In the

Supreme Court of the United States

CURTIS CRAIG, and CAROLYN WHITENER d/b/a "The Honk and Holler,"

Appellants,

v.

HON. DAVID BOREN, Governor, State of Oklahoma, et al.,

Appellees.

No. 75-628

Washington, D.C.
October 5, 1976

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Washington, D. C.

Tuesday, October 5, 1976

The above-entitled matter came on for argument at 11:03 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 P. STEVENS, Associate Justice

APPEARANCES:

FREDERICK P. GILBERT, ESQ., 1401 National Bank of Tulsa Building, Tulsa, Oklahoma 74103, for the Appellants.

JAMES H. GRAY, ESQ., Assistant Attorney General, 112 State Capitol Building, Oklahoma City, Oklahoma 73105, for the Appellees.

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 75-628, Craig against Boren.

Mr. Gilbert, you may proceed whenever you are ready.

ORAL ARGUMENT OF FREDERICK P. GILBERT

ON BEHALF OF THE APPELLANTS

MR. GILBERT: Mr. Chief Justice, and may it please the Court: This appeal directly challenges the constitutionality of the Oklahoma beer law which says that females may buy beer at 18, 3.2 percent beer at 18, but males must wait until they are 21 years of age. This is an age/sex discrimination for persons 18, 19, and 20 years of age.

The law is broad and all-encompassing in its sweep. It says that all females, even those that are the most alcoholic, most immature, and most irresponsible, may purchase 3.2 percent beer at age 18 in absolutely unlimited quantities.

QUESTION: The law doesn't say it in quite those words, does it?

[Laughter.]

MR. GILBERT: No, your Honor. And the law doesn't say it in quite the words that all males 18 to 21, even though they are the most mature, most sober, most self-restrained, can't purchase a drop of it, at least directly, until they are 21. But that's what the law does.

QUESTION: I gather there is no question in the case

that drinking 3.2 beer may make one intoxicated?

MR. GILBERT: I think there is a question, your Honor. The legislature has concluded that beverages in concentrations of 3.2 percent alcohol or less is not intoxicating. In fact, not only the legislature; a popular referendum has said that, and the State Supreme Court has upheld both of them.

QUESTION: Then what is the relevance of your suggestion that women can get drunk on 3.2 beer?

MR. GILBERT: I believe the relevance comes from the State's assertion of what the purpose of the statute is. I think the State asserts that this could contribute to the overall drunkenness problem among young adults.

QUESTION: Even though one can't get drunk on it?

MR. GILBERT: Well, your Honor, I am perhaps exaggerating a point there. It would be difficult; I would hesitate to say it is absolutely impossible.

QUESTION: Maybe we could take judicial notice of some of these facts and you won't have to exaggerate them, counsel.

MR. GILBERT: Very well, your Honor.

QUESTION: I guess some of us do remember 3.2 beer.

MR. GILBERT: Yes, your Honor.

All right, now, the real legislative purpose for this discrimination we don't know. It has been lost in the mists of antiquity. The beer law that we challenge today was originally

enacted in 1890 by the first territorial legislature as part of a generalized civil majority statute of 18 for females and 21 for males for virtually all purposes, of almost exactly the same type of statute that was held unconstitutional by this Court last year in Stanton v. Stanton.

QUESTION: Stanton v. Stanton didn't involve intoxicating beverages or the 21st Amendment, did it?

MR. GILBERT: No, your Honor, it was a generalized statute. The particular issue was the question of child support, I believe.

QUESTION: And when you say "we," you are referring to your client who is the tavern keeper?

MR. GILBERT: Yes, your Honor.

QUESTION: There is no potential purchaser left in the case, is there?

MR. GILBERT: Well, technically he turned 21 about two weeks ago, your Honor.

QUESTION: If he technically turned 21, I take it that means he had a birthday?

MR. GILBERT: Yes, sir.

QUESTION: I presume he no longer is barred by Oklahoma law from buying 3.2 beer.

MR. GILBERT: That is correct, your Honor.

I believe under some of your abortion cases, I believe mootness would not be a bar to his consideration or his

assertion of the same interests that he has been asserting throughout the litigation.

QUESTION: Why do you say that? This is not a class action, is it?

MR. GILBERT: No, your Honor.

QUESTION: And why is it not a class action?

MR. GILBERT: The reason it wasn't is because the class would be composed of all males 18 to 21 in Oklahoma, a constantly changing class, and the clause --

QUESTION: Isn't that true of the class in the abortion cases? That was only a 9-month run there.

MR. GILBERT: Yes, your Honor. But the reasoning was that because it's a limited period of time; the normal flow of litigation is such that if you are going to be really strict about the mootness point, you could never raise the question, and the protracted litigation of this Court is further example of exactly the same thing.

QUESTION: You have three years here.

MR. GILBERT: Yes, your Honor, and this case is now into its fourth year.

QUESTION: How do you avoid the precedent of DeFunis?

MR. GILBERT: Your Honor, DeFunis was more or less individualized. The degree to which that person was claiming reverse discrimination would to some extent depend on his score on the LSAT, the favored class's score on the

LSAT, and, oh, various numerous things. But in this case, every single male 18 to 21 would have identical standing because there is no differentiation under the standard between mature young men or immature young men.

QUESTION: Doesn't the decision in Sezna say in that case you bring a class action and you have this constantly changing spectrum of class members and if the one that is the named plaintiff no longer meets the standards, someone can succeed if the class remains? But it doesn't say if you don't bring a class action, you can just avoid normal mootness.

MR. GILBERT: Your Honor, I would invite attention to the fact that the statute actually runs against the vendor. She is the one who is subject to penal sanctions and administrative sanctions, and she is still very definitely in the case.

QUESTION: That's quite a different point, though. If you are arguing on behalf of the vendor, then you have a question of standing. That doesn't support your argument that the potential purchaser is still in the case.

