAFT

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**SUPREME COURT OF THE UNITED STATES**

Nos. 77-1163, 77-1164, AND 77-1186

E. Richard Friedman et al.,  
77-1163 v.

N. Jay Rogers et al.

N. Jay Rogers et al., Appellants,  
77-1164 v.

E. Richard Friedman et al.

Texas Optometric Association,  
Inc., Appellant,

77-1186 v.

N. Jay Rogers et al.

On Appeals from the  
United States District  
Court for the Eastern  
District of Texas.

[January —, 1979]

MR. JUSTICE POWELL delivered the opinion of the Court.

Texas law prohibits the practice of optometry under a trade name. It also requires that four of the six members of the State's regulatory board, the Texas Optometry Board, be members of the Texas Optometric Association, a professional organization of optometrists. A three-judge District Court sustained the constitutionality of the statute governing the composition of the Texas Optometry Board against a challenge based on the First and Fourteenth Amendments. But it held that the prohibition of the practice of optometry under a trade name ran afoul of First Amendment protection of commercial speech. 438 F. Supp. 428 (ED Tex. 1977). These appeals and cross-appeals bring both of the District Court's holdings before the Court.<sup>1</sup>

<sup>1</sup>The District Court also sustained a constitutional challenge to the statute prohibiting price advertising by optometrists, but upheld the

✓  
— changes at  
pp. 4, 10, 13, 14

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall ✓  
Mr. Justice Blackmun  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Powell

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3rd DRAFT

## SUPREME COURT OF THE UNITED STATES

Nos. 77-1163, 77-1164, AND 77-1186

E. Richard Friedman et al.,  
77-1163                   v.  
N. Jay Rogers et al.  
  
N. Jay Rogers et al., Appellants,  
77-1164                   v.  
E. Richard Friedman et al.  
  
Texas Optometric Association,  
Inc., Appellant.  
77-1186                   v.  
N. Jay Rogers et al.

On Appeals from the  
United States District  
Court for the Eastern  
District of Texas.

[January —, 1979]

MR. JUSTICE POWELL delivered the opinion of the Court.

Texas law prohibits the practice of optometry under a trade name. It also requires that four of the six members of the State's regulatory board, the Texas Optometry Board, be members of the Texas Optometric Association, a professional organization of optometrists. A three-judge District Court sustained the constitutionality of the statute governing the composition of the Texas Optometry Board against a challenge based on the First and Fourteenth Amendments. But it held that the prohibition of the practice of optometry under a trade name ran afoul of First Amendment protection of commercial speech. 438 F. Supp. 428 (ED Tex. 1977). These appeals and cross-appeal bring both of the District Court's holdings before the Court.

The District Court also sustained a constitutional challenge to the statute prohibiting price advertising by optometrists, but upheld the

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
~~Mr. Justice Marshall~~  
Mr. Justice Blackmun  
Mr. Justice Rehnquist  
Mr. Justice Stevens

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The District Court also sustained a constitutional challenge to the statute prohibiting price advertising by optometrists, but upheld the

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

March 1, 1979

Case held for No. 77-1163, Friedman v. Rogers

MEMORANDUM TO THE CONFERENCE

The case held is an appeal in No. 78-683, Century 21 Real Estate Corp. v. Nevada Real Estate Advisory Comm'n. The only important issue raised by the appellant is whether a regulation promulgated by the appellee contravenes the First Amendment. The regulation requires franchised real estate brokers to display their names as prominently as those of their franchisors in all advertisements.

Unlike the Texas statute at issue in Friedman v. Rogers, which prohibits the use of tradenames by optometrists, the challenged regulation in the present case does not ban the use of the franchisor's name. It requires only that the franchisee's name appear along with that of the franchisor in any advertising. In upholding the Texas statute in Friedman v. Rogers, the Court approved a more restrictive regulation of commercial speech than the rule at issue here.

The Court's decisions regarding the First Amendment protection afforded to commercial speech have never suggested that a State may not require disclosure of information additional to that which the speaker might otherwise disclose in connection with a commercial transaction. In fact, in passing in Ohralik v. Ohio State Bar Assn, 436 U.S. 447, 456 (1978), the Court noted that communications "such as the exchange of information about securities" "are regulated without offending the First Amendment." The rule challenged in this case requires only that the names of the franchisor and the franchisee be disclosed with equal prominence.

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

January 2, 1979

Re: Nos. 77-1163, 77-1164, and 77-1186 Friedman v. Rogers

Dear Lewis:

Please join me.

Sincerely,



Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS



December 28, 1978

RE: Nos. 77-1163, 1164, 1186 - Friedman v. Rogers

Dear Lewis:

The word "likely" in the last line of the text on page 13 troubles me. It may imply that we believe all trade name advertising is likely to be deceptive. Would you consider substituting "possible" or perhaps recasting the sentence? Apart from this fly speck, I think your opinion is excellent and I will be happy to join it.

Respectfully,

A handwritten signature, likely of John Paul Stevens, is written below the word "Respectfully,".

Mr. Justice Powell



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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

December 28, 1978

RE: Nos. 77-1163, 1164, 1186 - Friedman v. Rogers

Dear Lewis:

Please join me.

Respectfully,



Mr. Justice Powell

Copies to the Conference