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In the

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-628

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

VERSUS

HONORABLE DAVID BOREN, Governor, State of Oklahoma, HONORABLE LARRY DERRYBERRY, Attorney General, State of Oklahoma, HONORABLE D. M. BERRY, Chairman, HONORABLE LAWTON L. LEININGER, Vice-Chairman, HONORABLE J. L. MERRILL, Secretary-Member, Oklahoma Tax Commission, HONORABLE RAY WALL, Presiding Judge, Ninth Judicial District Court, State of Oklahoma, HONORABLE CHARLES H. HEADRICK, District Attorney, Ninth Judicial District, State of Oklahoma, HONORABLE ROSE JARVIS, District Court Clerk, Payne County, State of Oklahoma, HONORABLE FRANK PHILLIPS, Sheriff, Payne County, State of Oklahoma, and HONORABLE HILARY DRIGGS, Chief of Police, Stillwater, Oklahoma,
*Appellees.*

## BRIEF OF APPELLEES

## SUMMARY OF ARGUMENT

1. The trial court correctly applied the *Reed* v. *Reed*, 404 U.S. 71 (1971), test and found a rational basis based on criteria related to the subject matter for the classification found in 37 O.S. Supp. 1975, §§241 and 245.

2. The determination that the Oklahoma statutes at issue are not unconstitutional is fully supported by the presumption in favor of classifications rendered pursuant to the 21st Amendment as evidenced by *California* v. *LaRue*, 409 U.S. 109 (1972).

3. The decision of the trial court is not contrary to *Stanton* v. *Stanton*, 421 U.S. 7 (1975), and other similar decisions in that administrative inconvenience was not used as a basis for denying any substantive or procedural rights, neither were old and outdated archaic notions about differences between men and women indulged in.

4. The findings of fact supporting the rationality of legislation is fully supported by the evidence which is similar in scope and purpose to the statistics used by this Court in *Kahn* v. *Shevin*, 416 U.S. 351 (1974), and *Papachristou* v. *Jacksonville*, 405 U.S. 156 (1972).

5. The state's purpose in seeking to protect the persons affected and the public from the slaughter and property damage on the highways is a legitimate legislative goal and whether the legislation in question was the perfect or complete solution or not to this problem is not in issue. *Seagram and Sons* v. *Hostetter*, 384 U.S. 35, 50-51 (1966).

## PROPOSITION I

**THE TRIAL COURT WAS CORRECT IN DETERMINING THAT THE PROPER TEST OR STANDARD OF REVIEW WAS AS SET FORTH IN *REED* v. *REED*, 404 U.S. 71 (1971).**

At the outset appellees would suggest to the Court that the trial court's judgment was basically in two parts: (1) the determination of the legal standard against which the Oklahoma statutes were to be compared, and (2) a review of the evidence to determine if the standard had been met.

The first part of this judgment is perhaps the most critical in that if this Court determines that some different standard should have been applied then appellees would request that this case be remanded at that point to give the appellees opportunity to present evidence under any such new standard.

Appellees, however, do not urge that the standard adopted by the trial court was in error, but quite the contrary, appellees urge that the test as enunciated in *Reed* v. *Reed, supra,* was the proper standard to apply. That portion of *Reed* v. *Reed, supra,* which the trial court determined set forth the standard to be applied is found at pages A6-A7 of the Jurisdictional Statement, 399 F.Supp., at 1308, which is reprinted here for convenience:

> "We feel that *Reed* v. *Reed*, 404 U.S. 71, provides the applicable test here. In *Reed* the Court stated, 404 U.S. at 75-76:
>
> > 'In such situations, §15-314 provides that different treatment be accorded to the applicants on the basis of their sex; it thus establishes a classification subject to scrutiny under the Equal Protection Clause.

> 'In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. (citations omitted) The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920).'"

The trial court was certainly not unaware of this Court's recent decisions of *Stanton* v. *Stanton*, 421 U.S. 7 (1975); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975), and *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975), but considered these decisions carefully and correctly noted that no new test was set out in these opinions and that no determination of "inherently suspect" classification was tagged onto sex-based classifications which then might have required a compelling state interest to be shown.

Without jumping ahead into Proposition II appellees would at this point direct the Court's attention to the legal conclusions which the trial court reached after having applied the evidence to the *Reed* test. These legal conclusions are found on pages A4-A5 of the Jurisdictional Statement, 399 F.Supp., at 1307, and are reprinted here for convenience:

> "We uphold the Oklahoma statutes in question for three main reasons: (1) in this case, unlike some others in which the Supreme Court and other courts have invalidated sex-based classifications, proof was made in which we find a rational basis for the legislative judgment underlying the challenged classification; (2) the classification here is directly related to apparent legislative objectives, looking to protection of the persons affected and the public; and (3) the statutes in question concern the regulation of alcoholic beverages—an area where the States' police powers are strengthened by the Twenty-first Amendment."

Although appellees certainly agree with the trial court determinations set forth above, appellees would assert that the trial court minimized the effect of the Twenty-first Amendment on the classification at issue. That Amendment states in Section 2 as follows:

> "The transportation or importation into any state, territory or possession of the United States for use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

Previous decisions of this Court would indicate that regulations to control intoxicating beverages made pursuant to a state's police powers and later more specifically under the Twenty-first Amendment are entitled to great weight indeed.