MR. GILBERT: Well, the potential purchaser is in fact 21. But I believe under one line of authority, the abortion cases, that there is no real problem of mootness in the case.

QUESTION: You would have an injunction saying that you have got to serve me beer because I am below

21. How in the world can he get that? He is over 21.

MR. GILBERT: All right. At least the --

QUESTION: You didn't ask for damages.

MR. GILBERT: No, your Honor, we can't in a 1983 action.

QUESTION: That's right.

MR. GILBERT: So we are asking for declaratory relief. We can still ask for that.

QUESTION: Before you were 21 you could have had a drink.

MR. GILBERT: Your Honor, the vendor still has --

QUESTION: The only way he can get relief is to move his age back and drink.

MR. GILBERT: Your Honor, it is not really so much the vendee who needs the injunction; it is the vendor who is trying to sell, because the vendee, the young man, he can drive up to the store and have his girl friend run in and get the beer. That's legal. What is needed is really the injunction for the vendor because she is the one who is in danger of losing her liquor license for selling the stuff.

QUESTION: Don't we have to rule that the young man is no longer in this lawsuit?

MR. GILBERT: In a technical sense like women who have actually --

QUESTION: I don't -- technical --

MR. GILBERT: Right, your Honor. That is technical.

QUESTION: That's what I want.

QUESTION: Counsel, if you prevail here, what is the result of the Oklahoma law? Does it mean that all people under 21, or all people under 18 be forbidden?

MR. GILBERT: The portion of the statute which is challenged is not the entire discrimination; it is that portion of the statute which purports to exclude males from the class of persons 18 to 21 from purchasing alcohol. That is the way the complaint was drafted, and that is the basis on which the State has seen fit to defend the action throughout these four years.

QUESTION: Are you positive about this?

MR. GILBERT: Yes, your Honor.

QUESTION: You might win a Pyrrhic victory.

MR. GILBERT: Well, the only thing before the Court is the unconstitutionality of the exclusion of the males.

QUESTION: Will you expand a little bit for me how the vendor here has standing?

MR. GILBERT: Yes, your Honor. It would be like the doctors to some extent in the abortion cases or the vendor of contraceptive articles in the Eisenstadt v. Baird case. In fact, I believe in your recent Singleton v. Wolf case last year, I believe went into this standing question quite to some extent.

QUESTION: Yes, but in Singleton I think we relied somewhat on the fact that the patient would be reluctant to bring the lawsuit. Here your vendees weren't reluctant at all, your single vendee wasn't reluctant at all, and hence I wonder about the soundness of your equating the relationship between the bar and its customer with that between the doctor and his patient.

MR. GILBERT: Well, I don't think the desire of privacy is all that is -- we still have the legal problem. If the vendor sells to the male 18 to 21, she loses her license. She is subjected to possible criminal action. Now, I think that's standing enough right there, certainly the Eisenstadt v. Baird, the contraceptive cases. That's where the penal sanction actually runs, and if anything, I think Mrs. Whitener has found more standing; even if we did have a class action of young men, Mrs. Whitener would really be "the party" in this case.

QUESTION: Of course, you have to say the same thing about a person aged 17.

MR. GILBERT: No, your Honor, there is no such discrimination that the vendor could vicariously assert in that case.

QUESTION: She is injured just as much as --

MR. GILBERT: Your Honor, if there were some theory of law supporting an argument that young persons down to 17

should buy beer, the vendor would have standing to assert that in addition to the 17-year olds.

QUESTION: But analytically speaking, can we really give your vendor client any relief? If we decide that this is an unconstitutional discrimination, don't we have to leave it up to the State of Oklahoma to decide whether all minors up to 21 will be barred or all minors up to 18 will be barred? So in effect your client's position may be worsened if you win the lawsuit.

MR. GILBERT: No, your Honor, that I don't -- let me say a first thing. If the legislature wants to raise the age, they can do that in a prospective manner. Now, in judicial action, first of all, the way the complaint is drafted and what is before the Court is only the exclusion of the males.

QUESTION: You say what's before the Court. What's before the Court is your complaint that it's an unconstitutional discrimination to treat, say, women can buy at one age, and men at another. Now, I don't know that the parties are free under our decided cases to say you may only decide this case in a particular way. I mean, I think that depends on the thrust of our decision.

MR. GILBERT: All right. Let me explain this. First of all, as I have mentioned, the way the complaint has been drafted; second, the State has not urged this alternative argument as a basis for supporting the denial of beer to young

men 18 to 21, and I happen to know that that was a deliberate decision, so it hasn't been raised by either side.

The third point, this is a due process question which was not touched on in Stanton v. Stanton. Let me point out, if the legislature wants to raise the age or take away a vested statutory right, the legislature doesn't have to give notice. But if a court wants to take away a vested statutory right such as the vested statutory right of females 18 to 21 to purchase beer, it can't be done in a judicial action without giving notice and opportunity to be heard, which means to take away the young women's right by judicial action as opposed to legislative action, you would have to turn this case into kind of a third-party cross-claim class action and serve notice on all females 18 to 21 to give them an opportunity to argue to the court why that shouldn't be done.

QUESTION: Perhaps you should have joined them as indispensable parties.

MR. GILBERT: Well, your Honor, if we had the money to have a class action, we would have spent it on getting a class action for the young males.

But that is why the State, incidentally, did not make the third party, was just the expense of impleading an entire class. Now, that is why to resolve an inequality by taking away the benefit to the favored class, I submit cannot be done on the basis of judicial action without impleading the

favored class to come in and be heard for whatever their arguments may be worth. The legislature can do it, but the court can't.

Furthermore, in Stanton, I believe there was a question of remanding to the State courts. In this case we have a direct appeal from a three-judge Federal court. There is no State court to remand to.

