

The Burger Court Opinion Writing Database

Bolger v. Youngs Drug Products Corp.

463 U.S. 60 (1983)

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



4

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

CHAMBERS OF
THE CHIEF JUSTICE

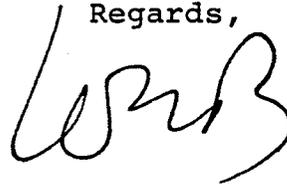
June 13, 1983

Re: No. 81-1590, Bolger v. Young Drug Products Corp.

Dear Thurgood:

I join.

Regards,



Justice Marshall

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

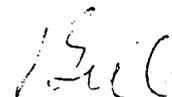
March 3, 1983

RE: No. 81-1590 Bolger v. Youngs Drug Products Corporation

Dear Chief:

My son just telephoned to tell me that his firm represents appellee Young Drug Products Corporation in a number of matters. He was not aware that the case was here until he saw a reference to it in Legal Times. In the circumstances, although I participated at the certiorari stage and at oral argument, I'll not participate in the decision.

Sincerely,



The Chief Justice

Copies to the Conference

①

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 3, 1983

Re: 81-1590 -
Bolger v. Youngs Drug Products Corp.

Dear Thurgood,

Please join me.

Sincerely,



Justice Marshall

Copies to the Conference

cpm

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

From: **Justice Marshall**

Circulated: **APR 29 1983**

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1590

**WILLIAM F. BOLGER, ET AL., APPELLANTS v.
YOUNG DRUG PRODUCTS CORP.** — 5

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

[May —, 1983]

JUSTICE MARSHALL delivered the opinion of the Court.

Title 39 U. S. C. § 3001(e)(2) prohibits the mailing of unsolicited advertisements for contraceptives. The District Court held that, as applied to appellee's mailings, the statute violates the First Amendment. We affirm.

I

Section 3001(e)(2) states that “[a]ny unsolicited advertisement of matter which is designed, adapted, or intended for preventing conception is nonmailable matter, shall not be carried or delivered by mail, and shall be disposed of as the Postal Service directs”¹ As interpreted by Postal Service regulations,² the statutory provision does not apply

¹Section 3001(e)(2) contains express limitations. In particular, an advertisement is not deemed unsolicited “if it is contained in a publication for which the addressee has paid or promised to pay a consideration or which he has otherwise indicated he desires to receive.” In addition, the provision does not apply to advertisements mailed to certain recipients such as a manufacturer of contraceptives, a licensed physician, or a pharmacist. See § 3001(e)(2)(A) and (B).

²Domestic Mail Manual § 123.434 (July 7, 1981). The Manual, which is issued pursuant to the Postal Service's power to adopt regulations, 39 U. S. C. § 401, is incorporated by reference into 39 CFR Part 111.

The Postal Service's interpretation of § 3001(e)(2) resulted from the decision in *Associated Students v. Attorney General*, 368 F. Supp. 11 (CD Cal.

P. 4

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. 81-1590

**WILLIAM F. BOLGER, ET AL., APPELLANTS v.
YOUNGS DRUG PRODUCTS CORP.**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

[June —, 1983]

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 22, 1983

Re: No. 81-1590 - Bolger v. Youngs Drug
Prod. Corp.

Dear Chief:

According to my record, this case is now
ready to come down.

Sincerely,



T.M.

The Chief Justice

cc: The Conference

2

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 4, 1983

Re: No. 81-1590 - Bolger v. Youngs Drug Products Corp.

Dear Thurgood:

Please join me.

Sincerely,

H. A. Blackmun

Justice Marshall

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 30, 1983

81-1590 Bolger v. Youngs Drug Products Corp.

Dear Thurgood:

As I am not at rest in this case, I will await
other writing.

Sincerely,

Lewis

Justice Marshall

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 6, 1983

81-1590 Bolger v. Young Drug Products Corp.

Dear Thurgood:

Subject to one change, I will be glad to join your opinion for the Court.

In the final paragraph of note 5 (p. 4) you properly note that respondent did not cross appeal from the restrictions imposed by the DC. You further say that the constitutional analysis in your opinion "does not depend" on these conditions. The final sentence in the paragraph implies that we do not approve of the restrictions. I would not go this far, as it seems to me they are properly within the DC's discretion. I do not think we can imply that he abused it.

Would it not be more appropriate simply to say that in the absence of a cross appeal we have no occasion to consider the appropriateness of these particular restrictions.

After all, we are dealing with "junk" advertising mail that is a nuisance in many households regardless of the subject matter. It is particularly appropriate to make clear - as the DC requires - that the recipient may have his name removed from the mailing list of any advertiser. The average person will not know the right exists.

Sincerely,



Justice Marshall

lfp/ss

cc: The Conference

3

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 7, 1983

81-1590 Bolger v. Youngs Drug Products

Dear Thugood:

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

May 2, 1983

Re: No. 81-1590 Bolger v. Youngs Drug Products Corp.

Dear Thurgood:

I think I will write separately in this case.

Sincerely,



Justice Marshall

cc: 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: MAY 28 1983

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1590

**WILLIAM F. BOLGER, ET AL., APPELLANTS v.
YOUNGS DRUG PRODUCTS CORP.**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA**

[June —, 1983]

JUSTICE REHNQUIST, concurring in the judgment.