The various states have traditionally had the power to regulate intoxicants by virtue of their Tenth Amendment police powers, and more recently, the Twenty-first Amendment to the United States Constitution. The unique nature of the regulation of intoxicants is clearly indicated by the existence of a separate constitutional amendment dealing

specifically with that commodity. However, apart from the Twenty-first Amendment adopted in 1933, the Supreme Court at an early date recognized the unique nature of the regulation of intoxicants and the non-existence of any legal right to trade in them. In *Crowley* v. *Christensen,* 137 U.S. 86 (1890), the Court reviewed the conviction of the petitioner who had been convicted of selling liquor without a license. The petitioner challenged his conviction on the basis that the discretionary power in granting and withholding of the license by the Board of Police Commissioners was a violation of the Equal Protection Clause. In denying the claim the Court stated:

> "By the general concurrence of opinion of every civilized and christian community, there are few sources of crime and misery to society equal to the dram shop, where intoxicating liquors, in small quantities, to be drunk at the time, are sold indiscriminately to all parties applying. The statistics of every state show a greater amount of crime and misery attributable to the use of ardent spirits obtained at these retail liquor saloons than to any other source. The sale of such liquors in this way has therefore been, at all times, by the courts of every state, considered as the proper subject of legislative regulation. Not only may a license be extracted from the keeper of the saloon before a glass of his liquors can be thus disposed of, but restrictions may be imposed as to the class of persons to whom they may be sold, and the hours of the day and the days of the week on which the saloons may be open. Their sale in that form may be absolutely prohibited. *It is a question of public expediency and public morality and not of federal law.* The police power of the state is fully competent to regulate the business—to mitigate its evils or to suppress it entirely. *There is no inherent right in a citizen to thus*

> *sell intoxicating liquor by retail; it is not a privilege of a citizen of the state or of a citizen of the United States.* As it is a business attended with danger to the community it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rests in the *discretion* of the governing authority . . . As in many other cases, the officers may not always exercise the power conferred upon them with the wisdom or justice to the parties affected. *But that is a matter which does not affect the authority of the state; nor is it one which can be brought under the cognizance of the courts of the United States.*" (Emphasis added.)

Similarly in *Giozza* v. *Tierman,* 148 U.S. 657 (1892), the petitioner was convicted by the state courts for the sale of liquor without a license. The challenged Texas law provided that applicants for a liquor license would post a five hundred dollar penal bond to be forfeited if the licensee sold liquor to certain prohibited persons. The petitioner contended that the imposed conditions operated to deny him the equal protection of the law. In denying the claim presented and affirming the conviction, the Court stated:

> "Irrespective of the operation of the Federal Constitution and restrictions asserted to be inherent in the nature of American institutions, the general rule is that there are no limitations upon the legislative power of the Legislature of a state, except those imposed by its written constitution. There is nothing in the Constitution of Texas restricting the power of the Legislature in reference to the sale of liquor, and it is well settled that the Legislature of that state has the power to regulate the mode and manner and the circumstances under which the liquor traffic may be conducted, and to surround the right to pursue it with

such conditions, restrictions and limitations as the Legislature may deem proper. . . .

"The privileges and immunities of citizens of the United States are privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the Constitution of the United States, and the right to sell intoxicating liquors is not one of the rights growing out of such citizenship. *Bartmeyer* v. *Iowa,* 18 Wall. 129.

"The amendment does not take from the states those powers of police that were reserved at the time the original constitution was adopted. Undoubtedly it forbids any arbitrary deprivation of life, liberty or property, and secures equal protection to all under like circumstances and the enjoyment of their rights; but it was not designed to interfere with the power of the state to protect the lives, liberty and property of its citizens, and to promote their health, morals, education and good order. *Barbier* v. *Connolly*, 113 U.S. 27, 31; *In re Kemmler*, 136 U.S. 436."

A state's power to completely prohibit the trade in intoxicants has been held to be a matter which is no longer open to question by the courts, and no longer presenting a substantial federal question. See *Mugler* v. *Kansas,* 123 U.S. 623, 659 (1887). The Court in *Mugler, supra,* in addition, commented as follows on the power of the state in regulating intoxicants:

". . . By whom, or by what authority, is it to be determined whether the manufacturer of particular articles of drink, either for general use or for the personal use of the maker, will injuriously affect the public . . . Under our system of government that power is lodged with the legislative branch of the government. It belongs to that department to exert what are

> known as the police powers of the state, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety . . . Every possible presumption is to be indulged in in favor of the validity of a statue . . . If, in the judgment of the legislature, the manufacturer of intoxicating liquor for the maker's own use, as a beverage, would tend to cripple, if it did not defeat, the effort to guard the community against the evils attending the excessive use of such liquors, it is not for the courts, upon their views as to what is best and safest for the community, to disregard the legislative determination of that question . . . Neither the amendment (Fourteenth) broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people. . . ."

The 18 through 20 year old males in the State of Oklahoma have been denied no constitutionally fundamental right, since any right to purchase beer does not exist and is not recognized by the courts. Furthermore, it was the prerogative of the Legislature to prescribe the regulations which they deemed most able to protect the people of the State of Oklahoma from any harm arising from the sale or use of intoxicants. That prerogative should be disturbed only upon the clearest showing of constitutional insufficiency. The appellees urge that the regulation of intoxicants is a matter of special legislative concern, and that except for the gravest constitutional insufficiencies, the Legislature's judgment on how to effectively regulate and control intoxicants should be upheld.

In *Seagram & Sons* v. *Hostetter*, 384 U.S. 35 (1966), the Court considered New York's law which regulated the price of liquor in the context of alleged violations of the Equal Protection and Due Process Clauses. In upholding the validity of the law and denying the injunctive and declaratory relief sought, the Court stated:

> "A statute is not invalid under the Constitution because it might have gone farther than it did, or because it may not succeed in bringing about the result that it tends to produce . . . The reform may take one step at a time, addressing itself to the phase of the problem which seems most acute in the legislative mind."