As I believe the recent general rule also that, oh, to some extent a court may try and second-guess a legislature, since 18 seems to be almost a universal age for adulthood now, I think 18 would be the age. I don't think there is any question about it. The legislature has gone through and said 18 for just about everything in Oklahoma except this beer discrimination.

QUESTION: Are you going to mention Mr. Justice Douglas' opinion in Kahn v. Shevin sometime in your argument?

MR. GILBERT: Your Honor, Kahn was a question, I believe, of compensatory discrimination for the effects of past discrimination for the unfavored sex. I think it is clearly inapplicable in this case. I mean, if the compensation is access to 3.2 percent beer, the only way that can be compensation for anything would be to say it's giving young women an opportunity to drown their sorrows in 3.2 percent beer for the effects of past discrimination.

QUESTION: Perhaps you have stated the position of

Kahn v. Shevin in rather too narrow a way. Didn't the court hold that there are differences which can be recognized by legislative bodies, and isn't that what the legislature of this State did, that --

MR. GILBERT: Your Honor, if that is correct --

QUESTION: -- on the accident record and on the vulnerability record of males as against females?

MR. GILBERT: Your Honor, the facts which the legislature took judicial notice of or reacted to in Kahn was the fact of past discrimination. It wasn't really based on any innate difference between male and female. And there is no basis in this record to say that the legislature even remotely thought it compensating for past discrimination.

Now, the difference between male and female in Kahn was that the female was the victim of discrimination, but that would not apply --

QUESTION: There was a passing reference to that, but that's not the heart of that decision.

MR. GILBERT: Well --

QUESTION: It turned on the unemployability in large part that happened to come from past discrimination, but the relative difference in employability of women and men at the age of the people involved there.

Well, you go on with your argument.

MR. GILBERT: Now, as I was saying, this statute

derived in its origin from the 1890 legislature, and there are many theories as to why it happened. I think the theory that there was maybe a legislative intent that little boys were little devils and little girls were little angels is as good as anything I have heard. The State has never come up with what the real reason was.

QUESTION: In 1890, I gather, the prohibition was against sale to minors, and there was another statute that defined, for some purposes, civil, perhaps, girls were minors until what?

MR. GILBERT: Minors were females till 18, and males to 21.

QUESTION: But that's how you got the distinction 18 to 21 in 1890, wasn't it?

MR. GILBERT: Yes, your Honor. And that was retained in Oklahoma until 1972. Now, in 1972 there were two judicial decisions that told the legislature this couldn't survive. One was this Court's decision in Reed v. Reed, and the other was a Tenth Circuit decision which held Oklahoma's criminal age/sex discrimination unconstitutional.

So in 1972 the legislature said 18 is the age for criminal and civil majority for both females and males, but retained it for this one purpose.

QUESTION: Did the legislature tell us why they retained it?

MR. GILBERT: No, your Honor. Nor has the Attorney General ever told us why. There is no real --

QUESTION: Didn't you have a lot of religious groups?

MR. GILBERT: Yes, your Honor. I can make a statement of counsel that I think it was strictly sectarian pressure.

QUESTION: Were there not in fact pressures of that kind in Oklahoma?

MR. GILBERT: Yes, your Honor, there is no question about it.

QUESTION: And that's why it was retained, isn't it?

MR. GILBERT: Yes, your Honor, it was to save the souls of young men 18 to 21 from exposure to pool, beer, and girls. That was what was quoted in the legislative committee.

QUESTION: Mr. Gilbert, may I ask this question before you go on: Assume for the moment that the legislature by an appropriate committee had conducted hearings and come up with findings that legislation of this character was required in the public interest by safety, would that affect your position in this case?

MR. GILBERT: No, your Honor, but that does get us into the next question, the statistics which the State has elected to rely upon.

QUESTION: If it were perfectly clear that the legislative purpose was safety on the highways primarily, would

that change your position?

MR. GILBERT: Well, it's kind of a moot question because we know what the real reason was.

QUESTION: I am not suggesting what the real reason was. I have no idea what it was. I was asking you a hypothetical question.

MR. GILBERT: All right, the hypothetical answer would be if they are concerned about safety from irresponsible young adults, they are going to have to say all irresponsible young adults regardless of race, creed, color, sex, and whatever. They can't single out one particular group of teenagers just on the accident of their birth and say, "We are going to say that these people are congenitally dangerous and deny them the right to buy nonintoxicating beer."

Now, this doesn't --

QUESTION: ... even though the legislature had statistics that may have shown that the men drove, when men and women went out together, men were more often drivers than women were?

MR. GILBERT: All right. First of all, there weren't any statistics.

QUESTION: What if there were statistics.

MR. GILBERT: All right. Your Honor, the mere fact that there were more men on the road doesn't mean that the individual male is any more dangerous. Now, maybe since there

are more men on the road, there may be more men just by the flow of natural statistics getting involved in collisions. In fact, it would be almost inevitable. But that doesn't mean that the individual male is any more dangerous just because he is a member of a class that has more --

QUESTION: No, but that means that the law that Justice Powell was talking about,would it be arguably an improvement in safety?

MR. GILBERT: Your Honor, I would say anything could be -- you could pass a law saying no Negro will drive while intoxicated. Now, this relates to the public thing, but the thing is you can't discriminate even for something like public safety on the basis of certain criteria.

QUESTION: Has the Court ever held that discrimination of this sort is of the same class as discrimination on the basis of race?

MR. GILBERT: Your Honor, this Court has come very, very --

QUESTION: Well, I asked you a question. Has it ever held?

MR. GILBERT: No, it has never held that it is totally to be treated the same as race, your Honor.

QUESTION: Is it your position that Cronin v. Adams has to be overruled if you were to prevail here?

MR. GILBERT: Yes, your Honor.

QUESTION: Are you asking that it be overruled?

MR. GILBERT: Yes, your Honor. Or it could be tactfully ignored.

[Laughter.]

