ORIGINAL

In the

Supreme Court of the United States

E. RICHARD FRIEDMAN, O. D., ET AL.,
APPELLANTS,
V.
N. JAY ROGERS, O. D., ET AL.,
APPELLEES. No. 77-1163

N. JAY ROGER, O. D., ET AL.,
APPELLANTS,
V. No. 77-1164
E. RICHARD FRIEDMAN, O. D., ET AL.,
APPELLEES.

-----AND ----------

TEXAS OPTOMETRIC ASSOCIATION, INC., ET AL., No. 77-1186
APPELLANTS,
V.
N. JAY ROGERS, O. D., ET AL.,
APPELLEES.

Washington, D. C.
November 8, 1978

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IN THE SUPREME COURT OF THE UNITED STATES

E. RICHARD FRIEDMAN, O.D., et al., Appellants, v. N. JAY ROGERS, O.D., et al., Appellees.	No. 77-1163
N. JAY ROGERS, O.D., et al., Appellants, v. E. RICHARD FRIEDMAN, O.D., et al., Appellees.	No. 77-1164
and TEXAS OPTOMETRIC ASSOCIATION, INC., et al., Appellants, v. N. JAY ROGERS, O.D., et al., Appellees.	No. 77-1186

Washington, D. C.,

Wednesday, November 8, 1978.

The above-entitled matters came on for argument at 10:05 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

LARRY NIEMANN, ESQ., Niemann & Niemann, 1210 American Bank Tower, Austin, Texas 78701; on behalf of Texas Optometric Association, Inc.

MISS DOROTHY PRENGLER, ESQ., Assistant Attorney General of Texas, P. O. Box 12548, Capitol Station, Austin, Texas 78711; on behalf of Friedman, et al.

ROBERT Q. KEITH, ESQ., Mehaffy, Weber, Keith & Gonsoulin, 1400 San Jacinto Building, Beaumont, Texas 77701; on behalf of N. Jay Rogers, et al.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in 1163 and the consolidated cases, Friedman and others against Rogers and others.

Mr. Niemann, you may proceed whenever you're ready.

ORAL ARGUMENT OF LARRY NIEMANN, ESQ.,

ON BEHALF OF TEXAS OPTOMETRIC ASSN., INC.

MR. NIEMANN: Mr. Chief Justice, and may it please the Court:

This case involves the constitutionality of two provisions of the Texas Optometry Act, one dealing with the statutory requirements for Board membership, the other dealing with statutory prohibitions of the practice of optometry under an assumed name.

I, as attorney for the Texas Optometric Association, will be presenting the facts relevant to the Board membership statute, and arguing that that statute is constitutional. Miss Dorothy Prenqler, who is an Assistant Attorney General of the State, representing the Board, will be presenting the facts concerning the assumed name statute; and she will be arquing that that statute is also constitutional.

Now, if I may briefly present the procedural posture of this case. The first statute, as I mentioned, which is in issue is the Board membership statute. It requires that four of the six members of the Texas Optometry Board shall be

members of the Texas Optometric Association. The second statute is the assumed name statute. It provides that optometrists in Texas shall practice optometry under their own personal name and may not practice optometry under assumed names or trade names.

The lawsuit was originally filed by Dr. Rogers, who is one of these six members of the State Board. He challenged the Board membership statute as an arbitrary classification in violation of his equal protection rights, his due process rights and, most recently, his association rights.

He also challenged the assumed name statute as a violation of his rights of commercial free speech. The lower court, which was a three-judge court, held that the assumed name statute was unconstitutional and was in violation of commercial free speech, concluding that their decision was mandated by this Court's opinion in Bates.

QUESTION: What do the Texas statutes provide about group practice of medicine and the general practice of medicine? A similar prohibition?

MR. NIEMANN: Your Honor, the Texas statutes are silent regarding the group practice of medicine. I would point out that it's very important that there has been no history of abuse, and that is a distinction between the group practice of medicine and the assumed name practice of optometry; and I will expand on that later in my argument.

At the same time the Court held that the assumed name statute was unconstitutional, the Court upheld the Board membership statute; reasoning that it was an economic regulation law that the rational relationship test applied and that the State Legislature did have ample reason, ample justification for the statute, the Court listed three specific rationales for the statute, the bottom line of each being that there was a greater likelihood of law enforcement if four of the six members of the Optometry Board were from TOA.

Now for the facts which are specifically relevant to the Board membership statute.

QUESTION: I take it, Mr. Niemann, a commercial optometrist may not join the TOA, or may he?

MR. NIEMANN: That's correct, Your Honor.

The unique history of optometry in Texas is what the lower court pointed to as the justification for the Board membership statute. That history deals with commercial optometry, historical track record of hostility toward enforcement of the Texas Optometry law.

QUESTION: Counsel, Mr. Justice Blackmun, as I understood it, asked you kind of an either/or question and you said "That's correct". Can a commercial optometrist join the TOA or can he not?

MR. NIEMANN: He cannot.

It also deals not only with the track record of

non-law enforcement by the commercial optometrist, but also a track record, prior to the passage of the Act, for disception and consumer abuse.

Now, in understanding these facts, it is important for the Court to appreciate that in Texas there are two separate classifications of optometrists: professional optometrists and commercial optometrists. Traditionally --

QUESTION: In your view, could Texas prohibit commercial optometry altogether, constitutionally?

MR. NIEMANN: Yes, Your Honor, I think they could.

Traditionally, professional optometrists have been characterized by an economic independence from opticians. They have been characterized by their "practice by appointment" rather than a "wait in line" method. They have emphasized quality and longer and more thorough examinations of the patients, and a close doctor-patient relationship. But, most importantly, professional optometrists have been characterized by a long history of strong law enforcement of the Texas Optometry laws.

And, as I indicated earlier, professional optometrists, or, rather, the Texas Optometric Association is composed exclusively of professional optometrists.

QUESTION: Well, that's kind of circular, isn't it? They have been interested in enforcing the law because the law benefits them. And probably the law was enacted under their

support.

MR. NIEMANN: The law was enacted by the Legislature.

QUESTION: Yes.

MR. NIEMANN: We happen to agree with the Legislature, and we hold a philosophy of strongly enforcing the mandates of the Legislature, Your Honor.

QUESTION: Because it's to your benefit.

MR. NIEMANN: That's right. There's no doubt about that.

In contrast are the commercial optometrists. Now, the commercial optometrists have been characterized by high volume, high speed, assumed name practices. Traditionally they have been employed with or associated with the retail optician chain stores. They have been subject to highly restrictive employment contracts, economic tie-ins --

QUESTION: Is there a difference in prices charged by the two groups?

MR. NIEMANN: There is some dispute in the record over that, Your Honor. Dr. Rogers has witnesses to say there are lower prices. We have a former commercialist himself, the owner of a chain, that stated that the chain store operations, actually, under some circumstances, cause an increase in prices. And there is a California study, that I think is in the record, that discounts the long-standing argument that a commercial advertising assumed-name type practice actually

reduces prices.

As I was saying, the commercial optometrists are characterized historically by these economic tie-ins and control by opticians. Most importantly, commercial optometrists have been characterized in Texas by a repeated history of hostility toward the enforcement of the Texas Optometry laws on the books.

Now, in the record, the most blatant episode of optometry, commercial optometry's hostility toward law enforcement, is an incident which occurred in 1967, the year immediately preceding the Legislature's adoption of the Board membership statute. During that year, the commercial optometrists held a majority of the board. They immediately proceeded to repeal a rule called the "professional responsibility rule". Now, that rule contains some very important provisions. It prevented fee-splitting between optometrists and opticians. It prevented tie-ins and kickbacks. It minimized the economic control by opticians over optometrists. It required optometrists to use their own personal name, and prevented them from using assumed names or names at offices where they did not actually practice.

That professional responsibility rule was the cornerstone of the public's protection against deception and abuse in optometry. And it had been adopted as a rule by the Board to correct and cure some long-standing abuses by commercial

optometry.

Now, as soon as the commercialists on the Board attempted to repeal this rule, the Legislature reacted very strongly. The Legislature refused to confirm the appointment of the commercialists that had done the damage, the Legislature abolished the old Board, created a new Board, and mandated that four of the six members be from TOA.

And the Legislature went even further. They withdrew all rule-making authority from the Board. They incorporated the professional responsibility rule into the statute, and assigned the task of enforcing the statute to the Board.

In effect, what the Legislature did was to codify into statutory form very high standards of professional conduct, standards which coincided with those of TOA. And the Legislature did not want to put enforcement of these very high standards in the hands of the commercial optometrists who were the mortal enemies of those standards.

In other words, Your Honor, the Legislature didn't want to put the fox in charge of the hen house.

And that is the historical background of the Board membership statute. Miss Prengler will, as I've stated, present the facts relevant to the assumed name statute.

Now to the legal arguments regarding the Board membership statute.

I'd like to rebut in sequence each of the four separate

grounds of unconstitutionality presented by Dr. Rogers.

These are: arbitrary classifications; irrebutable presumption; procedural due process; and associational rights.

Turning first to the arbitrary classification argument, Dr. Rogers has argued that the Board membership statute is an arbitrary classification of optometrists which violates his equal protection rights.

