

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

IN THE SUPREME COURT OF THE UNITED STATES

- - - - -X

MICHAEL FITZGERALD, :  
TREASURER OF IOWA, :  
Petitioner :

v. : No. 02-695

RACING ASSOCIATION OF :  
CENTRAL IOWA, ET AL. :

- - - - -X

Washington, D. C.  
Tuesday, April 29, 2003

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
11:15 a.m.

APPEARANCES:

THOMAS J. MILLER, ESQ., Attorney General of Iowa; Des  
Moines, Iowa; on behalf of the Petitioner.  
KENT L. JONES, ESQ., Assistant to the Solicitor General,  
Department of Justice, Washington, D.C.; on behalf of  
the United States, as amicus curiae, supporting the  
Petitioner.  
MARK McCORMICK, ESQ., Des Moines, Iowa; on behalf of the  
Respondents.

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	THOMAS J. MILLER, ESQ.	
4	On behalf of the Petitioner	3
5	KENT L. JONES, ESQ.	
6	On behalf of the United States,	
7	as amicus curiae, supporting the Petitioner	17
8	MARK McCORMICK, ESQ.	
9	On behalf of the Respondents	26
10	REBUTTAL ARGUMENT OF	
11	THOMAS J. MILLER, ESQ.	
12	On behalf of the Petitioner	50
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

P R O C E E D I N G S

(11:15 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 02-695, Michael Fitzgerald v. Racing Association of Central Iowa.

General Miller.

ORAL ARGUMENT OF THOMAS J. MILLER

ON BEHALF OF THE PETITIONER

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

The Iowa Legislature, consistent with the Equal Protection Clause, can charge different tax rates for its riverboats and its racetracks for a number of legitimate State interest reasons, including and especially the one highlighted by the district court judge here, the promotion of the development of river communities.

In 1983, Iowa broke ground and got more friendly with gambling and allowed horse racing and dog racing in our State.

QUESTION: It's called gaming if -- if you favor it.

MR. MILLER: I -- is there a neutral term, Your Honor?

In -- in regard to gaming, one of the main purposes of having horse and dog racing was to develop a

1 new subset of our agricultural economy, the breeding,  
2 training, and raising of horses and dogs. And that  
3 succeeded. It turned out to be about a \$50 million  
4 industry.

5 Six years later, with visions of Mark Twain in  
6 the background and the two incredible rivers in America  
7 surrounding our State, the Mississippi and the Missouri,  
8 the legislature authorized riverboat casinos, riverboat  
9 gambling. And one of the main purposes there was tourism,  
10 economic development for the river communities and  
11 riverfront development. In a very short time, there were  
12 \$17 million worth of investment along the various  
13 riverfronts.

14 A few years later, though, neither gaming  
15 enterprise was -- was doing as well as they would like,  
16 indeed, not doing -- not doing well at law.

17 In regard to the riverboats, the problem was,  
18 well, Iowa had this sort of, in a way, naivete maybe about  
19 betting. They restricted the amount of bets on  
20 riverboats. It could only be a \$5 bet and one couldn't  
21 lose more than -- more than \$200 in one setting. Well,  
22 Illinois had a different view and had no limits and were  
23 starting to succeed competitively.

24 The -- the situation with the racetracks was  
25 more severe, that economically it just wouldn't work to

1 have racing, either horse racing or dog racing alone. So  
2 Iowa became the first State in the Nation to allow the  
3 sort of the -- the golden goose of gambling, slot  
4 machines, at racetracks.

5 QUESTION: So now the bulk of the earnings are  
6 from slot machines rather than the races. Is that right?

7 MR. MILLER: That -- that's right, Your Honor.  
8 Indeed, really the slot machines support the -- support  
9 the racing.

10 QUESTION: But under your scheme, I take it the  
11 highest tax rate for slot machine income at racetracks is  
12 36 percent versus 20 percent for slot machines on  
13 riverboats.

14 MR. MILLER: That -- that is correct, Your  
15 Honor. And that was provided on a -- on a graduated  
16 basis. Actually in next year it's -- the 36 percent would  
17 be -- would be reached.