In subsequently construing the powers of the various states by virtue of the Twenty-first Amendment, the United States Supreme Court has consistently upheld the states' broad powers in the area of the regulation of intoxicants. There can be no doubt but that the Oklahoma laws challenged herein regulate the sale and use of intoxicants within the territorial limits of the State of Oklahoma. Therefore, an examination of the relationship between the Twenty-first and the Fourteenth Amendment Equal Protection Clause would be relevant. In one of the early significant cases following the adoption of the Twenty-first Amendment, the Court in *State Board of Equalization* v. *Youngs Market Company*, 299 U.S. 59 (1936), ruled on a challenge to California's regulation which required an importer's license as being violative of the Equal Protection Clause. In upholding the validity of the State's classification the Court stated:

> "The claim that the statutory provisions and the regulations are void under the Equal Protection Clause

> may be briefly disposed of. A classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth."

Later in *Mahoney* v. *Triner Corporation*, 304 U.S. 401 (1938), the Court again upheld the validity of a state's regulation of intoxicants, despite alleged violations of the Equal Protection Clause:

> "The sole contention of Joseph Triner Corporation is that the statute violated the Equal Protection Clause. The state officials insist that the provision of the statute is a reasonable regulation of the liquor traffic; and also, that since the adoption of the Twenty-first Amendment, the Equal Protection Clause is not applicable to imported intoxicating liquor. . . .
>
> "We are asked to limit the power conferred by the [Twenty-first] amendment so that only those importations may be forbidden which, in the opinion of the court, violate a reasonable regulation of the liquor traffic. To do would, as stated in the *Youngs Market* case, p. 62, 'involve not a construction of the amendment, but a rewriting of it.' "

See also *Carter* v. *Commonwealth of Virginia*, 321 U.S. 131, 142 (1944), in which the Court again rejected contentions that a state's regulation of intoxicating liquor must be a reasonable one. The Court approved its prior language in *Triner, supra,* to the effect that if the Court struck down those regulations of intoxicants which it felt unreasonable, then it would be in effect rewriting, and not construing a state's power pursuant to the Twenty-first Amendment.

In *Goesaert* v. *Cleary*, 335 U.S. 464 (1948), the Court reviewed the validity of a Michigan statute which prohibited women, other than the wives and daughters of

owners, from being licensed as bartenders, as an alleged violation of the Equal Protection Clause. It is readily apparent that the Michigan statute construed in *Goesaert, supra,* involved a classification based on sex, analogous at least to the classification prescribed by the Oklahoma Legislature in the case at bar. The Supreme Court in *Goesaert, supra,* upheld the validity of the law as not being violative of the Equal Protection Clause. The Court stated beginning at page 465:

> "Beguiling as the subject is, it need not detain us long. To ask whether or not the Equal Protection of the Laws Clause of the Fourteenth Amendment barred Michigan from making the classification the State has made between wives and daughters of owners of liquor places and wives and daughters of non-owners, is one of those rare instances where to state the question is in effect to answer it. . . .
>
> "The Fourteenth Amendment did not tear history up by the roots, and the regulation of the liquor traffic is one of the oldest and most untrammeled of legislative powers. *Michigan could, beyond question, forbid all women from working behind a bar.* This is so despite the vast changes in the social and legal position of women. The *fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the states from drawing a sharp line between the sexes, certainly in such matters as the regulation of the liquor traffic.* See the Twenty-first Amendment and *Carter* v. *Virginia,* 321 U.S. 131, 88 L. Ed. 605, 64 S. Ct. 464. *The Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards.*

"While Michigan may deny to all women opportunities for bartending, Michigan cannot play favorites among women without rhyme or reason. The Constitution in enjoining the equal protection of the laws upon states precludes *irrational* discrimination as between persons or groups of persons in the incidence of a law. But the Constitution does not require situations 'which are different in fact or opinion to be treated in law as though they were the same.' *Tigner* v. *Texas,* 310 U.S. 141, 147, 84 L. Ed. 1124, 1128, 60 S. Ct. 879, 130 A.L.R. 1321. Since bartending by women may, in the allowable legislative judgment, give rise to moral and social problems against which it may devise preventive measures, the legislature need not go to the full length of prohibition if it believes that as to a defined group of females other factors are operating which either eliminate or reduce the moral and social problems otherwise calling for prohibition. . . .

"We cannot cross-examine either actually or argumentatively the mind of Michigan legislators nor question their motives. Since the line they have drawn is not without a basis in reason, we cannot give ear to the suggestion that the real impulse behind this legislation was an unchivalrous desire of male bartenders to try to monopolize the calling." (Emphasis added.)

See also *Krauss* v. *Sacramento Inn,* 317 F.Supp. 171 (E.D. Cal. 1970).

Most recently in *California* v. *LaRue,* 409 U.S. 109 (1972), the United States Supreme Court reaffirmed the plenary power of the states to regulate intoxicants and establishments where they are served. In *LaRue, supra,* the Court upheld California's power to prohibit explicitly live sexual entertainment in bars where liquor was dispensed by the drink. After noting that the Twenty-first Amendment "has been recognized as conferring something more

than the normal state authority over public health, welfare and morals," the Court went on to note in the last sentence of its opinion that there is a "presumption in favor of the validity of the state regulation in this area which the Twenty-first Amendment requires. . . ." The appellees respectfully urge that the challenged state law is authorized by and within the scope of the Twenty-first Amendment to the United States Constitution, as it regulates the sale and use of intoxicants within the State of Oklahoma. Since the sale-challenged state regulation deals with the regulation of intoxicants, the State has a great extraordinary interest in regulations obviously enacted for the ultimate welfare and safety of its citizens; that it, the State's regulation in the case at bar, is in an area over which the State has something more than the normal state authority over public health, welfare and morals. It would, indeed, be erroneous to state that a regulation of intoxicants was completely isolated from the Equal Protection and Due Process Clauses. However, the appellees urge that Oklahoma's interest in regulating intoxicants is extraordinary, and should be held to meet only the barest minimum requirements of equal protection.