QUESTION: Let me -- perhaps you told us this, but I want to get it clear in my mind. What's the total membership of the Board?

MR. NIEMANN: Six.

QUESTION: And their members serve for how long a term?

MR. NIEMANN: Four, I believe.

QUESTION: Staggered or --

MR. NIEMANN: Staggered.

QUESTION: And how do they become members?

MR. NIEMANN: By appointment of the Governor, Your Honor.

QUESTION: Appointment of the Governor. Total of six, and the law requires that at least four have to --

MR. NIEMANN: Well, let me add another step. There is a gubernatorial appointment which must be confirmed by the Senate, which meets every two years. And they serve until they are either confirmed or unconfirmed by the Senate.

QUESTION: Yes.

MR. NIEMANN: Now, regarding the arbitrary --

QUESTION: Mr. Niemann, on that point, supposing -- is there any provision in the statute for what happens if a member of TOA is appointed and confirmed and starts to serve and then resigns from the Association?

MR. NIEMANN: Under those circumstances, it would be a vacancy and the Governor --

QUESTION: No. Resigns from TOA, not from the Board.

MR. NIEMANN: Oh.

QUESTION: Is there an automatic vacancy or could he -- is the test his status at the time of appointment or must he continue a member throughout his term?

MR. NIEMANN: Your Honor, the question has never arisen. I would think the statutory construction of that law would require his continuing membership in TOA. But I don't know.

QUESTION: Well, do you mean by that that he would be removed? He would be removed if he resigned? He would forfeit the office?

MR. NIEMANN: Your Honor, I really don't know.

The statute requires that the Board consist of four members of TOA, and I would think conclusively that it would require their membership at the time of appointment; I would presume that it requires continuing membership, and resignation

or ouster from TOA would vacate his position.

Now, regarding arbitrary classification, Dr. Rogers argues that the statute is arbitrary because it has no rational basis. We disagree, and the lower court disagreed.

The lower court concluded conclusions very similar to the facts I have just recited. The court stated that the three rationales were that TOA members are more likely to be economically independent than non-TOA members; that TOA members have a greater likelihood of emphasizing the highest quality of eye care as compared to non-TOA members; and, thirdly, that TOA members are more prone to enforce the Texas Optometry Act than non-TOA members.

I believe it is a fair reading of the opinion that these were findings of fact.

It is our position that the bottom line of all of these three reasons is a greater likelihood of enforcement of the optometry laws.

We do submit, then, that there are rational bases, and therefore the arbitrary classification argument falls.

Dr. Rogers' next theory is that the Board membership statute violates substantive due process because of an irrebutable presumption. He argues that the legislative classification creates or triggers an irrebutable presumption that a non-TOA member is unfit to serve on the Board.

And the lower court we believe correctly rejected

this argument, noting that an irrebutable presumption does not exist in this case, since no commercial optometrist is conclusively denied membership on the Board. Commercial optometry is not prevented from sitting on the Board in those two spaces, as is evidenced by the fact that Dr. Rogers, himself a commercialist over 20 years, has been a continuing member of the Board during that period of time.

Additionally, we would submit that there is another reason why the irrebutable presumption analysis should not be used. We believe that the irrebutable presumption test appears to demand legislative perfection, yet nearly all legislative classifications on economic regulations contain some degree of imperfection and inaccuracy. Indeed, very few Acts of the Legislature could ever survive the bottom line requirement of the irrebutable presumption test, i.e., that the requirement that the legislative classification be an accurate yardstick to implement the legislative goals 100 percent of the time.

Dr. Rogers' next theory is that the Board membership statute violates procedural due process. The thrust of his claim here is that the present and the future TOA Board members will, as a matter of law, always be prejudiced against commercial optometrists in all case proceedings in all situations.

He argues that if the Board majority consists of

TOA members, the Board is unconstitutional per se, for all purposes,including examinations, license renewal and disciplinary actions.

We submit that if his argument were to be correct, the present Texas Board, consisting of four TOA members, would be unconstitutional even if there never had been a Board membership statute. In other words, the constitutionality of the Board would vary from year to year, depending on how many TOA members were appointed to the Board by the Governor. And we don't think that makes sense.

The lower court rejected this inherent bias analysis and noted that bias must be proven on a case by case basis. It cannot be legally presumed as a matter of law, as an inference from Association membership.

We submit that bias must be actually proved in the context of specific parties in specific hearings that are pending or which are about to commence. In other words, proof of bias in a hypothetical future adjudicatory hearing simply does not allow the legal presumption of bias in all conceivable future Board functions.

QUESTION: Mr. Niemann, isn't there perhaps some inconsistency between that argument and your rejection of the first argument your opponent makes, that your justification, the reasoning for having majority is that there is in substance a bias in favor of enforcement?

MR. NIEMANN: Apparently there -- it might be construed as an inconsistency, Your Honor, but it is not. The first argument is that the Legislature is justified in concluding that TOA members would be more likely to enforce the law.

The second argument here is that the judiciary cannot presume, as a matter of law, that there will be prejudice throughout the future.

One deals with the legislative right to declare a reasonable classification, one deals with the prohibition against the judicary assumption of prejudice in the future.

QUESTION: So that the Legislature can agree that a group of people are prejudiced, but the court can't?

MR. NIEMANN: In the future, Your Honor, that's correct.

QUESTION: Is it --

MR. NIEMANN: The Legislature can -- I'm sorry.

QUESTION: Well, is it the judiciary deciding they are prejudiced or the judiciary saying that "we accept the presumption the Legislature adopts to justify its statute", and given the presumption must the Legislature not out of -- I mean, must not the judiciary, out of deference to the Legislature, say, "Yes, we'll accept the proposition these people are biased."

MR. NIEMANN: Your Honor, bias toward law enforcement

is what the Legislature had in mind. The bias being complained about by Dr. Rogers is pecuniary bias, not bias regarding law enforcement. And those are two completely different animals.

I think the Legislature can presume that certain persons, certain categories or classifications of persons will be biased toward law enforcement and others may not. Particularly -- particularly, Your Honor, when there is a track record of strong hostility, strong bias against law enforcement, which has been exemplified by the track record of commercial optometry in Texas.

Dr. Rogers' final theory is that his First Amendment associational rights are infringed. I would comment that the issue was not raised below, and is being considered for the first time by this Court on appeal.

The thrust of Dr. Rogers' argument here is that he is being prcluded from being on the majority of the Board if he chooses not to associate with TOA. It's important to note here that Dr. Rogers is not arguing that commercial optometry is deprived of any representation on the Board, but only that as a commercial optometrist he is deprived of being on the voting majority of that Board.

QUESTION: It's not a matter of his choosing not to associate with TOA, he's ineligible, isn't he?

MR. NIEMANN: That's correct, Your Honor. It's another distinction which --

QUESTION: So it's not quite accurate to say that if he chooses not to associate with the TOA, he's ineligible to be on the majority, he's ineligible to belong to the TOA and therefore ineligible to be a member of the majority of the board; isn't that fair to say?

MR. NIEMANN: That's correct, Your Honor. That's correct.

We submit that Dr. Rogers' associational rights, if any, are incidental and insignificant here. Dr. Rogers' complaint is that he is being deprived of being on the voting majority of the Board, and it is our position that there is no constitutional provision which guarantees the right of anybody to be on the majority side of any vote, be it in a political election, a legislative vote or an Optometry Board vote.

QUESTION: Well, isn't there a rule -- excuse me, sir. Isn't there a general rule that you can't be excluded? As I understand it, there's no way for Dr. Rogers to win. Is that right or not? On the Board.

MR. NIEMANN: I'm not quite sure that I understand the question, Your Honor.

QUESTION: That when a vote is taken on the Board, there's no way for Dr. Rogers to win.

MR. NIEMANN: Your Honor, I might point out that --

QUESTION: Well, is that true or not?

MR. NIEMANN: If the vote deals with enforcing the law, and the four members of the -- the TOA members on the Board vote to enforce the law, and Dr. Rogers votes against enforcing the law, then there is no way he's going to win.

QUESTION: That was not my question. My question was, can you show any time that Dr. Rogers won the vote?

MR. NIEMANN: Oh, there have been many occasions, Your Honor, when Dr. Rogers has been on the majority. I might point out that the majority here is not a --

QUESTION: Well, I thought you said earlier that these people just couldn't get along at all.

MR. NIEMANN: They don't get along, but they still agree on some things, Your Honor, in the way of license or license renewal and enforcement of some of the laws, they have common interests. Dr. Rogers feels very strongly about enforcing some of the laws; but not all of the laws.

And so where they happen to agree on some of the laws, then they will be voting together at that --

QUESTION: Well, my point is, I don't see any difference between being a minority of two or one or being a minority of 89. If you're in the minority, you are, quote, "in the minority", end of quote, period.

MR. NIEMANN: Your Honor, I might ask --

QUESTION: Am I right?

MR. NIEMANN: Yes, You are. But I would point out

that there is no constitutional right that a minority always has the right to be in the majority. Consider for a moment a board of health consisting of various members from the different professions and businesses: a physician, an optometrist, a dentist, a hospital administrator or a nursing home administrator. None of these -- no one person on the board would have his special-interest viewpoint represented by the majority of the board. But the fact that they are in a minority, so to speak, from their special-interest viewpoint, does not make that board unconstitutional. If it were, we would need to consider the unconstitutionality of thousands of boards across the country.