18 QUESTION: And you want to offer a rational  
19 basis for that scheme?

20 MR. MILLER: Yes. Yes, we do, Your Honor. And  
21 what -- what we say is that the development of the -- of  
22 the riverboats could be rationally preferred by the -- by  
23 the legislature because of riverboat development, because  
24 of economic development on the -- on the rivers.

25 Additionally, the -- the district court found

1 that the additional rational basis could be sort of  
2 supporting the riverboat enterprises as a -- as an  
3 industry, promoting riverboat history.

4 Also, we argue that there was a problem of  
5 riverboats leaving the State, that three out of six in the  
6 previous -- previous to 1994, the legislation year, had --  
7 had left the State.

8 QUESTION: Well, because of that legislation,  
9 the Delta King left the Sacramento River and it's gone up  
10 to the Mississippi.

11 MR. MILLER: Well, that was the next purpose,  
12 Your Honor, to try and get other boats to -- to come to  
13 Iowa, and apparently --

14 QUESTION: They're -- they're saying -- and  
15 maybe there's -- I take it from their brief that, look,  
16 there's never been a tax scheme like this. Obviously, a  
17 State very often would -- would tax at a different rate a  
18 handsaw and a screwdriver, but we've never heard of a  
19 State that said when you sell a screwdriver, you pay 5  
20 percent tax if you sell it in Des Moines and a 3 percent  
21 tax if you sell it in Dubuque, and if it's sold by one  
22 kind of a person, they sell 8 percent tax, and it's all  
23 the same screwdriver. So they're saying there's never  
24 been a -- really a tax system like this anywhere, and --  
25 and they better have some pretty good reason or -- or

1 something.

2 I mean, now -- so is all that true, that there  
3 never has been a system like that, saying the same  
4 screwdriver, everything identical, all it is is it's sold  
5 in different parts of the State or by different people,  
6 and -- and you have to pay a different tax?

7 MR. MILLER: Well, I think there's been many  
8 times where the -- the taxpayer has been -- been treated  
9 differently even if -- even if the transaction is the  
10 same.

11 QUESTION: Like what? Like what?

12 MR. MILLER: Sort of the -- the enterprise  
13 zones, for instance. Communities are -- are given  
14 favorable tax rates all the time for economic development  
15 purposes and that's what's here. And -- .

16 QUESTION: Typical -- typical sales tax. You  
17 know, the State may tax a barber's income at a different  
18 rate than a hairdresser's and yet they may use the same  
19 stuff.

20 MR. MILLER: Yes. Yes, Mr. Chief Justice, that  
21 -- that would -- that would be another example.

22 And, you know, the State has great latitude in  
23 the taxation area and justifiably so because there are so  
24 many complexities that -- that that be available to the  
25 State.

1           QUESTION: Do -- do you agree, at least to the  
2 extent the respondents say, that there's no other State in  
3 which slot machines are taxed at a different rate  
4 depending on their location, that this is unique to Iowa?

5           MR. MILLER: I -- I think as far as I know,  
6 that's -- that's the -- that's the case. Slot machines  
7 typically are not in multiple purposes -- not multiple  
8 places like Iowa. Typically they're in -- they're in  
9 casinos. So there's not -- not a lot of apt comparisons.

10           But you know, this is -- this is a -- a question  
11 for the legislature. When there's no suspect category or  
12 fundamental right available, the legislature has -- has a  
13 great deal of -- of discretion. And the enterprise -- the  
14 purpose of the enterprise is different. The economic  
15 development as opposed to the agricultural, for instance.  
16 When that -- when that is the case, the -- the legislature  
17 really has -- has a great deal --

18           QUESTION: So I push their argument or am I  
19 imagining -- I'm trying to put it the strongest way.  
20 Look, cosmetologists and barbers do different things, and  
21 moreover an enterprise zone is a special part of the State  
22 that's not exactly the same. Something different is going  
23 on there. Here it's slot machine income. Nothing  
24 different is going on. Nothing.