MR. GILBERT: There is another candidate in that same category, I would submit for your Honors' consideration, is Goesaert v. Cleary. I feel that Goesaert is to sex as Plessy v. Ferguson was to race and should be treated accordingly. In fact, as I read the Goesaert decision, it was considerably worse than Plessy in the race, because Plessy, while saying that the unfavored race would have to have its education and facilities and so forth separately, Plessy never went so far as to say the unfavored sex (sic.) could be denied these things altogether. But Goesaert went to far as to say the unfavored sex could be denied these things altogether. So that's one way I view Goesaert as being considerably worse than Plessy v. Ferguson.

QUESTION: Has Plessy v. Ferguson ever been overruled?

MR. GILBERT: It was not directly overruled, as your Honor knows. It was quietly put to rest as an example of the mentality of the age which gave it birth. I would actually ask no more for Cronin and for Goesaert.

QUESTION: The first Harlan and Mr. Justice Holmes participated in Cronin v. Adams, of course.

MR. GILBERT: Yes, your Honor. Well, the founding

fathers we might say really didn't do away with slavery either, but we don't look at it that way.

QUESTION: That was Mr. Justice Bradley who wrote Goesaert, wasn't it?

MR. GILBERT: I can't remember who wrote -- Goesaert, your Honor?

QUESTION: Frankfurter wrote it.

MR. GILBERT: I believe it was Justice Frankfurter.

QUESTION: Yes.

QUESTION: May I ask if you know of any State laws still existing that prohibit or limit the sale of intoxicants to Indians?

MR. GILBERT: No, your Honor. To my knowledge there are no such laws any more. I think they derived from the time when certain Indians, under the wording of the 14th Amendment, were not U.S. citizens at the time, the so-called wild Indians. To my knowledge there are no such laws extant at the present time.

QUESTION: What about Choctaw County?

MR. GILBERT: Your Honor?

QUESTION: They have county laws in Oklahoma of complete prohibition, don't they?

MR. GILBERT: I don't believe it's a complete prohibition for intoxicants. According to the State constitution --

QUESTION: Choctaw County recently was.

MR. GILBERT: I am unfamiliar with that, your Honor. Now, there are certain restrictions to restricted Indians, but they have to do with conveyance of lands and so forth. I am not familiar with any --

QUESTION: Choctaw County restricted liquor to anybody.

QUESTION: That's different.

MR. GILBERT: It's not that way now. That was back in territorial days.

QUESTION: Yes, in 1940.

[Laughter.]

MR. GILBERT: Your Honor, we have some statistics in this case, and this is what the court claims separates this case from everything else. I have examined these statistics in detail in my proposition two. I would point out one very salient thing, and I think it sets the tone for all the other defects. The statistics are arrest statistics; they are not conviction statistics. All the statistics show is that young men are suspected by the police more often or are accused by the police more often for alcohol-related offenses than young women. That's it. And the statistics go downhill right from there. I don't have time for a detailed discussion of them, but we do have this.

Now, I have another thought on these statistics. When you look at the nonarrest rates, the sobriety rates, it's

something like 98 percent of the males and 99 percent of the females, plus or minus 1 or 2 percent differential.

QUESTION: Counsel, for that argument do you not necessarily assume that everyone who has never been arrested has never been drunk?

MR. GILBERT: Well, I think the law presumes that, your Honor. There is a presumption of innocence, and anyway if it's a State statute and they are trying to defend a suspect type or scrutinize a classification, I think the burden of proof is on them to come in with something more than "we suspect that young males are guilty more often than girls."

QUESTION: Is it your position that a legislature may never rely on statistical evidence based on numbers of arrests?

MR. GILBERT: Not for proving that some group is inherently irresponsible or criminal or deleterious in some thing.

QUESTION: What percentage of the total 18 to 21 male population is represented by the arrest statistics?

MR. GILBERT: I believe 2 percent, your Honor.

QUESTION: Are you arguing that at the very least it's over-inclusive, 98 percent are to be denied 3.2 beer because 2 percent might --

MR. GILBERT: Yes, your Honor, that's irrational in the sense it --

QUESTION: Over-inclusive.

MR. GILBERT: Yes, your Honor. But the point I am trying to make on the statistics, all we have got in what I take the liberty of calling the sobriety ratio is that there is only a 1 or 2 percent difference. It's the way you juggle the statistics depending on which ax you have got to grind.

I leave the Court with the thought before I sit down for rebuttal, that if that's all it takes to get around the equal protection clause, let's forget equal protection. There will always be a couple of percentage difference between any two groups you separate, black versus white, male versus female, Catholic versus Protestant, whichever group the legislature is out to get, if all they have to do is draw on statistics like what happened below, then I think it will be the beginning of the lend of equal protection.

Furthermore, just to run into my rebuttal time for just a moment, a discrimination based on sex is like race because it's an accident of birth which can't be changed, and for at least 99 percent of human activity, it has absolutely no relationship to one's character, ability, competence, sobriety, or anything else. Now, if race is going to be treated differently from sex, it can only be because in sex there are some organic differences which for limited purposes might be relevant. We have no analogy between the races. But for nonorganic discriminations like this, I think it is

indistinguishable from race, and I ask this Court, although it's not necessary to this case, because the statistics really wouldn't pass even a rational relationship muster, to maybe clear the air to say that sex discrimination not based on organic differences can be treated the same as racial differences (sic).

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Gray.

ORAL ARGUMENT OF JAMES H. GRAY ON BEHALF OF THE APPELLEES

MR. GRAY: Mr. Chief Justice, and may it please the Court: I am James Gray and I am here representing the State of Oklahoma. I feel that the State can summarize its position rather briefly.

The trial court was presented with an attack on a State statute which, as counsel for the appellants has indicated, limits the purchase of beer, 3.2 beer by weight, to boys until they are 21 and to girls until they are 18.