QUESTION: My only point is that you say he has all the rights and everything, but he just gets outvoted.

MR. NIEMANN: He gets outvoted, Your Honor, because of his philosophy of non-enforcement and his opposition to the anti-commercial optometry provisions of the Act. These reasons --

QUESTION: Is there any other case like this that you know of?

MR. NIEMANN: No, Your Honor, this is a case --

QUESTION: Where you take a dogfight and put it in a statute?

QUESTION: No, there are no other federal cases, Your Honor. There is a host of other cases, State court cases, in

which Board memberships have been tied to associational qualifications. They have been invariably upheld by the States throughout the country.

QUESTION: But not federal.

MR. NIEMANN: But no federal cases, Your Honor. For those reasons.

QUESTION: Mr. Niemann, -- oh, excuse me.

QUESTION: Can Congress constitutionally require that the Chairman of the EEOC be a member of the NAACP?

MR. NIEMANN: No, Your Honor. I think there is a federal constitutional provision that impliedly prevents the delegation of congressional powers to an association.

I would point out, however, that there is no constitutional provision that prevents the State from delegating such a power to private associations.

And that is a very distinctive difference.

For these reasons --

QUESTION: Mr. Niemann, one other question, if I may. The reason for favoring, for having four non-commercial optometrists is the interest in enforcing of the prohibitions against commercial optometry. Other than the trade prohibition against practicing the trade name, what are some of those provisions that remain on the books and are constitutional?

MR. NIEMANN: Your Honor, if I may summarize them by referring back to my statement of facts, they are generally

reflected in the professional responsibility rule. And that rule prevents fee-splitting among optometrists, --

QUESTION: Oh, I remember that; right.

MR. NIEMANN: -- it prevents the economic control, the economic tie-ins, the kickbacks.

QUESTION: Are those statutory provisions or are they ethical rules?

MR. NIEMANN: Those are statutory provisions. I might refresh our memory, they were at one time a regulation, adopted by the Board. Then, when the commercialists got in control, they were repealed, --

QUESTION: Right. I know.

MR. NIEMANN: -- and then they were enacted by statute, because the Legislature wanted them to stick.

QUESTION: Thank you.

MR. NIEMANN: Thank you.

MR. CHIEF JUSTICE BURGER: Miss Prengler.

ORAL ARGUMENT OF MISS DOROTHY PRENGLER, ESQ.,

ON BEHALF OF E. RICHARD FRIEDMAN, ET AL.

MISS PRENGLER: Mr. Chief Justice, and may it please the Court:

I represent the State of Texas and the members of the Texas Optometry Board. I will address the issue of the constitutionality of Section 5.13(d) of the Texas Optometry Act, which provides that "No optometrist shall practice under,

or use in connection with his practice of optometry, any trade name, corporate name, assumed name, or any name other than the name under which he is licensed to practice optometry in Texas."

The court below held that this section is unconstitutional under the First Amendment, and relied extensively on the holding in Bates vs. State Bar of Arizona and Virginia Pharmacy Board vs. Virginia Consumer Council.

Instead of properly analyzing the State's interest and the First Amendment interest involved in this section, the court deferred to the advertising cases as being determinative of the outcome in this case, and thus struck down the statute.

If the balancing test in Bates and Virginia Pharmacy is properly applied to this section, it becomes evident that the statute validly promotes important State interest and inflicts minimal restriction on First Amendment rights.

Before a discussion of the balancing test and the State interest advanced by Section 5.13(d), I would like to point out to the Court certain elements that are not in issue in this case. This is not an advertising case. Optometrists in Texas are free to advertise price, the availability of goods and services, or even the quality of goods and services, as long as it is not deceptive or misleading.

Therefore, the consumer is not denied the right to receive information, as was true in Bates and Virginia Pharmacy.

They can also advertise in any media that they wish to advertise in. The prohibition against advertising prices struck down by the court below, and we have not appealed that issue.

We would also like to point out to the Court that opticians, who merely dispense eyewear and are not licensed in Texas, may freely operate and advertise under assumed names, trade names or corporate names. The Texas Optometry Act fully allows --

QUESTION: Opticians just manufacture the lenses, don't they?

MISS PRENGLER: That's right.

QUESTION: Fill a prescription is what they do.

MISS PRENGLER: That's right, and they are not licensed in Texas.

QUESTION: In Texas can a patient come directly to an optician?

MISS PRENGLER: Yes. A patient can come directly to an optician to get glasses if they have a prescription from a doctor.

QUESTION: Well, that's what I mean. They have to first go to an optometrist or an oculist; correct?

MISS PRENGLER: That's correct.

QUESTION: An optician can't deal directly with a patient, --

MISS PRENGLER: They cannot --

QUESTION: -- so far as diagnosing.

MISS PRENGLER: That's right; they can only fill a prescription.

QUESTION: Right.

MISS PRENGLER: Right.

Dr. Rogers is free under the Texas Optometry Act to use the name Texas State Optical in his opticianary, and in fact he does so use it in over 100 opticianaries in Texas. Thus, his ability to use a trade name in the merchandising business of selling frames and filling eyeglass prescriptions is in no way impaired by this statute.

I would briefly like to give the Court some additional facts to show why the Legislature was reasonable in enacting Section 5.13(d), the assumed name statute.

This particular section was passed two years after the opinion of the Texas Supreme Court in Texas State Board of Examiners in Optometry vs. Carp. The Court specifically discussed some of the abuses and the evils that existed in the practice of optometry under an assumed name in Texas. Thus, the Legislature, when they passed this statute, were specifically aware of past abuses that had occurred in Texas in the practice of optometry under a trade name, and had been specifically found by the Texas Supreme Court to be misleading to the public. It was in response to those abuses that the

statute was passed.

And we contend that the Legislature had compelling reasons to enact the statute in light of this particular case and the abuses that were actually --

QUESTION: Miss Prengler, is there any explanation or any reason for not barring the group practice of optometry? Texas permits it, doesn't it? It's just you can't do it under a trade name.

MISS PRENGLER: That's right. You can practice in association with other optometrists, but you have to practice under the names of all the optometrists. The statute does allow optometrists to practice under a partnership name, as long as the names of the partners, those partners actually practice there at the office, the statute requires that they have to at least practice at the office 50 percent of their time.

QUESTION: So the statute just bars how you hold yourself out to the public, just what kind of words you use in representing yourself to the public?

MISS PRENGLER: It requires that the individual optometrist hold himself out in his own name.

QUESTION: But any other aspect of group practice is not forbidden?

MISS PRENGLER: No.

QUESTION: Well, --

QUESTION: It's not too different from a full-disclosure requirement under the Securities Act or something like that in that context, I suppose?

MISS PRENGLER: That's what we would contend. That's correct. And it in fact requires that the optometrist give more information to the public.

QUESTION: And in billing, in any communications, or in advertising, all of the names must be given?

MISS PRENGLER: That's correct.

QUESTION: You can't send a bill out under just a trade name?

MISS PRENGLER: That's correct. It's the individual. He must practice under that name, he cannot use a trade name in connection with his practice; that's correct.

QUESTION: Would you repeat --

QUESTION: Miss Prengler, as I understand it, your State does permit the practice under a partnership name so long as the partners devote at least 50 percent of their professional time to --

MISS PRENGLER: That's correct, yes. There had been an abuse in Texas where partnerships -- where names of owners of a practice were used on the door, and this was found to be deceptive since they were not actually there practicing.

QUESTION: So Smith & Jones, Optometrists, can practice as such a partnership so long as Dr. Smith and Dr.

Jones devote at least half their time to the partnership work.

MISS PRENGLER: Correct, Your Honor.

QUESTION: But, now, can they practice as Smith & Jones, Optometrists, and also have as partners Brown, Black and Green?

MISS PRENGLER: Yes, they can. That is correct.

QUESTION: Even though they are not mentioned in the partnership name?

MISS PRENGLER: That's correct.

QUESTION: But if they have a name like Cromwell & Sullivan, there must be a Cromwell and a Sullivan who spend half their time?

MISS PRENGLER: That's correct, and the statute also --

QUESTION: And there might be a hundred others who are not named; would that be so?

MISS PRENGLER: That's right.

At one time optometrists in Texas were permitted to practice under a trade name. Then in 1959 the Optometry Board, as part of their rule-making powers at that time, adopted the professional responsibility rule, which prohibited the practice under a trade name.

The rule was then challenged by several optometrists, including Dr. Rogers. And it was in this context that the case came before the Texas Court.

QUESTION: Well, do your cases explain, or is there

any reason for distinguishing between unincorporated groups that use a trade name and partnerships that use just two names of maybe a hundred partners?

MISS PRENGLER: The Court did not speak to that particular issue. However, the abuses were not present in a situation where -- they didn't find the abuses to exist; they found the abuses to be directly associated to the use of a name other than the partnership name. And there were no abuses that were documented that existed in the use of a partnership name.

We would contend that, at least in a situation where you have a partnership name, there is personal accountability there in the name of the partner, and there is a partner whose name is part of the practice, and it lends more accountability.