25           MR. MILLER: Well, there is difference --



1 QUESTION: I -- I -- yes, go ahead.

2 MR. MILLER: There is difference in -- in the  
3 enterprise. One has slot machines and table games. The  
4 other has slot machines and -- and racing. But here you  
5 have a -- a series of communities in -- in eastern Iowa  
6 and then in western Iowa along the rivers that had  
7 suffered loss of manufacturing jobs. This was -- this was  
8 an effort, a legitimate effort, on the part of the  
9 legislature to advance a new industry, a tourism industry,  
10 on the two rivers.

11 QUESTION: As I understood it, didn't -- didn't  
12 the tax on the -- the higher tax on the racetracks come  
13 later?

14 MR. MILLER: It was -- it was phased in, Your  
15 Honor. That --

16 QUESTION: And I can't quite understand how  
17 imposing an extraordinarily high tax on racetracks is  
18 suddenly going to provide a benefit for riverboats.

19 MR. MILLER: Well, the legislature, of course,  
20 had the -- had the discretion to -- to have them both at  
21 36 percent. The -- the benefit of the -- to the -- to the  
22 riverboats was that -- that they didn't go to the higher  
23 rate that -- that the -- that they did for the -- for the  
24 racetracks. It's sort of a chicken and egg problem, but  
25 -- but they're spared that -- that higher rate and -- and

1 that's -- and that's an appropriate benefit.

2 QUESTION: It's across-the-board rate for  
3 everything that goes on at the riverboat, right? It's a  
4 20 percent rate, whether its roulette or card games or  
5 dice, it's all 20 percent.

6 MR. MILLER: That's it. The --

7 QUESTION: For the race, there's a great  
8 disparity between the parimutuels. It's only what, about  
9 5, 6 percent?

10 MR. MILLER: That's right, Your Honor. There's  
11 a -- there's a very favorable rate for the -- for the  
12 racing at the -- at the racetrack. So it's a -- in a  
13 sense it's a -- it's a blend of rates between the two.  
14 Again, understandably so --

15 QUESTION: Is the rate -- is the rate for taxing  
16 other gaming activities on the riverboats different from  
17 the slot machines on the riverboats?

18 MR. MILLER: No, Your Honor, it's not. It's --  
19 it's the same. It's the same rate. So you have -- you  
20 sort of have 20 percent there as opposed to, say, as was  
21 just pointed out, 4 or 5 percent for the racing at the --  
22 at the racetrack.

23 QUESTION: So it's administratively easier to  
24 calculate if you have all one rate for the riverboat?

25 MR. MILLER: It would be -- it would be more

1 easily to -- to calculate and more efficient.

2 QUESTION: You say the riverboats, obviously,  
3 are located on the rivers which bound Iowa on the east and  
4 on the west. How about the racetracks? Are they  
5 scattered throughout the State?

6 MR. MILLER: They are scattered throughout the  
7 State. Two of them are on the -- turned out to be on the  
8 rivers. But the largest one, the premier one, Prairie  
9 Meadows, is in the Des Moines area in -- in central Iowa.

10 QUESTION: Add that if we looked into this at  
11 any depth at all, we'd discover this originated from a  
12 legislator who hated racetracks and loved riverboats and  
13 was trying to kill the whole thing. And then they say  
14 that besides that, there was a report of a committee that  
15 said all this enterprise zone -- we don't think that's so,  
16 et cetera, et cetera.

17 MR. MILLER: Well, I mean, shocking that -- that  
18 a legislator on -- on -- in riverboat country would try  
19 and help the -- help the riverboats. I mean, that's, for  
20 better or worse, part of the -- part of the legislative  
21 process, always was and always will be. And -- and courts  
22 can't be sort of cops to -- to make sure that -- that they  
23 -- that they do not do that.

24 QUESTION: Well, under --

25 QUESTION: If we ever look to the real reasons

1 for things, it would be a disaster, wouldn't it?

2 (Laughter.)