I agree that the judgment should be affirmed, but my reasoning differs from that of the Court. The right to use the mails is undoubtedly protected by the First Amendment, *Blount v. Rizzi*, 400 U. S. 410 (1971). But because the home mailbox has features which distinguish it from a public hall or public park, where it may be assumed that all who are present wish to hear the views of the particular speaker then on the rostrum, it cannot be totally assimilated for purposes of analysis with these traditional public forums. Several people within a family or living group may have free access to a mailbox, including minor children; and obviously not every piece of mail received has been either expressly or impliedly solicited. It is the unsolicited mass mailings sent by respondents designed to promote the use of condoms that gives rise to this litigation.

Our earlier cases have developed an analytic framework for commercial speech cases.

“At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental inter-

NO

STYLISTIC CHANGES THROUGHOUT

B.1

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

From: **Justice Rehnquist**

Circulated: _____

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1590

**WILLIAM F. BOLGER, ET AL., APPELLANTS v.
YOUNGS DRUG PRODUCTS CORP.**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

[June —, 1983]

JUSTICE REHNQUIST, with whom JUSTICE O'CONNOR
joins, concurring in the judgment.

I agree that the judgment should be affirmed, but my reasoning differs from that of the Court. The right to use the mails is undoubtedly protected by the First Amendment, *Blount v. Rizzi*, 400 U. S. 410 (1971). But because the home mailbox has features which distinguish it from a public hall or public park, where it may be assumed that all who are present wish to hear the views of the particular speaker then on the rostrum, it cannot be totally assimilated for purposes of analysis with these traditional public forums. Several people within a family or living group may have free access to a mailbox, including minor children; and obviously not every piece of mail received has been either expressly or impliedly solicited. It is the unsolicited mass mailings sent by respondents designed to promote the use of condoms that gives rise to this litigation.

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 14, 1983

Re: 81-1590 - Bolger v. Youngs Drug Products

Dear Thurgood:

In a few days I will circulate an opinion concurring in the judgment.

Respectfully,



Justice Marshall

Copies to the Conference

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

From: **Justice Stevens**

Circulated: ~~DOM~~ 17 '83

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1590

WILLIAM F. BOLGER, ET AL., APPELLANTS *v.*
YOUNGS DRUG PRODUCTS CORP.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

[June —, 1983]

JUSTICE STEVENS, concurring in the judgment.

Two aspects of the Court's opinion merit further comment: (1) its conclusion that all of the communications at issue are properly classified as "commercial speech" (*ante*, at 8); and (2) its virtually complete rejection of offensiveness as a possibly legitimate justification for the suppression of speech (*ante*, at 12). My views are somewhat different from the Court's on both of these matters.

I

Even if it may not intend to do so, the Court's opinion creates the impression that "commercial speech" is a fairly definite category of communication that is protected by a fairly definite set of rules that differ from those protecting other categories of speech. That impression may not be wholly warranted.

I agree, of course, that the commercial aspects of a message may provide a justification for regulation that is not present when the communication has no commercial character. The interest in protecting consumers from commercial harm justifies a requirement that advertising be truthful; no such interest applies to fairy tales or soap operas. But advertisements may be complex mixtures of commercial and noncommercial elements: the noncommercial message does

pp. 3,5

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

From: Justice Stevens

Circulated: _____

Recirculated: JUN 20 1983

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1590

WILLIAM F. BOLGER, ET AL., APPELLANTS v.
YOUNGS DRUG PRODUCTS CORP.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

[June —, 1983]

JUSTICE STEVENS, concurring in the judgment.

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

From: Justice Stevens

Circulated: _____

Recirculated: JUN 21 '83

2 . 1-4

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-1590

WILLIAM F. BOLGER, ET AL., APPELLANTS *v.*
YOUNGS DRUG PRODUCTS CORP.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

[June —, 1983]

JUSTICE STEVENS, concurring in the judgment.

Two aspects of the Court's opinion merit further comment: (1) its conclusion that all of the communications at issue are properly classified as "commercial speech" (*ante*, at 8); and (2) its virtually complete rejection of offensiveness as a possibly legitimate justification for the suppression of speech (*ante*, at 12). My views are somewhat different from the Court's on both of these matters.

I

Even if it may not intend to do so, the Court's opinion creates the impression that "commercial speech" is a fairly definite category of communication that is protected by a fairly definite set of rules that differ from those protecting other categories of speech. That impression may not be wholly warranted. Moreover, as I have previously suggested, we must be wary of unnecessary insistence on rigid classifications, lest speech entitled to "constitutional protection be inadvertently suppressed." *Central Hudson Gas and Electric Co. v. Public Service Commission*, 447 U. S. 557, 579 (1980) (STEVENS, J., concurring).

I agree, of course, that the commercial aspects of a message may provide a justification for regulation that is not present when the communication has no commercial charac-

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 2, 1983

No. 81-1590 Bolger v. Youngs Drug Products Corp.

Dear Thurgood,

I will wait for the dissent in this case before
deciding whether to join your opinion.

Sincerely,



Justice Marshall

Copies to the Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 31, 1983

No. 81-1590 Bolger v. Youngs Drug Products
Corp.

Dear Bill,

Please join me in your opinion concurring
in the judgment.

Sincerely,



Justice Rehnquist

Copies to the Conference