QUESTION: Now, could there be, under the Texas law, two named partners doing business and spending 100 percent of their time on the job, and they have as employees fifty others who aren't partners?

MISS PRENGLER: Yes.

Specifically, some of the abuses that were found by the Texas Supreme Court were that the assumed name practice disrupted the doctor-patient relationship by concealing the identity of the individual optometrist and bearing the responsibility of a licensed optometrist in the trade name.

The Court cited situations where optometrists would

add, drop, or change their trade name at a particular location, even though the licensed optometrist would remain the same.

The Court further cited instances of optometrists being shifted from one location to another within the trade name practice and not maintaining a stable practice in any one particular location.

The Court found --

QUESTION: But couldn't that still happen if you had a -- I just wondered, if you had a Smith and Jones partnership with 45 other partners who were not named, and that partnership operated offices all over the State.

MISS PRENGLER: They could not operate offices all over the State under the statute, because that particular name could not be used all over the State unless they could somehow spend fifty percent of their time there, of the time the particular practice was open for business.

QUESTION: That would mean only two branches, at most; wouldn't it?

MISS PRENGLER: Yes, Your Honor.

QUESTION: Fifty percent twice.

MISS PRENGLER: Right.

QUESTION: But two other partners of the 100-man partnership could open the offices in some other place, and be named partners, and all the other unnamed partners could shift around, and all the employees could move in and out of

these various branches, I take it?

QUESTION: But each of the named partners has to spend at least fifty percent of his time of the partnership business in an office.

MISS PRENGLER: That's correct.

QUESTION: Yes, but if a hundred -- if there are a hundred partners, or fifty partners, two can be the named partners in one place and two in another place. Right, or not?

QUESTION: No, it doesn't work.

MISS PRENGLER: They could not be the named partners, because under the statute it would be prohibited. They could not spend the requisite amount of time. You have to have different optometrists at different locations, with different names.

QUESTION: Right.

QUESTION: Oh, different named partners.

MISS PRENGLER: Yes, that would be possible.

QUESTION: So, if I have it, if there are four partners, two of the four can practice as a partnership in Dallas by Smith and Jones, can use their name, and Brown and Jackson can be the two named partners in Fort Worth.

MISS PRENGLER: That's true.

QUESTION: Yes.

MISS PRENGLER: The Court further found that it was common for one trade name owner to have different trade names,

practices under different names, within a small geographical location. This gave the impression to the public that each of the offices were independently owned and operated. The Court specifically found that the practice of optometry under a trade name was misleading and confusing to the public, and it was against this background that the Texas Legislature enacted the prohibition in 1969.

Dr. Rogers urges that the assumed name statute is unconstitutional as a violation of commercial free speech. It is our contention that the assumed name statute does not easily fit into the commercial free speech category. It is a concept that is admittedly difficult to characterize, but we would contend that it should be properly characterized as a regulation of conduct rather than speech.

The statute is designed to regulate the mode of practice, and it is designed to cure the abuses that have existed in Texas in relatively recent times.

The primary purpose of the statute is to insure that optometrists do not obscure their license identity by merging their identity with other licensed optometrists under one trade name.

The assumed name statute is primarily directed towards preserving the individual optometrist's identity, rather than regulating his speech. If the assumed name statute is viewed as a regulation of conduct, as we contend

that it should be, a rational basis test is used to analyze the statute, and, as the facts indicate, there is clearly a rational basis for the statute.

However, if the assumed name is characterized primarily as a regulation of commercial free speech, the proper test for analysis would be the balancing test as set out in Bates. Even under the balancing test, the assumed name statute withstands constitutional muster. In applying the balancing test, various interests the State has in enacting the statute are weighed against the conflicting First Amendment interest to determine whether there have been significant abridgements of those First Amendment interests.

In this case, any encroachment on the First Amendment rights are minimal; and, on balance, we contend that the interest promoted by the statute in protecting the health and well-being of the citizens of Texas rises to an acceptable reason for prohibiting the practice of optometry under a trade name.

We first would consider the seller's interest. When the seller's interest in disseminating information is considered under Section 5.13(d), we contend that there is no significant impairment. A seller is allowed to get his message across to the public through his own name and through any form of advertising that he wishes. The requirement that he practice under his own name does not prevent him from using any media to

convey this message to the public, as long as the message is not fraudulent.

At the very most, this section imposes a minimal restriction on the wording of a message. It, in effect, provides more meaningful information to the public by providing the name of the individual practitioner.

Dr. Rogers' real complaint is about the effectiveness of a merchandising method and the value to him of using this merchandising method to attract clients; not that any message is suppressed. Dr. Rogers is not proposing a commercial transaction just by the use of his trade name, as was the case in Bates and Virginia Pharmacy. But, rather, he is identifying the source of the provider of services.

We contend that the identity of the individual is the more meaningful identification of the source.

QUESTION: May I ask you a question about Texas law generally with respect to trade names and trademarks?

MISS PRENGLER: Yes, sir.

QUESTION: I suppose you have a statute comparable to that in any if not all States, providing for the registration of trade names and trademarks -- do you?

MISS PRENGLER: I believe so, Your Honor.

QUESTION: Now, I realize, under your current law, you couldn't register the trade name you're talking about. But let's assume you have a registered trade name or trademark

in Texas, may it be sold, transferred, assigned? Is it regarded as an item of property?

MISS PRENGLER: I would think that it would be, Your Honor. I don't know, but I would assume that it is.

QUESTION: It usually is.

MISS PRENGLER: Yes, Your Honor.

QUESTION: Are there any cases in Texas that deal with this, so far as you know?

MISS PRENGLER: As far as I know, no, sir.

I'm sure that there are, though. I had not researched that particular area.

QUESTION: I'm wondering why you don't argue that a trade name is property not speech.

If a trade name acquires a secondary meaning, no one else can take it away from you.

Well, you've answered my question.

MISS PRENGLER: Thank you.

Next, on considering the consumer's interest in receiving valuable information, Section 5.13(d) does not restrict the information that's received by the consumer.

QUESTION: May I ask -- Justice Powell prompts this question from me. Does your argument that this is not a violation of the First Amendment, would it apply to another statute prohibiting the use of trade names in other service industries? Forget products. But say in a cleaning business,

you couldn't use the name "Quality Cleaners" or something like that. Would the State of Texas have the constitutional power to say, "We think 'Cleaners' ought to identify the owner and location and so forth"; would it be the same issue?

MISS PRENGLER: Only if the State can find the type of abuses that are present in this particular case.

QUESTION: Well, are the abuses essential to your argument? That's really, I guess, what I am asking.

MISS PRENGLER: Yes, the abuses that were --

QUESTION: And if they are essential, and if the other side were to persuade us that those abuses could be prohibited by specific prohibitions without also prohibiting the trade name, does your case then collapse?

MISS PRENGLER: No. We would contend that the State would have a right to restrict the use of a trade name, assuming that there has to be some reason.

QUESTION: Are you making a distinction between a chain of cleaning establishments, the Quality Cleaners on the one hand, and other establishments that are dealing in services relating to health?

MISS PRENGLER: That's correct, Your Honor.

QUESTION: Is that the distinction that you'd make for Mr. Justice Powell and Mr. Justice Stevens?

MISS PRENGLER: Yes, sir, that would certainly be a distinction. The use of a trade name to just sell products

would certainly not have the potential harms and consequences as it would in the health-related field.

QUESTION: What worries me is, how much more information does an individual in a large city like Big D, like Dalla, get from the name N. Jay Rogers or the Rogers Optometric Corporation?

MISS PRENGLER: We think that he does get significantly more information --

QUESTION: Well, what is -- I mean, they don't know Mr. Rogers from a --

MISS PRENGLER: But at least --

QUESTION: -- baseball bat, do they?

MISS PRENGLER: No, but at least when the name is part of the practice, they can have an opportunity to check out the particular reputation of that optometrist.

QUESTION: Where?

MISS PRENGLER: Through their friends, through acquaintances, they can get more --

QUESTION: Well, they can check out the company, too. Through friends and acquaintances.

MISS PRENGLER: They can check out the company, but there may be a hundred optometrists at that company and that wouldn't give them the information as to the reputation of the individual practitioner.

QUESTION: Well, you don't know how many people are

in Rogers' office either, do you?

MISS PRENGLER: There are -- in this particular case, there are a great many.

QUESTION: So you -- I mean, normally these people aren't practicing as individuals in this day and age. They at least have a nurse. You don't know who the nurse is.

MISS PRENGLER: That's true, but --

QUESTION: And you don't know who the technician is.

MISS PRENGLER: But the State --

QUESTION: Do you? You just don't know.

So I guess that the numbers, the more that you don't know the worse off you are.

MISS PRENGLER: I think that the State of Texas has a right in trying to encourage the situation that you would know, to encourage the doctor-patient relationship and encourage the possibility --

QUESTION: Well, suppose you put out on your door everybody that works in there, the names of everybody: Joe Doakes, toilet cleaner; Sam Brown, floor sweeper. Would that be all right?

Suppose you put that in your advertisement, you put in everybody that worked in that firm's name.

MISS PRENGLER: The important relationship that the State is trying to promote is the doctor-patient relationship.