Counsel for the appellants presumes to know the exact reasons for this legislation. I will make no assertion. The citation of authority that I recall was a newspaper article in his brief. But evidence was put on by the State, statistical in nature, which we believe shows a difference in this limited age group of 18 to 20-year-olds involving primarily traffic, involving, I think, in terms of the State interest, a desire

to reduce and to --

QUESTION: Was there any legislative hearing?

MR. GRAY: Your Honor, I am not able to say. Oklahoma does not keep committee records, legislative history as does Congress, and I do not know.

QUESTION: Is it your submission that we simply have no evidence whatever why the legislature of Oklahoma retained this distinction in this law when they abolished it for all other purposes?

MR. GRAY: We have nothing in the form of legislative documentation of committee reports, et cetera, et cetera. The State has offered what it believes to be a very reasonable basis for the law and for which the legislature undoubtedly passed it, but we cannot --

QUESTION: Now, you have changed to "for which the legislature undoubtedly passed it." Where do you get the basis for that?

MR. GRAY: That is purely the judgment, your Honor, of our office and taking our history.

QUESTION: But that is really conjecture, isn't it?

MR. GRAY: Yes, it is.

QUESTION: What about -- I understand there was considerable pressure by sectarian groups at that time upon the legislature to retain this distinction. Is that true or not?

MR. GRAY: I do not know. Mr. Gilbert says it's so. I am unable to refute his statement, but I have no assurance of my own that this was the case. I think Oklahoma was traditional in its treatment of the age of majority since its statehood in 1907 being 18 for girls and 21 for boys. It is significant, I think --

QUESTION: Am I correct that that was certainly true, indeed, ever since 1890,wasn't it?

MR. GRAY: Yes.

QUESTION: There was a general statute which for civil and criminal purposes made the distinction.

MR. GRAY: Yes.

QUESTION: But that was all erased, wasn't it, in 1971 or '72, with the exception of this statute.

MR. GRAY: Yes. In 1972 the legislature amended the statute which defined minors for most all purposes and changed it to 18 for boys and girls.

QUESTION: But retained it for this statute.

MR. GRAY: But retained it for this statute by enacting a new statute defining minors for purposes of selling 3.2 beer. And this is why I think that it is their intent in '72 which is critical here, not necessarily the intent they may have had years ago.

The purpose that the trial court found is one which we have asserted which we think, though we cannot document it

with committee reports or this sort of material, which would be the best, of course, is to reduce the traffic, reduce death, injury, and property damage. The court applied --

QUESTION: Really what you are arguing is that might have been a very legitimate reason.

MR. GRAY: Yes.

QUESTION: But you can't say to us that that was indeed the reason they retained it.

MR. GRAY: No, I cannot, your Honor.

QUESTION: Can you think of any better reason?

MR. GRAY: No, your Honor, I cannot think of better ones for purposes of sale of beer other than traffic where you would distinguish between the sexes. I could think of reasons --

QUESTION: Are there some people in Oklahoma who don't drive?

MR. GRAY: Certainly.

QUESTION: Who do drink?

MR. GRAY: Yes.

QUESTION: What do you do with that?

MR. GRAY: I don't think the legislature -- I will say why. I don't think the legislature was concerned with that aspect of it in this legislation because this same statute also eliminates from consideration a parent who may wish to give his child beer. This is not prohibited specifically

by the statute.

QUESTION: Do you think that helps?

MR. GRAY: I think it only eliminates the now driving members of the class as a reason for the legislation.

QUESTION: Well, are there some nondrivers who don't have parents to give them liquor who drink liquor?

MR. GRAY: I am sure there are.

QUESTION: Have you got anybody else?

MR. GRAY: Well, I am sure there are many who drink beer who do not drive of all ages.

QUESTION: General Gray, does this statute prohibit an 18-year-old male from drinking 3.2 beer?

MR. GRAY: No, sir.

QUESTION: Then how can it be related to the objective you describe?

MR. GRAY: I think it can because of the nature of the establishments that sell beer. Many of them are package stores, Seven-Eleven convenience stores, grocery stores, where in our society today you mostly drive to get to.

QUESTION: If the legislature were concerned with your objective, don't you think they ought to have made it unlawful for an 18-year-old to drink this dangerous product?

MR. GRAY: No, sir, because drinking it without driving --

QUESTION: When a boy and a girl of the same age go

out together, the girl can go in and buy it and they can drink it together.

MR. GRAY: Yes.

QUESTION: But the legislature just didn't think of that eventuality, is that your assumption?

MR. GRAY: No, sir, I am not saying they didn't think of it. I am saying that the statute -- I would have to be candid and say it is not perfect; it sure doesn't solve all the problems even if I offered reasons or truth.

QUESTION: What problem did it solve?

MR. GRAY: I think it does reduce the amount of traffic involved in accidents in this age group which will affect the general public.

QUESTION: Do your figures show that?

MR. GRAY: A reduction, no, sir, the figures we submitted to the Court did not show reductions, but showed percentages of involvement.

QUESTION: It didn't show a drop.

MR. GRAY: No, sir. On the contrary, the FBI statistics showed that arrests --

QUESTION: You have a driving under the influence statute, don't you?

MR. GRAY: Yes, sir.

QUESTION: Do you think it would show anything at all about 3.2 beer?

MR. GRAY: Not specifically, other than the preference for beer in the statistics on the roadside survey, Exhibit 3, I recall.

QUESTION: Does it show anything about the intoxicating nature of 3.2 beer?

MR. GRAY: The statistics do not.

QUESTION: I gather the premise has been that 3.2 beer is not intoxicating, isn't it?

MR. GRAY: Yes, sir, this has been submitted by the appellants, and I think it is simply not true. Counsel relies on one Oklahoma case which he says means that 3.2 beer or 3.2 percent alcohol by weight in beer is nonintoxicating when in fact it is intoxicating.

QUESTION: Didn't Congress find that it wasn't back in 1933 or 1934 under the Volstead Act?