Thus, in *Parks* v. *Allen*, 426 F.2d 610, 613 (5th Cir., 1970), the Court reviewed alleged violations of the Equal Protection Clause by an ordinance which prohibited the issuance of more than two retail liquor licenses to a family. It was alleged that persons were penalized by reason of their birth in not being able to obtain a license if members of the family had more than the prescribed number of licenses. In denying the injunction, the Court stated as follows:

"It is firmly established that the state through the 21st Amendment has a broad right to regulate traffic in intoxicating liquors in the valid exercise of its police power. *Crowley* v. *Christensen*, 137 U.S. 86, 11 S. Ct. 13, 34 L. Ed. 620 (1890); *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, 384 U.S. 35, 86 S. Ct. 1254 (1966); *Hornsby* v. *Allen*, 326 F.2d 605 (1964). *Moreover, the Fourteenth Amendment admits of the exercise of a wide scope of discretion in this regard. It only prohibits what is done when it is without any reasonable basis and therefore is purely arbitrary.* E.G., *Block* v. *Hirsh*, 256 U.S. 135, 41 S. Ct. 458, 65 L. Ed. 865 (1920); *Mestre* v. *City of Atlanta*, 255 F.2d 401 (5th Cir. 1958). Moreover, the exercise of the power in connection with the liquor industry *particularly allows the widest discretion and is subject to minimal demands of the Fourteenth Amendment's due process and equal protection requirements.* See *United States* v. *Frankfort Distillers*, 324 U.S. 293 at 299(5), 65 S. Ct. 661, 89 L. Ed. 951 (1945); *Atlanta Bowling Center, Inc.* v. *Allen*, 389 F.2d 713 (5th Cir. 1968); *Lewis* v. *City of Grand Rapids*, 356 F.2d 276 (6th Cir. 1966).

"*Thus there is a rebuttable presumption of the propriety of the ordinances under attack and, only upon a clear showing that they are arbitrary, should the court substitute its judgment for that of the legislative body concerned.* In such respect, legislative bodies are free to act on the basis of such intangibles as public opinion, hearsay, rumor and an original self-determination of proper policy and, unlike courts, are not limited to admissible testimony or a preponderance of the evidence or other judicial standards. Accordingly, the courts ought to be loath to interfere. If the ordinance under attack is arguably reasonable, it should be sustained. . . .

". . . [T]he plaintiff contends that the ordinances per se are unconstitutional in that they penalize him

> unjustly. Thus, 'the condition of a man's birth or a matter over which he has no control cannot be made the basis of a rule restricting him from a license unless his condition is something that would make him unfit.' This claim that the ordinances are facially unconstitutional is likewise rejected. The argument presupposes that the sale of liquor is a right, rather than a privilege. And the test is the reasonableness of the ordinance as relates to the business licensed and not the reasonableness as it relates to a particular applicant. As seen, the ordinance is reasonably related to the control of abuses in the industry and plaintiff is on prior notice of its requirements. The mere fact that he does not qualify by virtue of birth is no bar, even though it might create a personal hardship. Circumstances of birth may preclude a person from holding certain jobs under the laws against nepotism. E.G. 18 U.S.C.A. §1910. Or from holding public office, even that of President." (Emphasis added.)

While appellees do not suggest that the Twenty-first Amendment stands alone and unfettered by other provisions of the Constitution, we do suggest that a presumption of validity in this narrow area is indicated and that the trial court should have thus considered the classification, together with the evidence and, if it had done so, no doubt whatever of the validity of these statutes would have remained. Thus, in *California* v. *LaRue, supra,* a regulation of intoxicating beverages was upheld even though First Amendment rights were threatened. In the case at bar, no such constitutional rights are even suggested to be infringed.

One further comment in regard to the trial court's conclusions must be made. The trial court might have

found specifically that administrative convenience was not the basis of this classification. The record amply supports this statement. More recent cases of *Stanton, Weinberger* and *Schlesinger* struck down sex-based classifications which were primarily based on such a premise, as indeed was done in *Reed* v. *Reed, supra.* In the case at bar, the trial court did correctly determine that the classification was for the protection of the persons affected and the public. While appellants suggest that the appellees could test each person individually for blood alcohol content, such a suggestion is absurd on its face. The point being that any such administrative inconvenience was not the basis or foundation for the classification, rather the very lives and property of the persons affected and the public was involved and was the primary objective of the Legislature. In summary, the public health and welfare, which is sought to be protected by the statutes, is much more concrete and real than the "other" reasons given to this Court to sustain the sex-based classifications in *Stanton, Weinberger, Schlesinger,* and *Reed* cases. This Court wisely looked beyond these "other" reasons and found that the foundation for such classification insufficient. Appellees assert that the record in this case amply supports the trial court's conclusions in upholding the Oklahoma statutes.

## PROPOSITION II

**THE TRIAL COURT WAS CORRECT IN DETERMINING THAT THE PROOF WAS SUFFICIENT TO SHOW A RATIONAL BASIS FOR THE LEGISLATIVE CLASSIFICATION.**

Both the appellants and amicus curiae have gone to great length to find fault with the evidence submitted to the trial court by the appellees. In responding to these objections it is appropriate to review the Findings of Fact by the trial court after it had examined all of the evidence submitted in the case. The trial court's findings were specific and to the point as quoted below from Jurisdictional Statement, page A14, 399 F.Supp., at 1311:

> "With this in mind, we find in the record sufficient support of the rationality of the limited sex-based classification in question under the *Reed* test. We find each support in the record data indicating more likely consumption of beer by males in the 18-20 age group; more driving in this age group by males with significant BAC levels than by females; the greater number of vehicle injuries in the younger male group; and the apparent relationship of such injuries to alcohol use. We conclude that the classification made has a fair and substantial relation to apparent objectives of the legislation for the protection of those affected and the public generally." (Footnotes omitted.)