QUESTION: Well, this -- and I'm through after this -- this company, Optometric, whatever you want to call it, Optometry Company, says that "We have the following people practicing in this office: A, B, C, D", full name in the advertisement. Wouldn't that be sufficient information?

MISS PRENGLER: That would certainly provide more information than just practicing under --

QUESTION: But it wouldn't qualify under your law?

MISS PRENGLER: That's correct, because the Legislature felt that the abuses were so potentially harmful to the public that they outlawed the trade name practice completely.

The consumer in this particular situation is not deprived of valuable information as were the consumers in Virginia Pharmacy and Bates. The consumer is not denied information necessary to the making of an intelligent decision.

QUESTION: I take it that a single practitioner could practice under his own name and with twenty employees, all of whom are doing the same thing he is.

MISS PRENGLER: That's correct.

QUESTION: And that patients will come and visit any one of those employees, and perhaps never see the man whose name is on the door.

MISS PRENGLER: That's possible.

QUESTION: And none of these others, none of the names of the employees have to be on the door or on any

stationery or anything?

MISS PRENGLER: They have to be in the office, their license has to be prominently displayed.

QUESTION: Their what? Their licenses, but they don't have -- their names don't have to be listed?

MISS PRENGLER: No.

QUESTION: They just have to have their license on the wall.

MISS PRENGLER: That's correct.

QUESTION: But if a practitioner's name is there, is he subject to this fifty percent work at the office?

MISS PRENGLER: Yes.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Keither.

ORAL ARGUMENT OF ROBERT Q. KEITH, ESQ.,

ON BEHALF OF N. JAY ROGERS, ET AL.

MR. KEITH: Mr. Chief Justice, and may it please the Court:

The trade name in fact communicates a bundle of valuable information to the consumer, and, respectfully, the suppression of the trade name is the suppression of speech, not the regulation of conduct.

This was the holding of the district court in this particular case, and they relied very heavily, and applied Virginia Pharmacy and Bates to the facts of our case.

And the Court will bear in mind that there were two issues that are related to this discussion --

QUESTION: When you say a package of information, you mean that its quality and reliability and the continuity of the organization, is that the sort of thing you mean by the package?

MR. KEITH: That is correct. There is integrity, there is this bundle of services that are available that, through the years, and in this instance Dr. Rogers lived in Beaumont, Texas, he has operated with his brother and with others for 39 years; he has practiced under the trade name Texas State Optical. He has developed a reputation, a good will. There is communicated between him and members of the public a substantial body of information, much as you would say with respect to the Mayo Clinic. You might take out an ad in the New York Times and describe all of the accomplishments of the professional members associated with the Mayo Clinic, and you would not, even then, convey to me or to the ordinary members of the public the quality of medical care, the integrity, the attention and devotion to that service.

QUESTION: Well, Mr. Keither, supposing that Dr. Rogers, instead of being in the optometrist business, was in the business of murder-for-hire; could he take out an ad in the paper, notwithstanding a prohibition in Texas law, saying "I have been a successful murderer-for-hire for thirty years"?

MR. KEITH: No, Your Honor, and the Court spoke specifically to that in the Pittsburgh Press case. The underlying activity, that is murder-for-hire, is illegal and thus the State may suppress the advertising of that illegal activity.

QUESTION: Well, that's what the State argues here, too, isn't it, that the underlying activity, this particular type of practice is illegal, and therefore he may not advertise it as such?

MR. KEITH: That's the argument, yes, sir. But --

QUESTION: Well, that again gets a little circular, it's illegal because the States made it illegal.

MR. KEITH: That's correct, but the underlying activity, that is the practice of optometry, is legal. What is made illegal is the mere advertisement of the name in association with the practice. So that the only illegal activity under State law is the communication of the name, it's not the underlying practice itself.

And, Mr. Justice Rehnquist, you had asked the question, if I may respond to it, isn't this much like the full-disclosure requirements of the Securites and Exchange Commission.

May I answer that question --

QUESTION: By all means.

MR. KEITH: -- in this way: Dr. Rogers practices under the trade name Texas State Optical. He communicates to the public this bundle of information that is of value and

interest to the consumer.

Furthermore, the evidence shows that in each of his offices -- let us say there is a Dr. Fahey who is the optometrist present. Dr. Fahey's name is on the door. Dr. Richard Fahey, Optometrist.

That's factual. The statute further requires that if Dr. Fahey is present, his license must be conspicuously displayed in his office, so that if you or I or any other member of the public goes to the office we find that there is in fact Dr. Fahey and what his license number and registration is. His license must be registered in the county of his residence. And, finally, when he completes a State statute-prescribed examination -- and the statute in this instance even prescribes the test that must be performed for visual examination -- once he has completed the examination and writes a prescription, he must sign that prescription with his own name. And thus, you see that there is three -- in this office there are three classic instances, that is, the name on the door, the license on the wall, and the signature on the prescription; all of which are disclosed to the patient. And in addition thereto, there is disclosed to the patient the fact that he is in association with others in the practice of optometry and that he provides this bundle of services that this name has come to convey.

QUESTION: Oh, I'm sure many securities registrants

have taken the position with the SEC that they have disclosed everything that needs to be disclosed and that, nonethless, the SEC has taken the position that "no, you haven't, you have either not disclosed a fact that ought to be disclosed, or one of the statements you're making is misleading."

And isn't that what Texas is saying here, that this particular type of commercial practice tends to mislead the public?

MR. KEITH: Well, sir, we have made full disclosure. Let's put that to rest.

Now, as you get to the subject of "misleading", there are at least three responses to that. To begin with, as a matter of fact, the district court, and this was a three-judge district court, the district court found as a matter of fact -- and it appears in Footnote 4 of the Court's opinion -- that the use of the trade name Texas State Optical was not misleading.

Secondly, and this takes a little explanation -- secondly, the Carp case, and that is the case relied upon by --

QUESTION: The Supreme Court of Texas.

MR. KEITH: Yes, sir. The Court will realize that that cas was tried in Dallas in the fall of 1963, some 15 years ago. The particular Act in question here was not adopted and did not become effective until September 1, 1969. The new Act, and it is a comprehensive, close regulation of

optometry -- and I can go through it if the Court finds it necessary -- the new Act prescribes a variety of ways of eliminating and precluding fraud, misrepresentation, poor optometric practices and the like. The Act specifically speaks to misrepresentation.

Now, when the Act was adopted, it suppressed the blanket, the blanket suppression of the use of the trade name. However, it provided an exemption or a grandfather clause that extends in part until January 1, 1979.

So Dr. Rogers, in some offices, has been exempt from the trade name provision of the statute -- not in all offices, but in some instances. He has operated under the new Act, which prevents, and effectively prevents, any type of misrepresentation. He has operated under the new Act for eight years. He has operated 65 offices in Texas under the new Act. At the time this judgment was rendered by the district court.

There is not one line of testimony, there is not one witness, there is not even one affidavit, there is not one suggestion of fact of any deception, fraud, misrepresentation, dissimulation, confusion, or the like.

QUESTION: But this is a regulation of business, and it's my understanding under the Constitution that States are entitled to adopt prophylactic rules that perhaps may sweep more broadly than is necessary, if they are intended to prevent deception. That very likely some people who would have no

intent to deceive will be required to cease certain practices or perhaps disclose more than would be required if you were to judge each case on an individual basis. But that's what a statute is all about. It avoids the necessity of judging each case on an individual basis.

MR. KEITH: This is, respectfully, Your Honor, a regulation of speech and not of conduct. The State of Texas, as Mr. Justice White pointed out in the example to counsel, the State of Texas did not say that it could have said, "You can only own one optometric office, or you can only own three optometric offices", it did not choose to do so. The State could have said, "You cannot employ another optometrist." The State did not choose to do so. Instead, the State specifically said, "You may employ other optometrists."

The State could have said, "You may perform only X number of examinations per day." It did not choose to do so. The State could say, "You may not practice fraud, deceit or misrepresentation in the practice." The State said that, and the evidence shows -- or there is a complete absence of evidence of any fraud, misrepresentation or deception, although there have been operated by the plaintiff in this case 65 offices for eight years.

QUESTION: But the State also said, "You may not practice under a trade name." And if the State's susbstantive provision in that regard is permissible, certainly it can

prohibit the advertising of a trade name.

MR. KEITH: The substantive provision would be business conduct. And the State could otherwise regulate business conduct without stamping out all elements of speech. And that's what the State has chosen to do.

QUESTION: Well, are you saying, then, that when the State regulates business conduct it must follow some sort of a least restrictive alternative test that has previously been reserved for First Amendment cases?

MR. KEITH: Yes, sir, when it reaches the First Amendment question, then the State must choose the least restrictive alternative. And in this instance, as the evidence shows, there are available to the State a number of other alternatives that do not suppress truthful, legitimate use of the trade name.

QUESTION: Mr. Keith, you mentioned the Carp case. In that case, the facts, as I recall them, Dr. Carp operated 71 offices around the State and used ten different trade names. Under the new statute, may one operate under a different trade name in each community, if he wishes to?

MR. KEITH: Your Honor, --

QUESTION: Is Dr. Carp still in business?

MR. KEITH: No, sir, he's not.

QUESTION: Does Dr. Rogers operate under the same name all over the State?