MR. GRAY: Well, sir, I am not sure of that. I am not familiar with it.

QUESTION: I thought they did.

MR. GRAY: The case I have cited in our brief is Douglas v. State,, and it went into an effort at that time to avoid a conviction on a DWI charge by wanting to cross-examine the officer about what kind of beverage he had been drinking, the effort being there to require the State to prove that 3.2 beer was intoxicating because I think their effort was to show that's all he had had to drink. Our court said that was

not necessary, it was not error because our penal statutes, the after-the-fact statutes, the DWI, reckless driving, and so forth and so on, all of which could be involved in alcohol problems. It doesn't matter, the court said, what kind of alcoholic beverage you drink as long as you were intoxicated.

So I don't think this premise is correct.

QUESTION: General Gray, may I ask one other thing while you are interrupted. To the extent that the evidence does shed any light on the difference, if any, in impact on males and females of the consumption of alcohol tends to indicate that males because they are larger can absorb alcohol better than females, is that not correct?

MR. GRAY: I believe that's true when you consider the exact amount of alcohol intake. The average male, with myself as an exception, being larger than females would be able to assimilate more alcohol without being inebriated than the corresponding female.

QUESTION : Assuming that as a fact just for purposes of my hypothetical question, do you think that evidence would be sufficient to support the opposite discrimination from the one that the State elected to have. In other words, would that have been sufficient to provide an adequate constitutional basis for discriminating against females in favor of males?

MR. GRAY: I would have to say yes to the extent that it would at least be a concrete physical, physiological difference,

which would not be one based on old notions and stereotyping, and so forth. But I think --

QUESTION: But your theory, then, is that any rational basis is sufficient to sustain this discrimination?

MR. GRAY: Yes, if it is not based on a ground of difference which has no relation to the objective of the statute. And I think we have --

QUESTION: But how do we know what the objective of this statute was?

MR. GRAY: Well, the Court has nothing but what the State Attorney General's office presented in evidence as its best judgment on the legislative purpose.

QUESTION: In other words, if it's related to what the litigant says he believes is a reasonable assumption as to the objective of the statute.

MR. GRAY: Yes, sir. I have to be candid with the Court and say I have nothing to offer of a concrete nature as to the actual reasons the legislature chose to change this statute -- rather, not change it, but to add a definition to this statute. Oklahoma just does not keep that record ordinarily, and I am not personally aware of it. By the same token, I cannot assume that Mr. Gilbert's comment was necessarily correct that sectarian influences was the real reason. I am not aware of that either.

QUESTION: I don't find McGowan v. Maryland in your

citation of authorities. Is it in your brief somewhere?

MR. GRAY: Your Honor, I don't believe I put McGowan in the briefs. We have tried to adopt the trial court's determination in Reed v. Reed was the test, and I don't disagree with that. I think the trial court was correct in requiring this classification to be subject to close judicial scrutiny, and --

QUESTION: Don't you think McGowan v. Maryland gives you a little bit of support?

MR. GRAY: Yes, sir, I think it does, and we have cited a number of cases, some of which counsel has asked that this Court reverse.

QUESTION: Have you cited the early cases decided in the wake of the adoption of the 21st Amendment, those opinions written by Mr. Justice Brandeis, most of them, State v. Young's Market and those cases?

MR. GRAY: Yes, sir, we have stated some before and some after. We have stated Crowley v. Christensen in 1890 and go through with such decisions as the Goesaert decision which was after a 1948 law --

QUESTION: I think what Mr. Justice Stewart was asking was the 21st Amendment, which was adopted somewhere in the thirties, so a case in 1890 would have been before that rather than after it.

MR. GRAY: Yes, your Honor. The reason I have cited

those earlier cases is to show primarily a history of this Court, I think, supporting, under the Fifth Amendment the State's power to regulate intoxicating beverages. This power is crystallized in the 21st Amendment. In each of those cases, I think without exception, that I have cited, both from 1890 and through Goesaert in 1948, all involved an attack on an equal protection basis. None of them involved a sexual classification except for Goesaert.

QUESTION: Well, one of Justice Brandeis' opinions contains a statement, doesn't it, that what is a proper classification under what is permitted by the 21st Amendment can't be forbidden by the 14th Amendment?

MR. GRAY: Yes, your Honor. And we have cited that statement in our brief. I do not know, quite frankly I cannot evaluate that now in light of Reed v. Reed and California v. LaRue.

QUESTION: Reed v. Reed didn't involve anything to do with alcoholic beverages, did it?

MR. GRAY: No, it was the administrative appointment situation. But we do think that California v. LaRue is close to this case. It did not involve a sexual classification, but in its own way I think was a more difficult decision and a more difficult problem than the case at bar. And the reason I say that is because the activity sought to be curtailed by California was to prohibit live sexual entertainment in those establishments

which it licensed to sell liquor by the drink. Some of those activities were, I think, admitted by this Court to, or would have been ordinarily protected by the First Amendment. In our case, the activity which is being restricted, that is, the ability to purchase beer, is not, we think, and we have cited authorities, a constitutionally protected right. Certainly equal protection is a question here. We are not minimizing that. But even with First Amendment rights at stake, the Court I feel in California v. LaRue still recognized a presumption in favor of regulations authorized by the 21st Amendment.

QUESTION: May I ask does the record show whether the 3.2 beer in this case was imported into the State or manufactured in the State?

MR. GRAY: No, it does not. It would be all-inclusive, the statute would be all-inclusive.

QUESTION: The second clause of the 21st Amendment is very specific, as pointed out by Mr. Justice Brandeis in State Board v. Young's Market Company back in 1936, and refers to importation or transportation into the State.

MR. GRAY: Yes, sir.

QUESTION: So that might be a dispositive fact in this case, might it not, under the 21st Amendment?