Appellees urge that the evidence was more than ample to support these findings. Both appellants and amicus curiae urge that the evidence submitted by appellees proves that 18-20 year old males are inferior to like-aged females. Appellees invite this Court to examine the findings of the trial court and in doing so will discover that no such finding was made by the trial court or suggested by

the appellees. No effort was made by the appellees to prove that 18-20 year old males were in any way less capable than 18-20 year old females, the effort to construe the evidence as somehow proving such a state is entirely that of appellants. The evidence is sufficient to support the trial court's findings, noted above, and these findings are clearly legally cognizable as a basis for the classification at issue.

The appellees introduced eight exhibits in support of the restrictions on the sale of 3.2 beer, the most pertinent portions of which are summarized as follows:

*Appellees' Exhibit I,* Jurisdictional Statement A22 and 399 F.Supp., at 1314, which is an extract of data compiled by the Oklahoma State Bureau of Investigation, represents figures submitted by 194 law enforcement agencies in the State of Oklahoma. The Exhibit shows that for the offense of Driving Under the Influence, 92% of the 18 year olds arrested were male, 98% of the 19 year olds were male, and 95% of the 20 year olds were male. Of those arrested for drunkenness 90% of the 18 year olds were male, 91% of the 19 year olds were male, and 91% of the 20 year olds were male.

*Appellees' Exhibit II,* Jurisdictional Statement A23 and 399 F.Supp., at 1315, reflects the total number of persons arrested for various crimes by the Oklahoma City Police Department in 1973. For the offense of Driving Under the Influence, 82% of the 18 year olds were male, 98% of the 19 year olds were male, and 94% of the 20 year olds were male.

The overall percentage of males arrested for Driving Under the Influence, of all ages was 92%. Thus, for the

ages 19 and 21, the percentage of males arrested was higher than the overall rate, with the 19 year old figure showing a significant increase over the average.

Appellees' Exhibit II also shows that for the offense of Drunkenness, 85% of those 18 year olds arrested were male, 83% of the 19 year olds were male, and 84% of the 20 year olds were male.

*Appellees' Exhibit III,* Jurisdictional Statement A24-A29, and 399 F.Supp., at 1315-1320, contains the results of a scientific random roadside survey of drivers conducted by Oklahoma Management and Engineering Consultants, Inc. (O.M.E.C., Inc.) pursuant to a research grant from the Alcohol Safety Action Program. The survey was conducted at 19 locations in all quadrants of Oklahoma City during August of 1972 and 1973. The data is compiled by sex for the age group of under 20 years of age.

The cover letter reveals that the total number of drivers, male and female, under 20 years was 313 in 1972 and 306 in 1973. A comparison of that data with Table 3 reveals that in 1972, 78% of the randomly selected drivers under 20 years were male, and in 1973, 78% of the drivers under 20 were male. Table I shows that male drivers under 20 drive more average miles than females, and slightly more average days per week than females.

A comparison of Tables 2 and 3 reveals that of *all* males interviewed, 78% in 1972 and 74% in 1973 stated that their drink preference was beer. However, of the males *under 20 years* who were interviewed, 84% in 1972 and 80% in 1973, stated that their drink preference was beer. Of *all* females, 54% in 1972 and 44% in 1973 stated

their drink preference as beer. Of females *under 20*, 77% in 1972 and 50% in 1973 stated their drink preference to be beer.

Table 1 also shows: (1) that more males than female drivers under 20 had drunk alcoholic beverages within the two hours prior to interview, (2) that more male than female drivers under 20 had a Blood Alcohol Concentration (BAC) of greater than .01, and (3) that of those drivers under 20 who had a BAC of greater than .01, a significantly higher percentage of males had BAC's of .05 or greater.

*Appellees' Exhibit IV*, Jurisdictional Statement A30, and 399 F.Supp., at 1320, which contains data of Oklahoma motor vehicle collisions, compiled by the Oklahoma Department of Public Safety, portrays a very disturbing statistic. On page 7 of the report, there appears a summary of persons killed and injured in Oklahoma by age and sex. A cursory review of the various listed age groups as a whole reveals that the age group 17 through 20 years suffered the greatest number of persons killed and injured, than any other age group, in all categories, except pedestrians. The table shows a total of 116 males (77%) and 34 females (23%) were killed statewide in Oklahoma. Also, a total of 2,811 males as opposed to 1,916 females were injured statewide; again, the highest number in any age grouping listed. Of the drivers aged 17-20 who were killed, 65 were male and 14 were female.

*Appellees' Exhibit V*, Jurisdictional Statement A31, and 399 F.Supp., at 1321, also a summary by the Oklahoma Department of Public Safety, contains the data for 1973. Again, the 17-20 year old age group led in all categories,

except pedestrian deaths and injuries. A comparison of Exhibits IV and V reveals an even more disturbing statistic: Even though fewer total deaths occurred in 1973 (797 total, 544 males and 253 females) than in 1972 (843 total, 597 males and 246 females), the total deaths and injuries in the age group 17-20 *continued to increase.* Most significantly the number killed and injured *drivers* in age group 17-20 continued to rise.

Also, in both 1972 and 1973, the number of killed and injured drivers, both male and female, continued to increase. In addition, Exhibits IV and V both reflect that significantly more males than females were killed and injured in all categories.