MR. KEITH: Yes, sir. And he --

QUESTION: Could he operate under ten different names?

MR. KEITH: Yes, sir, unless such practice -- and I think this is the key -- unless such practice constituted some type of fraud, deception or misrepresentation.

QUESTION: In the Carp case, Dr. Carp operated three offices in one city within two blocks of each other, each under a different name, with the same man supervising them. Is that still possible under Texas law, assuming you win this case?

MR. KEITH: It would be possible unless, Your Honor, there were some type of fraud or deception. Then the statute speaks --

QUESTION: Well, the question --

MR. KEITH: -- and if that becomes deceptive, then he cannot.

QUESTION: The question might be whether or not it's inherently deceptive.

MR. KEITH: Yes, sir.

QUESTION: And if it is inherently deceptive, then the Optometry Act specifically prevents it, and Texas also has another general and very strong Consumer Protection and Deceptive Trade Practices Act.

QUESTION: And in the Carp case, the optometrist, as I understood it, could circulate among the 71 offices, so

that the one who served you today might be in an entirely different city next month. Is that -- do you see any opportunity in that sort of a situation for deceiving or misleading the public as to who will be available to serve them?

MR. KEITH: Respectfully, sir, that is still possible today, under Justice White's example, where one man employed 20 optometrists. Under Texas law one man was -- excuse me, let me go back to an example.

QUESTION: Certainly.

MR. KEITH: And answer the Court's question with respect to Carp. Carp was not only -- Carp would go in and buy an optometrist out, and then he would --

QUESTION: He would buy the trade name?

MR. KEITH: He would buy out Mr. Jones, and then he would claim to use the name Jones Optical; then he would buy out Dr. Smith and he would claim to use the name Dr. Smith. And these two offices would be two blocks apart. Under Texas law, this is not permissible.

However, --

QUESTION: You mean you can't buy a trade name in Texas?

MR. KEITH: Yes, sir, you can buy an optometric practice and you can operate an office, but you cannot operate it under someone else's name.

QUESTION: Yes, but most of Dr. Carp's names didn't

have the name of any individual. I recall one -- maybe I'm wrong.

MR. KEITH: Luck Optical?

QUESTION: Luck Cutrate Optical or words to that effect. Luck One-price Optical. Could you sell that trade name in Texas? Together with the business associated with it.

MR. KEITH: Yes, sir, under the general law of Texas, the trade name is an item of property that can be conveyed.

QUESTION: That's the general law around the country, as I've understood it.

MR. KEITH: Yes, sir.

Now, you had asked a question a moment ago that since the trade name is property, why doesn't the State argue that it is property rather than speech?

May I respond to that --

QUESTION: Yes.

MR. KEITH: -- in this way: a book or a newspaper is property, but it is also the highest form of speech. And while the trade name itself -- while I may own or develop a property interest in the trade name, what the statute prohibits is not that, not the property interest, the statute prohibits the use of the trade name, it's the --

QUESTION: But the book is supposed to convey information forthwith.

MR. KEITH: Yes, sir.

QUESTION: A trade name conveys information, meaningful information, if it's merely a trade name rather than the name of a doctor, only after it acquires the secondary meaning.

MR. KEITH: Yes, sir.

QUESTION: And that may be years.

MR. KEITH: That is true. But in this instance of the plaintiff in this case, he has acquired that secondary meaning after 39 years of the highest form of quality, service and integrity.

QUESTION: Well, I'm sure that's right. I wasn't thinking about Dr. Rogers, I was just generalizing about the effect of the statute.

MR. KEITH: Yes, sir. I appreciate that. But the trade name, and the court has recognized that it does convey valuable information. And, in fact, Dr. Benham's testimony in this case reflects the same example.

If I may turn to --

QUESTION: Well, you wouldn't -- would you say Texas could not require that optometry be practiced only by individual practitioners?

MR. KEITH: If there were a legitimate --

QUESTION: Is it the general rule that if you want to practice optometry, you do so by yourself?

MR. KEITH: Yes, sir, I believe the State could adopt that rule.

QUESTION: And what about -- not only must you practice by yourself, but you must practice under your own name?

MR. KEITH: No, sir, that's where the rule runs afoul of the First Amendment.

Now, --

QUESTION: Either you say that Texas could not require that people who -- individual practitioners to use their own name in the practice?

MR. KEITH: That is correct, sir.

Because the trade name and the use of the trade name conveys valuable information.

Now, I do not have a constitutional right, as this Court said, to practice law or to practice optometry; but the State cannot impose an absolute ban on my expression, under the guise of professional regulation.

QUESTION: Well, what information does this -- this is in the commercial area, I take it, isn't it?

MR. KEITH: Yes, sir; it is.

QUESTION: What information does that trade name convey to somebody?

MR. KEITH: It conveys information with respect to integrity, quality of service, price, convenience, availability, hours of service, length of service to the community, your grandmother and my aunt and our next-door neighbor --

QUESTION: Something that the -- just take my example now, the individual's name. Say there is a law that says to practice individually and use your own name.

Now, is there some information that the trade name would convey that the individual's own name wouldn't convey?

MR. KEITH: Yes,sir.

QUESTION: What is it?

MR. KEITH: As Justice Powell indicated, the trade name would convey this information after the public had come to associate with it. The first day it was used --

QUESTION: Well, only if that happened, and the same thing could happen with the individual's name.

MR. KEITH: Yes, sir, in the course of time. The trial court here found as a matter of fact that this trade name had developed the association of --

QUESTION: Well, wouldn't the only reason the trade name would acquire any secondary meaning or convey some information is because of the kind of service that the people behind the trade name gave?

MR. KEITH: Yes, sir. And that would be true whether that service was good or bad. It would convey in a word --

QUESTION: That's right, but if suddenly tomorrow the same people aren't behind the trade name, is there any reality to this meaning of the trade name?

MR. KEITH: If --

QUESTION: I mean one day the people who are responsible for it acquiring some value are suddenly gone.

MR. KEITH: Let us say, for example, --

QUESTION: It happens all the time, doesn't it?

MR. KEITH: If the "Mafia" were to come in and take over and use an otherwise --

QUESTION: No, if just some lousy optometrist came in and took over.

[Laughter.]

QUESTION: That's all. That's what we're talking about.

MR. KEITH: Then immediately that trade name would begin to denote lousy service, poor integrity, poor quality --

QUESTION: Not for a while. And Texas says if you're going to change the people -- they just don't want the people behind the trade name to change without it being noted.

MR. KEITH: Mr. Justice White, the State of Texas could simply say that in the practice of optometry you cannot change ownership of a trade name, period. That would be a permissible --

QUESTION: But if it just said that the people who have given the value to this trade name are suddenly there no longer and have been replaced by somebody else, please put it on the letterhead or put it on the door or something.

MR. KEITH: Or that it is not subject to being conveyed. That is exactly right.

QUESTION: Well, weren't we told a little while ago that unless the person whose name appears spends fifty percent of his time there, you can't use that name?

MR. KEITH: That is the present provision, and that is the provision that -- that is a part of the prohibition, the blanket suppression of the use of the trade name. And that's what the Texas Court struck down. Yes, sir.

QUESTION: But that is, itself, a substantive prohibition, not a prohibition of speaking about something that is lawfully permitted. I think, as Justice White said, what Texas is saying is that if you're practicing optometry you may not do so under a trade name, because of the potential for deceptiveness.

Now, if Texas is permitted to do that, certainly it's permitted to prohibit advertisement under a trade name, you have to argue that it isn't permitted to do, to enact the substantive regulation.

MR. KEITH: Respectfully, sir, it's not a substantive regulation. It is a suppression of speech, because the very use of the trade name -- and that's what the statute says, the optometrist may not use the trade name. And the use of the trade name is what communicates the valuable information to the consumer. And so the State has said: You may not communi-

cate to the consumer this information.

QUESTION: Well, supposing in a securities case the prospective corporation is named the Alpha Delta Estate, and the Securities and Exchange Commission decides that that has a potential for deceptiveness. Now, do you say that under the free speech decisions in the commercial area of this Court the SEC can't prohibit the communication of that information?

MR. KEITH: No, sir. If it has a tendency to deceive, the SEC can restrict it, the Texas statute restricts it, and we accept that and do not challenge it.

QUESTION: But you say the State can't legislate a prophylactic rule, that it's got to deal with it on a case-by-case basis.

MR. KEITH: Well, not necessarily on a case-by-case basis. The State can deal with the subject of deception without prophylactically abolishing all speech.

QUESTION: What about the subject of trade names? Can it prohibit a particular optometrist whom it has found to have used deceptive practices by the trade name from using a trade name?

MR. KEITH: No, sir. Only -- the State could prevent him from using any type of deceptive name.

QUESTION: Including a trade name?

MR. KEITH: If it were deceptive. And in this instance the trial court found as a matter of fact that this is not a

misleading or deceptive name.

QUESTION: And you feel that the three-judge district court has the right to substitute its judgment for the Legislature on that?

MR. KEITH: No, sir; but it is required to make a finding of fact as to whether or not this question -- this use is or is not misleading.

QUESTION: The three-judge district court in dealing with a constitutional challenge to a statute is required to make a finding of fact as to whether a trade name is misleading?