MR. GRAY: Your Honor, although I am not going to pretend to be the scholar I perhaps should be in the history

of the interpretation of the 21st Amendment, I can only say that it was my impression that it was not that strictly limited in its application in terms of regulatory authority over those kind of beverages. But even if that's true, surely under the 10th Amendment, the police powers of the State, that the State has the authority to regulate this industry as long as it does so in a reasonable manner. This is always a standard test.

QUESTION: You have specific authority under the 21st Amendment. That was the condition upon its recommendation of the Congress to the States for adoption. There is a great deal of history behind it, and you have a specific provision in the second clause of the 21st Amendment.

MR. GRAY: Yes, sir, and it refers to importing the --

QUESTION: And Mr. Justice Brandeis said for a unanimous court, except that Mr. Justice Butler concurred only in the result and Mr. Justice Stone took no part, that a classification recognized by the 21st Amendment cannot be deemed forbidden by the 14th.

You don't rely on that at all?

MR. GRAY: We do rely on it, your Honor. Perhaps I misunderstood you. If I am correct in assuming that importation of intoxicating liquors is not the only intoxicating liquor that may be controlled under the 21st Amendment, then that authority is clear that equal protection attacks, as cited in

the 1890 cases and through Goesaert in 1948, have all rejected equal protection attacks against regulations, whether it was the requiring of bond, requiring an importer's license, all these things which were asserted to be a denial of equal protection were not accepted on that basis because of the broad authority, whether they went from the 10th or through the 21st in deciding, in my opinion.

But I am wondering if, though ostensibly in my client's favor, the strong language about the 21st Amendment cannot be struck down by the 14th and so forth, I wonder if it is that strong. I wonder if Reed v. Reed and even California v. LaRue would still allow such, you know, quite a strong statement today.

But I think irregardless, the trial court in our case found from evidence which it conceded was not open and shut, not altogether without some objections, yet I think if we consider that legislatures in terms of what is admissible as evidence, what the court could have considered, I don't think legislators are bound to consider only evidence which would be admissible in court in reaching a decision as to legislation.

QUESTION: The three-judge court ruled on the police power as "strengthened" by the 21st Amendment.

MR. GRAY: Yes.

QUESTION: This was used to strengthen it, that's all.

MR. GRAY: Yes, sir. We think this is a minimum result based on the decision in California v. LaRue. It may be the 21st Amendment should be even more influence on this case.

QUESTION: Well, if you are going to knock out the 14th Amendment, then Oklahoma could pass a law and say no Negro can have a drink of beer.

MR. GRAY: Your Honor, I wouldn't pretend, and I think the States have already --

QUESTION: Personally, I hope you don't go that far.

MR. GRAY: No, sir.

[Laughter.]

MR. GRAY: And I don't believe we will, and we have been trying to say, and I will say it again before this Court, that we would not think that this evidence would justify racial discrimination on the purchase of beer or alcoholic beverages of any kind. But we don't think we have entered a suspect area yet either. We don't think this Court has noticed that yet, and we think that under the Reed test that we have met the burden to show a rational relationship.

QUESTION: Suppose we find it is not that reasonable, then where can you go? Do you lose?

MR. GRAY: Well, I think unless the presumption of the 21st Amendment is stronger than I feel it is, that if the Court rejects the evidence, then, yes, we would probably lose.

QUESTION: I didn't say reject it; I said is not sufficient to show that it meets the reasonableness test, you lose.

MR. GRAY: I think so. I cannot personally feel that the 21st Amendment would save it altogether if it did not pass the other test.

QUESTION: Did Oklahoma ever have laws prohibiting or limiting the sale of beer or other beverages to Indians?

MR. GRAY: Yes, sir, I think it was an absolute prohibition, and I don't know, I cannot recall when it changed. But I believe that's right, especially in territorial days I think this was so. But that was Federal.

QUESTION: There are no such laws on the books now, are there?

MR. GRAY: None to my knowledge.

QUESTION: In Oklahoma?

MR. GRAY: None to my knowledge.

QUESTION: Or any other States that you know of?

MR. GRAY: None that I know of. I don't know what Federal regulations there might be concerning reservations, but I don't know of anything myself.

QUESTION: As to the State law, it couldn't apply to judges on the Court of Criminal Appeals, could it. Judge Bearfoot was a Chief Judge. I'm sure it didn't apply to him.

MR. GRAY: No, sir. I think those laws, all those

laws had a way of bending at the appropriate time.

Your Honor, I would close, I think, by perhaps referring to one other case. The Oklahoma Supreme Court, to my knowledge, has not had an opportunity to rule on this issue directly. Counsel does cite Bassett v. Bassett which was decided after 1972, which was a court of appeals decision of Oklahoma. The issue before the court was whether a parent could sue an unemancipated minor for a tort, the minor being between 18 and 21 and thus subject to the old statutes, the cause of action having arisen before '72. The court of appeals concluded without having to change the legal period that this kind of an action shouldn't be allowed any more, this rule shouldn't bar the action any more, chose instead to declare all 18-21 year-old minority distinctions prior to '72 as unconstitutional in light of Reed v. Reed.

The court did not deal with this statute, and the court did not deal with the 21st amendment. And we feel the court went much beyond what was at stake in that particular case in reaching that conclusion.

The Supreme Court of Oklahoma's rule governing that case indicates that being a court of appeals decision not specifically approved by the Oklahoma Supreme Court is persuasive to the Oklahoma courts only, but is not precedent. And we think the true precedent for this case is the decision below, the first time it has come to grips, to my knowledge.

QUESTION: I think it would be difficult for you to object to the seller of beer asserting his own rights in this case. But have you ever in this case argued that he has no right to assert the rights of the young men under 21?

MR. GRAY: No, your Honor, we have not proposed that argument, and we have presumed, perhaps wrongly, that the sale of 3.2 beer to the restricted minority in this case would subject that seller to sanctions and perhaps loss of license.

QUESTION: The basis for the claim that there is an escalated standard in this case is that it's a sex discrimination.