Unfortunately, the Department's statistics in appellees' Exhibits IV and V do not show the levels of intoxication, if any, of those killed and injured in age group 17-20, but it is still amply illustrated that this age group is particularly vulnerable to death or injury in motor vehicle collisions, whether as a result of either intoxication or inexperience in driving, or both.

*Appellees' Exhibit VI,* App. 182-184, is a summary compiled by the Federal Bureau of Investigation of data from 10,000 law enforcement agencies covering 93% of the United States population. Table 29 at page 123 of the report shows a *nationwide increase* in the number of persons arrested for driving under the influence for the year 1972, as compared with the year 1967. The percentage increase (138%), of arrests for driving under the influence is larger than any other crime listed, except narcotic drug laws; the same is true for both age groups listed.

Table 34, at page 129, App. 184, shows that the 1972 national percentage of males of all ages arrested for Driving Under the Influence is 93% and 92% for the offense of drunkenness.

*Appellees' Exhibit VII,* App. 185-207, a report compiled by the Minnesota Department of Public Safety, shows that other states' statistics are similar to Oklahoma. Table 4, at page 7 of the report, shows more male drivers under 20 were killed than females, with significantly more males having extraordinarily high BAC levels than females.

*Appellees' Exhibit VIII,* App. 208-226, is a federal report on the proceedings of the Joint Conference on Alcohol Abuse and Alcoholism. Table 9, at page 127 of the report, shows a significantly higher "accident-vulnerability ratio" for 18-19 males at BAC levels of .01-.04 and .05-.09. The summary at page 130 of the report, App. 224, states that:

> "Under the age of 18, driving after drinking is quite rare. However, the frequency and intensity of driving after drinking increases rapidly for drivers 18 and 19 years old . . . there is an important relationship of alcohol to youth-involvement in collisions. . . . This concerns the impact of small amounts of alcohol; i.e., those resulting in BAC's which are positive but less than .05. Among teenagers such low concentrations are an important component in crashes. . . ."

The appellees urge that the preceding evidence-in-chief supports the conclusion that the classification is reasonable in prohibiting the sale of beer to a class (males 18-20) who have a demonstrated vulnerability to auto accidents. Surely the minimization of drunk drivers on Oklahoma highways is a rational objective of the Oklahoma Legislature, and even a compelling stated interest.

Both appellants and amicus curiae first complain that the arrest statistics in Exhibits I and II are of no significance because they did not show convictions for the respective offenses. Appellant cites *Schware* v. *Board of Bar Examiners,* 353 U.S. 232, 241-243 (1957), and *Loper* v. *Beto,* 405 U.S. 473 (1972), for the proposition that only convictions can prove guilt of any particular offense and that the records must show that the conviction was with counsel. However pertinent these cases may be where an individual is concerned they are not significant to the case at bar in that the appellees did not try to prove, as in the *Schware* case, *supra*, that any one individual lacked good moral character nor, more importantly, did the appellees attempt to prove that any individual was guilty of a crime, but rather this Exhibit, as the remaining ones, attempts to show involvement with alcoholic beverages of a group and in this respect the statistics are of the same nature as those used in *Kahn* v. *Shevin,* 416 U.S. 351 (1974). In that case a Florida statute granting a tax exemption for widows, but not to widowers, was upheld against an equal protection attack. This Court concluded at page 353:

> "There can be no dispute that the financial difficulties confronting the lone woman in Florida or in any other State exceed those facing the man."

Numerous statistics were used, similar in nature to those offered in the case at bar, to support this conclusion. Based on the evidence this Court further stated at pages 355-356:

> "There can be no doubt, therefore, that Florida's differing treatment of widows and widowers ' "rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation." ' *Reed*

v. *Reed,* 404 U.S. 71, 76, 30 L. Ed.2d 225, 92 S. Ct. 251, quoting *Royster Guano* Co. v. *Virginia,* 253 U.S. 412, 415, 64 L. Ed. 989, 40 S. Ct. 560.

> "This is not a case like *Frontiero* v. *Richardson,* 411 U.S. 677, 36 L. Ed.2d 583, 93 S. Ct. 1764, where the Government denied its female employees both substantive and procedural benefits granted males 'solely . . . for administrative convenience.' Id., at 690, 36 L. Ed.2d 583 (emphasis in original). We deal here with a state tax law reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden. *We have long held that '[w]here taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation.' Lehnhausen* v. *Lake Shore Auto Parts* Co., 410 U.S. 356, 359, 35 L. Ed.2d 351, 93 S. Ct. 1001. A state tax law is not arbitrary although it 'discriminate[s] in favor of a certain class . . . if the discrimination is founded upon a reasonable distinction, or difference in state policy,' not in conflict with the Federal Constitution. *Allied Stores* v. *Bowers,* 358 U.S. 522, 528, 3 L. Ed.2d 480, 79 S. Ct. 437. This principle has weathered nearly a century of Supreme Court adjudication, and it applies here as well. . . ."

A similar, if not stronger, consideration is afforded classifications drawn under the authority of the Twenty-first Amendment as evidenced by *California* v. *LaRue, supra,* and other cases cited in Proposition I.

The appellants and amicus curiae again suggest that the exhibits dealing with arrest cannot be recognized because they do not rule out multiple arrests. Exhibit I alone,

establishing 90 plus percent of 18, 19, and 20 year old arrests for Driving Under the Influence as being male, cannot be disregarded because the percentage figure might be reduced somewhat by an unknown number of multiple arrests. The Exhibit is sufficient to show a vastly larger percentage of 18-20 year old males, as opposed to females, are involved in driving and drinking, irregardless of the percentage figure that might result from actual convictions, even considering a reasonable number of multiple arrests.