MR. KEITH: Yes, sir, because if it were misleading, then there would be no impermissible infringement on speech, because the Court has held that the State can suppress misleading speech. And so the district court must determine: Is this truthful or is it misleading? If it's misleading, then you do not have the same free speech right that you have if it is truthful.

And that's the reason the finding of fact is required to be made by the court; yes, sir.

The State speaks, and I would like to speak briefly to the purported justifications for this absolute suppression, and weigh them respectfully against the consequences or the harm that falls --

QUESTION: Could Texas require that if you want to do business under a trade name you must go up to the State House

or down to the County Clerk's office and file a statement of the names of the people who are behind the trade name?

MR. KEITH: Yes, sir.

QUESTION: And keep it constantly current?

MR. KEITH: Yes, sir.

And prohibit, as you suggest, respectfully, sir, and prohibit the transfer of that name in the practice of a profession.

QUESTION: But you don't think they can make them put the names on the door?

MR. KEITH: Yes, sir, I think they can make them put the names on the door as well.

QUESTION: Well, can they make them put the names of everybody in the group on their stationery and in their advertisements?

Apparently not; that's what you say.

MR. KEITH: No, sir. If that becomes necessary, they can. But that's not what they have done, Mr. Justice White. What they have done, they said "you cannot" rather than "you must".

And there is a substantial difference in the area of speech.

QUESTION: Well, is it doing business under a trade name if you use a trade name and then give all the names?

MR. KEITH: Yes, sir, it would be. For example, my

client could not, with his brother and three others, list their names and say "associated in the" --

QUESTION: But you really wouldn't care very much, would you, if you had to put down all the names, you wouldn't -- would you really want to use the trade name?

MR. KEITH: Yes, indeed. Because the trade name is valuable, it has a substantial communicative value and thus is of substantial value to my client.

QUESTION: You want the value that past activity has given to it, even though the people are different?

MR. KEITH: No, sir. If the people are different, and if the slack operator, as you described him, this optometrist has come in, the State could require that before he adopts that name he must meet certain standards or tests or not even at all purchase the name. But that's not what the State has done here. They have just made an absolute suppression.

QUESTION: I didn't get the direct answer. You say they can be required to list all of the names?

MR. KEITH: No, sir, they are not presently required to do so.

QUESTION: I said they could be; you said it would be all right.

MR. KEITH: That is my belief, yes, sir.

QUESTION: Well, does that mean all of the names of

all of the officers on all the office doors?

MR. KEITH: If there were some interest of the State to be served by such, and this did not become an oppressive burden to speech, I would think so, yes, sir.

QUESTION: Well, is it an oppressive burden on speech?

MR. KEITH: If I'm required to list 200 names on a letterhead, that would become oppressive, because I couldn't write anything else on the paper, and thus it would constitute, I think, an impingement of speech. But the State has not done that, Mr. Justice Marshall.

QUESTION: So what is your answer to my question? Could the State require it or not?

MR. KEITH: Well, --

QUESTION: You know, you slid right over it, you said, "oh, it would be all right". I didn't think you meant it then, and I know you don't mean it now.

MR. KEITH: Yes, sir, I think the State can require it until it becomes an oppressive burden and effectively denies speech. And that's my intellectually honest belief, that it is not unreasonable until it becomes a denial of speech.

QUESTION: Do you see any analogy between the situation you're discussing and the rule of this Court that requires you to sign your own name to this brief, not your firm's

name?

Your firm name is on, indicating what your relationship is.

MR. KEITH: Yes, sir.

QUESTION: But you, personally, had to sign this brief, didn't you?

MR. KEITH: Yes, sir. And I made the identical disclosure to this Court that Dr. Rogers makes to his patients. I have my firm name on the brief. Dr. Rogers has his firm name, Texas State Optical, on his door or on his stationery. Likewise, I have personally signed the brief. The optometrist personally signs the prescription.

QUESTION: How about the advertising, to the extent there is any advertising material?

Is that in the name of the -- in what name would that be done?

MR. KEITH: That would be done in the name of Texas State Optical, yes, sir, in the trade name.

QUESTION: Which you can't put on the prescription.

MR. KEITH: Yes, sir, he can put that on the prescription, and he --

QUESTION: I thought he had to put his own name on it.

MR. KEITH: He can put his own name on there as well.

QUESTION: He must.

QUESTION: I thought he had to put his own name on there.

MR. KEITH: He must put his own name on the prescription.

QUESTION: That was my question. He can't just put Texas Optical, he's got to put the name of the person who did it.

MR. KEITH: That's correct, yes, sir. He's got to sign his own name. Just as I signed my own name to the briefs in this Court.

But legitimately under the First Amendment --

QUESTION: But not Dr. Rogers, Dr. Rogers doesn't sign all of those prescriptions.

MR. KEITH: No, sir. The man who performed the examination.

QUESTION: Well, when he makes that advertisement, don't the people get the idea that he will?

MR. KEITH: No, sir, because he does not hold out to the public that he is present and he is performing the examination. He merely lists the name Texas State Optical.

QUESTION: In fact, Mr. Keith, is it not true that he may not -- not only does not, but may not -- disclose his ownership of 64 of the 65 offices he owns?

Isn't there a statutory prohibition against the use of his name in the offices in which he does not practice, even

though he owns and dominates those offices?

MR. KEITH: Yes, sir. He may not hold himself out as practicing in that office. And that may be different.

QUESTION: Well, therefore, is it not true that even though he is the managing director, in a sense, of all those offices, nothing in those offices would so reveal?

MR. KEITH: That is correct.

QUESTION: Now, do you challenge the statutory provision that requires that nondisclosure?

MR. KEITH: No, sir.

QUESTION: You don't?

MR. KEITH: No, sir. Because in the case of Dr. Carp, there was a suggestion that some type of misrepresentation arose.

QUESTION: Where was that, in Wichita Falls?

MR. KEITH: Yes, sir. Yes, sir.

And we do not challenge any effort by the State to restrict or circumscribe deceit or fraud or misrepresentation at all. It is the absolute ban against truthful speech that we appeal to this Court.

QUESTION: Do you think there's a higher value on Dr. Rogers being able to tell the public that TOA, the trade name, whatever it is, operates the office elsewhere than his ability to tell them that he operates it? He doesn't assert the right to disclose his own connection with these other

offices.

MR. KEITH: Yes, sir, there is a higher right, because he is in association with others and they have developed, as Justice Powell suggested, a secondary meaning of good will and reputation attendant to a high quality of service through many, many years.

QUESTION: But couldn't he get the same secondary meaning attached to his own name, if it was made clear that he is the dominant figure in all these offices?

MR. KEITH: He might. He's been at this for 39 years, and it would be very difficult to start over and acquire the same reputational interest and good will in any reasonable period of time.

And it is this interest which is now the --

QUESTION: But that's a property interest.

MR. KEITH: Yes, sir, it is a property interest. The reputation and good will.

The consequences of this ban, not to mention the purely theoretical First Amendment consequences but the immediate and direct consequences of this ban are testified to by Dr. Benham, whom this Court/and the Federal Trade Commission have both cited as authoritative.

One is that since there is less information -- and that is Dr. Benham's testimony -- this results in higher cost and consequently less use. As this Court said in Virginia

Pharmacy and as Dr. Benham testified, the moment the price goes up, the consequences fall heaviest on those who need glasses the most; that is, the ill, the aged and the economically depressed.

As a result, fewer people are able to obtain the services or goods that they need. As a consequence then, in the aggregate, throughout the country or throughout a large State like Texas, you have a lower degree or quality of care. Society and the free enterprise system under the decisions of this Court suffer substantially because our free enterprise system depends on an intelligent private economic decision, and once you constrain information, as this Court and as Dr. Benham has testified, once you constrain this information, this results in what the Court has called a misallocation of resources, which then weakens in turn our free enterprise system, which is based on full disclosure, respectfully, rather than less information.

QUESTION: Mr. Keith, you mentioned the Federal Trade Commission regulation, do you think that has any bearing on this case?

MR. KEITH: Respectfully, I do not, sir. And neither party has suggested that it is mooted by the Federal Trade Commission order, and I do not believe that it is.

QUESTION: Mr. Keith, you talked of constraining information. The specific information that's constrained, as

I understand your argument, that all these offices follow the same high standards, are open the same hours, charge the same fees, prompt the same prompt service, and the like; is that basically what you're saying?

MR. KEITH: Yes, sir.

QUESTION: What if 64 of the offices do and the 65th has different opening and closing hours and has a very crabby receptionist and has different things; wouldn't that 65th office get the benefit of the information as the other 64, which would not be true?

MR. KEITH: And if that -- if those facts occurred, and there is no evidence in this record --

QUESTION: But certainly we cannot assume that in fact all 65 offices are precisely identical in all respects, can we?

MR. KEITH: I think that's correct, Your Honor.

But the trade name does not guarantee human infallibility.

QUESTION: It doesn't really guarantee any specific item of information will be true in the 65th office, does it?

MR. KEITH: That is correct, but it does --

QUESTION: Well, what information is constrained?

MR. KEITH: It does represent that this bundle of information --

QUESTION: Is probably true.