3 MR. MILLER: Yes. Well, it's, you know, the old  
4 adage about sausage, making sausage, that you shouldn't  
5 watch it, that --

6 QUESTION: But the Iowa -- the Iowa Supreme  
7 Court seems to think it could look to what was the real  
8 purpose, not the purpose that we could conceive. Lots of  
9 nice purposes like the riverboat drifts away and the  
10 racetrack is --

11 But you said something in your reply brief that  
12 -- that really surprised me. It seems to me that if we  
13 say -- if you're talking about Federal equal protection,  
14 this is an area in which the leeway for the legislature is  
15 the widest that there is. But couldn't Iowa then say,  
16 okay, we're just doing this under Iowa equal protection,  
17 and we can make that whatever we want? And for us, the  
18 real purpose counts, not the conceivable purpose.

19 MR. MILLER: Yes. The -- you know, the -- the  
20 legislature -- the court could have said that they were  
21 diverging from -- from the standards of this Court.

22 QUESTION: But you said they couldn't do that on  
23 remand. On page 6 of your reply brief, you said that the  
24 Iowa Supreme Court cannot reconsider the State court  
25 decision in order to subsequently establish an adequate

1 and independent State ground. Why couldn't it?

2 MR. MILLER: Well, our argument is -- is, Your  
3 Honor -- and we know we're -- we're into sort of a little  
4 bit new territory here. But our argument is that -- that  
5 the court has made a decision that the -- the analysis --  
6 a clear decision that the analysis is the same under the  
7 Federal and the State constitutional provision. If that  
8 analysis, judged by a higher court, is determined to be  
9 wrong, then that would -- would seem perhaps to settle it.

10 But more significantly, the -- the respondents  
11 didn't argue below that there was a separate analysis,  
12 that -- that they should look at it separately.

13 QUESTION: But they could. I mean, nothing  
14 would foreclose them on remand or the Iowa Supreme Court  
15 itself.

16 MR. MILLER: Yes. It's -- it might not, but we  
17 argue that -- that they sort of waived that argument, that  
18 they didn't argue that in -- in the first time through,  
19 that they -- it was a different analysis. They conceded,  
20 like everybody else, and assumed that it was the same  
21 analysis.

22 QUESTION: All our opinion would say, if we  
23 reverse the Supreme Court of Iowa, was remand it for  
24 further proceedings not inconsistent with this opinion.  
25 And so certainly, so far as our remand order is concerned,

1 the Supreme Court of Iowa is free to do whatever it wants  
2 so long as not -- as it's not inconsistent with our  
3 opinion.

4 MR. MILLER: I understand, Mr. Chief Justice.  
5 Maybe I'm making my argument too soon and -- and will --

6 QUESTION: I doubt if you'll have any better  
7 luck with it before the Supreme Court of Iowa.

8 (Laughter.)

9 MR. MILLER: Well, we -- we will -- we will try  
10 I -- I assume.

11 What -- what we're saying here is that -- that  
12 there are multiple legitimate State purposes available  
13 that are well within the zone of Nordlinger and the  
14 related cases that have been before this Court, that --  
15 that this is comfortably a legitimate State interest, a  
16 number of them, most specifically the development of the  
17 -- of -- of the river communities. And that's -- that's  
18 consistent --

19 QUESTION: Would it make any difference in your  
20 analysis -- I don't know if this is true or not -- but if  
21 the legislative history, if you had a complete record of  
22 all the debates and everything else, and it was perfectly  
23 clear that the hypothetical reasons you advance were  
24 definitely not the reasons that motivated the particular  
25 tax rates, that they did it just, say, to get even with

1 the racetracks because somebody was unhappy with something  
2 they had done in the past or something like that, would  
3 that make any difference?

4 MR. MILLER: Well, I -- I don't think that  
5 there's -- there would be sufficient legislative history  
6 to foreclose rational speculation.

7 QUESTION: No, no. Take his hypothetical.  
8 There is.

9 QUESTION: I'm assuming that there is, that --  
10 that there's a reason out there that -- that -- none of  
11 the reasons that you advance were, in fact, considered by  
12 any of the legislators. In fact, they rejected them.  
13 They thought, we really don't want to help the riverboats.  
14 What we want to do is do something to really penalize the  
15 racetracks because they're an immoral business, they're  
16 even worse than gambling on the rivers. But that's why  
17 they're doing it.