MR. GRAY: Yes.

QUESTION: And your position is that the seller may make that sort of a claim?

MR. GRAY: I am not sure the seller can step in the shoes of the minority. I would have to say that we have considered, at least, that his own situation was sufficient to make him a party in interest, but he is certainly not a minor. I don't think they can get a beer license until they are 21. So we know the vendor is not involved in this statute.

QUESTION: In the district court you had to defend claims by both, didn't you.

MR. GRAY: Yes, we did.

QUESTION: Mr. Gray, does the record show whether or not there is any distinction made in the insurance rates charged

for public liability insurance for young women as against young men?

MR. GRAY: No, the record does not reflect the information. I know that in Oklahoma at least until you are 25 you are rated pretty heavily in terms of liability insurance. But whether or not they distinguish between men and women, I do not know, and the record would not show.

QUESTION: General Gray, your statistical evidence you, I believe, contend and substance shows that there are more male drivers than females in this age bracket, and indeed they do more drinking than the females do.

MR. GRAY: Yes, your Honor.

QUESTION: That is basically what it boils down to, therefore, there is a greater hazard.

MR. GRAY: Yes, sir.

QUESTION: Would you consider it sufficient to sustain the statute if you had merely shown that males are more frequently drivers than females?

MR. GRAY: No, because that wouldn't have made it an alcohol-related problem at all. It wouldn't have been then within the --

QUESTION: But is it enough? You haven't proven that it's a 3.2 beer related problem. I am trying to figure out just exactly what your syllogism is.

MR. GRAY: Your Honor, we didn't feel that it would

have to be limited to 3.2 beer or itemized as 3.2 beer for this purpose, because it would have been illegal for boys or girls, either one, to drink alcoholic beverage in excess of 3.2 beer until they are 21. So if the statistics show that there is alcohol involved in an under-21-years-of-age group, then it's an illegal purchase automatically for boys, it might have been for girls if it was hard liquor, but it wouldn't have been if it was 3.2 beer. So we think that the fact that there is alcohol involvement in the statistics, some of them, is sufficient, not it has to be related just to one beverage, 3.2 beer. The hazard is the same, and they are both --

QUESTION: Your statistics relate entirely to law violators, don't they?

MR. GRAY: Except for the roadside survey.

QUESTION: You are assuming that these law violators would obey this law but not those other laws, that is what your statistics relates to.

MR. GRAY: I am not sure I understand that. I would like to try to answer it. I am not sure --

QUESTION: Well, your statistical evidence is based primarily, at least, on arrests. You are presuming -- I know a person, of course, is presumed innocent, but for statistical purposes and legislative purposes, you are assuming those are people who have in fact violated the law.

MR. GRAY: Yes.

QUESTION: They violated the laws now on the books, but you are presuming they will all obey this law in order for this law to accomplish its objective.

MR. GRAY: Yes, I am afraid -- yes.

QUESTION: It's kind of an anomalous method of proving this legislative purpose.

MR. GRAY: But the minority is not the only one. These boys and girls in this restricted class, of course, are only part of that restriction. Vendors can't sell to them either. These people we can expect to obey the law. They are threatened under penalty of losing their license if they do. This doesn't mean the law is perfect. It doesn't mean that these boys can't get it by having their girl friends go in and get it, as counsel has pointed out. It's not a perfect solution. But we don't think it's unconstitutional.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Gray.

Do you have anything further, Mr. Gilbert?

REBUTTAL ARGUMENT OF FREDERICK P. GILBERT

ON BEHALF OF THE APPELLANTS

MR. GILBERT: Yes, very briefly.

Your Honors, may it please the Court: On this question of standing, my distinguished co-counsel has talked to me to invite your attention to two cases, Barrows v. Jackson in 346 U.S. and Sullivan v. Little Hunting Park in 396 U.S., that a white owner of real estate wishing to sell to Negroes does have standing

to assert the equal protection rights of Negro vendees. I think that is relevant to the question here.

QUESTION: That's partly because that widens his market, doesn't it? He has an economic interest.

MR. GILBERT: Yes, your Honor. That's our plea here. It's the same thing.

Also, on this question about the boys being able to get the liquor somehow, this is just part of the old thing in Oklahoma that the dries have had their law and the wets have had their liquor, kind of a gentlemen's agreement. But I will tell you who really is the loser in this scheme, it's the vendor who around election time can always expect to be raided by the local law. That goes to the standing.

Now, on this getting intoxicated on 3.2, let me just state something actually from my own experience. 3.2 is so diluted that the normal man will get extremely bloated on the stuff before he can get drunk. It is possible to get drunk but you have to force it down.

[Laughter.]

It's difficult to get drunk on 3.2.

The question was made about sex in the LaRue case. That is a different kind of sex than what we have got involved in our case. That's sex's activity. This is sex as a biological grouping. If this Court would uphold a rule saying you don't have to serve, or you can't serve liquor at a horse

race, you wouldn't say that the State under the 21st Amendment can regulate the alcohol and race relationship because that is using race in a different sense than the normal sense. And that's what I am trying to explain, the difference between sex in LaRue and sex here. It's the same word but they mean two different things.

The statistics -- I want to mention one thing. They all date from 1973. Now, some of them date from 1972, but they weren't published until 1973, so this Court is at liberty to take whatever inference it wants as to what was or what was not before the legislature when this statute was passed.

OK. I just have one other thought. I leave you with the thought that the sobriety differential of 1 or 2 percent in this case was far less than the business experience differential in Reed v. Reed or the dependent differential between husbands and wives in Frontiero and so forth, Frontiero v. Richardson.

We are really dealing with something almost de minimis in the sobriety ratio. To get the seeming imbalance you have to juggle the statistics which I discussed in my brief. I don't have time for a parting thought.

I thank you for your time.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 12:02 p.m., the arguments in the above-entitled matter were concluded.]