MR. KEITH: -- this bundle of services is available, and if this constitutes a misrepresentation, then the State has another statute, it does not need to rely on the trade name ban, it has another statute to preclude and suppress that misrepresentation.

QUESTION: I understand. But you haven't identified for me any specific item of information that is constrained by the enforcement of this statute.

MR. KEITH: It is the entire bundle of information that --

QUESTION: Which may or may not be true in particular cases.

MR. KEITH: Which, factually, Your Honor, under this record, is true, except with respect maybe to the enthusiasm which one or another professional may apply to his work in any given day.

QUESTION: This record shows that all 65 are equally great?

MR. KEITH: Rather, Your Honor, the record is absolutely silent. There is no -- the record says that these offices all operate in this manner, and there is no suggestion to the contrary.

QUESTION: I don't see how anybody can say that two doctors are equal.

MR. KEITH: No, sir, and the record does not suggest

that.

QUESTION: Well, you're saying how many are equal?

MR. KEITH: I'm saying that the offices are all operated --

QUESTION: How many doctors are involved?

MR. KEITH: I would think --

QUESTION: I mean optometrists, not doctors.

MR. KEITH: I would think substantially a hundred.

QUESTION: Well, is there any way in the world that those hundred could be the same?

MR. KEITH: No, sir.

QUESTION: You've got a hundred different people with a hundred different abilities, operating in 65 different places under 65 different circumstances.

MR. KEITH: But, at the same time, Your Honor, neither could every associate or every lawyer at Covington and Burling be the same, but the use of the name Cromwell and Sullivan or Covington and Burling does convey to the listener a reputation for integrity, ability, industry, service to the client.

QUESTION: Not in all 64 of their offices.

MR. KEITH: That's correct, and not --

QUESTION: Do they have 64?

MR. KEITH: And not in any one of the offices are both lawyers of the same industry, ability, and integrity, but

as a whole the trade name conveys valuable information with respect to that firm.

QUESTION: It's sort of like McDonald's Hamburgers, you know generally what to expect wherever you find it. Is that the idea?

MR. KEITH: I --

QUESTION: Even though there is a variation among cooks and among the employees.

QUESTION: There's a lot of difference between having dyspepsia and going blind.

MR. KEITH: Yes, sir, but -- and that is true. And the State has very carefully and very closely regulated the optometrist in his professional function, to make certain that he does provide a minimum standard of care.

QUESTION: Mr. Keith, if Covington and Burling decided they wanted to practice under the name "Big Judgments" --

[Laughter.]

QUESTION: -- would they have a constitutional right to do so?

MR. KEITH: Your Honor, could I state it differently? If my firm wanted to practice under the name "Big Judgments" --

QUESTION: Well, say "Quality Practice" then. Say they want to use that name. Would they have a constitutional right to use the name "Quality Practice"?

MR. KEITH: No, sir, because I think that represents

some type of puffing and some type of deceit associated with puffing.

QUESTION: They are defense counsel, so they practice under the name "Small Judgments".

MR. KEITH: That would be more appropriate, yes, sir.

[Laughter.]

MR. KEITH: I think that likewise would be -- would tend to --

QUESTION: How about the name "Prompt Service", something like that. Say, something that they could demonstrate was not deceitful at all with respect to their own operation. Could they have a constitutional right to use a name, you know, some nonpersonal name, just a trade name like TOA.

MR. KEITH: Yes, sir.

QUESTION: You think they have a constitutional right to do so?

MR. KEITH: Yes, sir, because that involves the essential element of communication of speech. And so long as it is nondeceptive, then it is protected by the First Amendment guarantee.

QUESTION: I couldn't protect myself in private practice from being called a "freebie" lawyer; but that's all right.

QUESTION: A what?

QUESTION: "Freebie", no charge.

MR. KEITH: May I turn, Your Honor, respectfully, for a moment to the question of equal protection raised in the matter of Board appointment?

The reason that Dr. Rogers is not eligible for membership in the TOA is because Dr. Rogers exercises and claims a right to exercise his First Amendment rights. That's why he is not eligible, and that's exactly what the Code of Ethics of the Texas Optometric Association prescribes. It precluded membership to anyone who advertises price; it precluded membership to anyone who used a trade name; and it precluded membership to anyone who operated more than three offices.

He applied, he was not eligible, and he was disqualified from membership. And he was disqualified because of the expression of his fundamental First Amendment right. Whether you call that the right of speech or the right of association.

And the case becomes much like that of Turner v. Fouche decided by this Court in 1970. There the Georgia statute required that to be appointed to a school board a person had to be a freeholder. The Court recognized that none of us, and certainly Dr. Rogers recognizes that none of us have a right to be considered for public service. However -- that none of us have a constitutional right to be appointed. But we do have a right to be considered for public service

without an invidious, discriminatory disqualification. And the State may not deny to some the privilege of holding office that it extends to others on a basis that guarantees -- that violates constitutional guarantees.

And that's exactly what the State has done in this instance. They have said that "because you exercise your First Amendment right, there are four of six seats on that Board that you are not eligible to be appointed to."

And that is plainly and simply the argument made. There is respectfully no rational or legitimate reason for this regulation; as the colloquy with Mr. Niemann suggested, if you presume bias against law enforcement by Dr. Rogers -- and certainly there is no evidence of such in this case -- that would be just like presuming bias to the Solicitor General, to say that he could not fairly sit and serve as a judge.

QUESTION: What if the incoming Governor of Texas, whomever that may be, were to announce as part of his platform that he was going to make sure that four out of the six members of the Texas Optometric Board were members of the TOA during his adminsitration? Could you challenge his appointments, if they conform to that promise?

MR. KEITH: If that became a pattern or practice that became State policy, I think so. If it were a single instance, where the incoming Governor said, "I am going to pay

a political debt to this organization and I am going to appoint four members of that organization to the Board", I think not.

QUESTION: Well, what if, say, a Governor in appointing judges says, "I think we need more representation of certain groups", do you think someone who isn't appointed could challenge that?

MR. KEITH: No, sir, I do not. Until the policy became discriminatory -- until it became a policy that was discriminatory because of the exercise of a fundamental interest, such as free speech.

QUESTION: Until it became the equivalent of State law.

MR. KEITH: Yes, sir. Or --

QUESTION: The equivalent.

MR. KEITH: The equivalent of State law. Thank you.

QUESTION: How about the State statute that says that three members of the commission must be appointed from the opposite party?

MR. KEITH: That is the Federal Power Commission regulation, under federal law?

QUESTION: No, no, I'm talking about if Texas passes a law and says that -- and I think this is done in most States, it's done in the Federal Government, is it not?

MR. KEITH: Yes, sir, but --

QUESTION: That on this commission there be so many

members of the opposite party.

MR. KEITH: And the purpose there is to achieve a legitimate balance.

QUESTION: I assume so. They don't say why.

MR. KEITH: Yes, sir. And I do not know those cases, frankly.

QUESTION: Well, I mean, you know it's a fact, don't you?

MR. KEITH: Yes, sir. I do know it is a fact.

QUESTION: And nobody has objected to it that I know of.

MR. KEITH: I'm not aware of the basis of the decision in that respect.

QUESTION: Well, there are statutes that provide that, and so far as I know they have never been challenged. How do you distinguish them from this statute that you're challenging?

MR. KEITH: Because in this instance I am excluded from consideration because I have exercised this fundamental right. I am placed in a separate, distinct category.

QUESTION: Well, if there's a Republican vacancy on the Federal Trade Commission or a Democratic vacancy on the Federal Trade Commission, presumably all people of the opposite party are excluded, because they have exercised their First Amendment right of free association to belong to the party which the vacancy doesn't belong to.

MR. KEITH: Yes, sir; but in the course of -- we're not speaking about just one appointment, we're now speaking about the course of, let us say, three appointments or four appointments. I would then have equal opportunity to belong or be appointed to that body.

In this instance, that's not true. I do not have the same equal opportunity as the other optometrists who do not exercise First Amendment right of speech or association.

Now, Mr. Justice Marshall asked a question about this perpetual minority on the Board, and the evidence in this case -- it's not in the Appendix, but it's before the Court in the form of Board minutes -- shows that since the composition of this Board under this Act, there have been some sixty instances where the Board has voted 4 to 2.

Now, indeed, Dr. Rogers can't --

QUESTION: Sixty out of how many?

Sixty doesn't tell us anything.

Sixty out of six hundred or sixty out of a hundred?

MR. KEITH: I cannot answer that question factually.

QUESTION: Well, then it doesn't mean very much, does it?

MR. KEITH: Except that it represents, Your Honor, the fact that not only is there bias in the appointment, but this has a substantial impact in the service upon the Board.

QUESTION: Not unless you tell us the rest of the

story.

MR. KEITH: May I submit that --

QUESTION: Sixty out of six hundred -- is it in the record?

MR. KEITH: It is in the record, yes, sir, but it would have to be --

QUESTION: If it's in the record you can tell us; but if it isn't, you can't.

MR. KEITH: By post-submission memorandum?

QUESTION: If it's in the record.

MR. KEITH: Yes, sir.

QUESTION: Point out where in the record that appears.

MR. KEITH: Thank you, sir.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:37 a.m., the case in the above-entitled matters was submitted.]

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