18 QUESTION: And they put that right in the  
19 preamble to the act.

20 QUESTION: Would that make any difference in  
21 your analysis?

22 MR. MILLER: I -- I think that that kind of --  
23 kind of history would not, in a rational speculation case,  
24 that -- that --

25 QUESTION: I guess my question is, is it

1 rational speculation when you know it's not true?

2 (Laughter.)

3 MR. MILLER: Well, I -- I suppose not.

4 QUESTION: Well, it's usually not true. I mean,  
5 usually these things are done for the self-interest of --  
6 of legislators from various districts, and -- and as long  
7 as there could be a rational -- I -- I would have -- I'm  
8 surprised it took you so long to answer that question.

9 (Laughter.)

10 MR. MILLER: I wanted to be thoughtful, Your  
11 Honor. But like -- we get back to -- to the -- the rough  
12 and tumble of the legislative process as -- as you  
13 suggest, Your Honor, is such that the courts don't --  
14 don't review that, don't -- don't --

15 QUESTION: But isn't -- isn't that exactly  
16 really the point? The courts just don't review it. And  
17 unless you get to -- to some fact pattern that -- that  
18 gets you a -- a higher level of scrutiny, it's not so much  
19 that we're engaging in rational basis scrutiny. We're  
20 just saying we can't touch the political process unless  
21 you get yourself into a suspect class. Isn't that really  
22 what we're saying?

23 MR. MILLER: That's -- that's pretty much --  
24 pretty much what's -- what's being said here and -- and  
25 how the cases have been interpreted. And is -- and it



1 makes -- makes a lot of sense because like you -- like you  
2 suggest, Your Honor, when there's -- there's not a  
3 fundamental right or a suspect category, that's the pure  
4 legislative authority and that's where democracy kicks in  
5 our -- in our country, for better or for worse, and the  
6 assumption is that if they make a mistake, democracy later  
7 will -- will catch that mistake.

8           Your Honor, I'd like to -- to now turn it over  
9 to -- this has been my first argument, so I refer to him  
10 as my safety net.

11           (Laughter.)

12           MR. MILLER: Kent Jones from the Solicitor  
13 General's office, and reserve what time is remaining after  
14 he is done.

15           QUESTION: Very well, General Miller.

16           Mr. Jones.

17                           ORAL ARGUMENT OF KENT L. JONES  
18                   ON BEHALF OF UNITED STATES AS AMICUS CURIAE,  
19                   SUPPORTING THE PETITIONER

20           MR. JONES: I'd like to thank counsel. And Mr.  
21 Chief Justice, and may it please the Court:

22                   Taxing decisions are like spending decisions  
23 because they affect the State's economy, as well as its  
24 balance sheet. In recognizing that fact, this Court has  
25 consistently upheld the -- the -- has consistently held

1 that a State's desire to promote or foster one type of  
2 business over another or even to promote or foster one  
3 mode of doing a business over another is a rational basis  
4 that supports taxing the one and exempting the other.

5 For example, in *State Board v. Jackson* in 1931,  
6 this Court held -- upheld a tax differential, a different  
7 tax treatment, of chain stores versus single enterprise  
8 retail stores. Even though these businesses did  
9 essentially the same commerce, the Court held that in the  
10 State's exercise of its broad authority to govern the  
11 economy of the State, it can prefer one mode of doing the  
12 same business over another.

13 And that same rationale has been applied by this  
14 Court in numerous contexts involving tax distinctions  
15 between, for example, warehouses located near railroads  
16 and warehouses not located near railroads, between  
17 laundries that are operated by hand and laundries that are  
18 operated by machine, and even between individuals and  
19 corporations that are conducting identical businesses.

20 QUESTION: What about -- what about slot  
21 machines owned by Republicans versus slot machines owned  
22 by Democrats?

23 (Laughter.)

24 MR. JONES: Assuming that we're still talking  
25 about State laws --

1           QUESTION: No, that's exactly -- I'm serious  
2 about --

3           MR. JONES: Assuming we're still talking about  
4 State laws, I would have to ask myself what would be the  
5 rational basis. The rational basis --

6           QUESTION: The rational basis is the Republicans  
7 have a majority in the State legislature.

8           (Laughter.)