Exhibits I and II are further objected to because they are not related directly to only 3.2 beer. The fallacy of this argument lies in the fact that the Exhibits reflect arrest for drunkenness or Driving Under the Influence which are determined by the effect of alcohol on the person, not the source of that alcohol. The Exhibits need not have been limited to 3.2 beer because, as the appellants point out in their brief, there is no classification as to males and females in regard to other intoxicating beverages; the purchase of "hard liquor" is denied to both sexes until 21 years of age. Oklahoma Constitution, Article 27, §5, and 37 O.S. 1971, §537(a)(1). The Legislature had every right to look to other sources of alcohol and regulate its availability. Any "hard liquor" included in the arrest statistics in Exhibits I and II were already illegal under the Oklahoma law but the involvement of this 16-20 year old age group with alcohol resulted, in effect, in the regulation that no one could purchase 3.2 beer until 18 and even this privilege was denied to males until 21 years of age. Appellants suggest further that the Exhibits must be other than 3.2 beer because it is non-intoxicating and cites as authority *State, ex rel. Springer* v. *Bliss*, 199 Okla. 198, 185 P.2d 220 (1947).

The cited case does not say that 3.2 beer cannot be intoxicating in fact, but held only that 3.2 beer was not a prohibited beverage under Oklahoma's old prohibition laws. A later Oklahoma decision bears this out, as was stated in *Douglas* v. *State*, Okla., 225 P.2d 376, 380 (1950):

> "The defendant's second proposition is that the trial court erred in excluding evidence sought to be elicited on cross examination of the highway patrolman about what kind of liquor they smelled on the defendant's person and his breath. The trial court sustained his objection to this cross examination. The object of the defendant in seeking this information appears in his 5th proposition to the effect that the court erred in not giving his requested instruction that the state should be required in substance to prove 3.2 beer was intoxicating. It therefore appears that the defendant sought to lay the predicate for putting this burden of proof on the state by showing the officers smelled beer on the defendant, several bottles of which the officers found in the car, and the defendant admitted he had been drinking. This contention and the contention in the defendant's fifth proposition will be considered together. The kind of liquor the defendant had been drinking was immaterial. The material fact was, was the defendant drunk whether on 3.2 beer or liquor with an alcoholic content in excess thereof. It was not error to exclude such evidence on cross examination and refuse the defendant's requested instruction. In *Foglesong* v. *State*, 69 Okl. Cr. 360, 103 P.2d 106, it was said:
>
> " 'Section 1, Chapter 153, Session Laws of 1933, 37 Okl. St. Ann. §151, defines what is "intoxicating" and "non-intoxicating" liquors. The definition under this act was for the purpose of thus classifying beverages, as a foundation for the subsequent licensing and taxing provision. It was not intended to regulate the pro-

visions of the law with reference to the enforcement of the criminal statutes.

" 'Section 10324, O.S. 1931, 47 Okl. St. Ann. §93, makes it an offense for one who is under the influence of intoxicating liquor, or who is a habitual user of narcotic drugs, to operate or drive a motor vehicle on any highway within the state.

" 'Under this statute it was the intention of the Legislature to punish those who were in fact "under the influence of intoxicating liquor," whether it be caused from drinking beer with an alcoholic content of 3.2 per cent or liquor in excess thereof.'

"Hence the lack of merit in the defendant's second and fifth contentions clearly appears."

In the same vein the appellants argue that the number of miles males drive versus females could affect the validity of the arrest statistics. While this line of argument might show interesting results from a Driving Under the Influence per mile driven comparison between male and females, it does not detract the significance of these Exhibits in that if males as a class do drive more miles than females while indicating a preference for beer it still lends strength to the reasonableness of the classification. It logically follows that if, in fact, males do drive a significant number of miles more than females in the 18-20 year old age group that they might constitute a class whose accessibility to 3.2 beer should be curtailed.

Appellants next contend that because Exhibits I and II contain a category of offenses labeled "liquor laws," which contained as a part of its statistics arrests for offenses which would not apply equally to males and females, such as "working-in-a-beer-joint-by-a-minor," that the entirety

of both Exhibits were inadmissible and the judgment of the trial court is thus tainted with constitutional error. Appellants cite as authority *Fahy* v. *Connecticut,* 375 U.S. 85 (1963) and *Chapman* v. *California,* 386 U.S. 18 (1967). While these cases deal with illegally seized evidence and unconstitutional argument as requiring reversal of state criminal convictions, they cannot be construed to require a similar effect here. The category complained of constituted but one part of these Exhibits and the trial court properly did not exclude the entire Exhibit in either case. Furthermore, the trial court did not consider this particular data in reaching its decision, as can be quickly determined by again examining the specific Findings of Fact in the Opinion. Indeed, contrary to appellants' contentions, it appears obvious that the trial court disregarded this category altogether in that it was ignored completely in its decision.

Appellants and amicus curiae also suggest that there is selective law enforcement in Oklahoma in regard to males which ignores apparently certain offenses by females while arresting males and thus invalidates the statistical data introduced into evidence. But to what proof do they refer—none. No evidence of this so-called condition was before the trial court and none is offered to this Court. Rather, appellants ask this Court to take, in effect, judicial notice of a condition which is not proved to exist. Appellants rely on two case decisions to support his ungrounded statement of selective law enforcement in Oklahoma. The first is *Hayes* v. *Municipal Court,* Okla., 478 P.2d 974 (1971). This case, like the next one discussed, held as unconstitutionally vague certain vagrancy ordinances, but did not show any selective law enforcement against males as op-

posed to females and does not concern itself with the type of arrest records before this Court. To this same effect is *Papachristou* v. *Jacksonville,* 405 U.S. 156 (1972). While this case proves no selective enforcement pertinent to this case, it is an excellent example of the use by this Court of arrest data, see Footnote 16 beginning at page 169. Accordingly appellees respectfully request this Court to disregard this line of argument as completely unfounded.

In summary all of the appellants' and amicus curiae arguments in regard to the evidence submitted by appellees go to the weight to be given this evidence and not to its admissibility. While appellants suggest that a test might be given to individuals between 18-20 years of age as a less drastic alternative, surely this suggestion was correctly ruled out by the trial court. Considering the staggering, if not impossible, task of administering a sobriety test to each such person each time he decides to drive an automobile would not be a viable alternative solution as indicated in *Vlandis* v. *Kline,* 412 U.S. 441 (1973). See also the trial court's specific comments on this issue in the Jurisdictional Statement at pages A18-A19 and 399 F.Supp., at 1313.

Moreover, certain portions of the testimony of the appellants' experts further support the validity of the state's classification. One witness testified:

(1) that males have a greater interest in experimenting with alcohol (App. 82-83),

(2) that he has observed and treated more young male alcoholics, than females (App. 88),

(3) that women start drinking later in life (App. 85-89),

(4) that males between the ages of 18-21 would be more inclined to experiment with alcohol (App. 93-95),

(5) that males are generally more aggressive, or have a greater drive behavior in all years of their lives, including the years 18-21 (App. 95),

(6) that the greater activity behavior of males has leveled off at its highest level through the years 18-21 (App. 96),

(7) that more males aged 18-21 than females were alcohol users (App. 104),

(8) that for socially-determined reasons, males do tend to use alcohol more readily and more readily to the point of being identifiable abuse at all ages, including 18-21 (App. 109),

(9) that the challenged legislation is in the interest of controlling a tiny part of the problem of controlling drinking offenses (App. 111).

Another witness testified:

(1) that in general males consume greater quantities of alcohol than females (App. 125),

(2) that most of his subjects, male and female, started drinking around age 18 (App. 127).

The appellees urge that all of the preceding evidence amply illustrates a problem ripe for legislative action. The evidence submitted in this case demonstrates that there are different drinking and drinking-influenced behavior patterns between males and females aged 18-20. The differences may or may not be biological or psychological in

origin; the evidence in this case is not conclusive in either possibility. What is clearly established is the difference in alcohol-related behavior, for whatever reason, between males and females aged 18-20, which supports and establishes the rationality of the legislative classification in 37 O.S. Supp. 1975, §245.

## PROPOSITION III

### THE STATE OF OKLAHOMA HAS THE RIGHT TO SHOW THE RATIONAL BASIS FOR ITS LEGISLATION WITHOUT PROVING THAT SUCH LEGISLATION WAS A PERFECT SOLUTION.

Appellants' main thrust in their third proposition is that through their own reasoning and interpretation of the evidence, the Oklahoma statutes are ineffective and, therefore, irrational and unconstitutional. Appellants quote no legal authority for this line of reasoning but appellees feel that this line of argument has been rejected entirely by this Court. Thus, in *Seagram and Sons* v. *Hostetter*, 384 U.S. 35, 50-51 (1966), this Court limited the review of state laws in regard to whether they were successful or not. See quotations on page 10 of this brief.

More recently in *Kahn* v. *Shevin, supra,* at page 356, footnote 10:

> "The dissents argue that the Florida Legislature could have drafted the statute differently, so that its purpose would have been accomplished more precisely. But the issue of course is not whether the statute could have been drafted more wisely, but whether the lines chosen by the Florida Legislature are within constitutional limitations. . . ."

Thus, how well the Legislature of Oklahoma addressed itself to the problem of alcohol and its effect on death, injury and property loss on Oklahoma highways is not at issue here but only whether this regulation of alcohol in the questioned statutes is within constitutional limits, which burden the State has met.

Appellants' last proposition also asks this Court to hold that any classification by sex is automatically unconstitutional. Thus they suggest that any such classification is beyond merely "inherently suspect," which this Court has not held but is entirely and unequivocally forbidden by the Constitution. Appellants apparently reject the State of Oklahoma's right to prove its classification at bar had a rational basis. The appellants are simply saying it is impossible as a matter of law. Perhaps appellants are saying that they should only have had to file a complaint with the trial court in order to bring the offending statute to its attention, no opportunity to present a defense would have been necessary under this reasoning. Though litigation is time consuming and the appellees have been required to burden the Court with evidence, nothing in the *Stanton* v. *Stanton* decision, *supra*, or *Reed* v. *Reed, supra,* places an automatic unconstitutionality of any classification and appellees have shown the reasonableness of its classification sufficient to withstand the constitutional attack against it.

## CONCLUSION

The trial court was correct in determining that the Oklahoma statutes at issue do not deny the appellants equal protection of the laws guaranteed by the Fourteenth Amendment, but rather are well within the authority granted the states to control alcoholic beverages under the Twenty-first Amendment. Further, the classification delaying the purchase of 3.2 beer to males until 21 years of age is fully supported by the evidence so as to satisfy the rationale of *Reed* v. *Reed, supra,* and therefore appellees respectfully request this Court to affirm the decision of the lower court.

Respectfully submitted,

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April, 1976

**CERTIFICATE OF SERVICE**

This is to certify that three (3) true and correct copies of the foregoing instrument were served upon:

Mr. Fred P. Gilbert
1401 National Bank of Tulsa Building
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Attorneys for Appellants

Ruth Bader Ginsburg
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the only parties to be served, by mailing such true and correct copies, postage prepaid, this ..... day of April, 1976.

JAMES H. GRAY