9           MR. JONES: Well, that might explain -- the  
10 difference I think between your hypothetical and -- and  
11 where I'm trying to come from is that the rational basis  
12 has to be related to a legitimate State purpose. There's  
13 a -- a legitimate State purpose in fostering certain kinds  
14 of commerce and suppressing others.

15          QUESTION: What about -- what about slot  
16 machines owned by farmers and slot machines owned by city  
17 dwellers?

18          MR. JONES: It's -- it's hypothetically  
19 conceivable and that's the question that this Court asked  
20 itself under -- under FCC v. Beach. Is there a  
21 conceivable State interest that would justify that  
22 distinction? And obviously, that -- the fact that there  
23 has to be one doesn't mean there always is one, and I'm  
24 not standing here saying, well, every imaginable  
25 distinction is justifiable. The distinction in this case

1 is simply between -- is whether the State could  
2 conceivably have preferred riverboats over racetracks.

3 QUESTION: What -- what have we held wasn't  
4 justified outside of a suspect category situation, such as  
5 -- I don't mean Republicans and Democrats. You're into  
6 First Amendment suspect categories I suppose. What --  
7 what have we ever held was -- was irrational that didn't  
8 involve race or -- or, you know, political discrimination  
9 or something like that?

10 MR. JONES: The -- there's a case that Justice  
11 Ginsburg could tell us about. She argued a case where  
12 this Court -- I think it was called Weinberger v.  
13 Wiesenfeld, a case -- not a tax case. It was a Social  
14 Security benefits case, and the Court held that the  
15 distinct treatment of -- of the surviving spouse's  
16 ability --

17 QUESTION: It's a suspect category, and I mean,  
18 we're into sex discrimination.

19 MR. JONES: Well, it -- it was described by the  
20 Court as -- as a rational scrutiny case, and it said there  
21 was no legitimate State interest because in -- in the  
22 context between treating differently male and female  
23 surviving spouses, in light of the objective of that  
24 statute, which was to protect the -- the children of the  
25 couple, there was no rational basis to prefer one rather

1 than the other.

2 That is -- that is the only case that I can cite  
3 to you where this Court has applied a rational basis test  
4 to strike down a Federal statute. There may well be  
5 others.

6 QUESTION: There are others, but it's -- it's  
7 the -- it's quite interesting, is -- is there a -- there  
8 are two sets where they're struck down. One is what you  
9 might call the heightened rational basis which are  
10 normally not economic regulation, but there was the mental  
11 -- the mental -- the building, you know, the -- of the  
12 home for the mentally disturbed or whatever. And then  
13 there are the ones that are out-of-state, which are  
14 Dormant Commerce Clause cases. But is there any which is  
15 a pure rational basis in an economic area? You think the  
16 answer to that is no, and I can't think of one.

17 MR. JONES: I -- I can't think of one, but it's  
18 not because there is no rational basis test. It's because  
19 in applying this test, the Court is very deferential in  
20 recognizing that States have intentionally been given this  
21 authority over regulating State commerce, and that these  
22 kinds of choices are left to the legislative branch.

23 QUESTION: Mr. Jones, when you talked about  
24 Federal tax, I thought you were going to say the one that  
25 you have in your brief, *Martz* against Commissioner.

1           MR. JONES: Well, I -- we understand that to  
2 have been a case where the -- which you also argued I  
3 believe, unless I'm remembering the wrong case --

4           QUESTION: That was -- that was -- you left out  
5 that cert was denied.

6           MR. JONES: Ah.

7           (Laughter.)

8           MR. JONES: I made another mistake in the brief  
9 that I'll get to later if I have a chance. But that  
10 was --

11          QUESTION: These are all cases she won or lost?

12          MR. JONES: I'm afraid --

13          (Laughter.)

14          QUESTION: You didn't -- you didn't make the  
15 mistake of citing one that she lost, did you?

16          (Laughter.)

17          MR. JONES: No, I don't think so.

18          QUESTION: There are no such cases.

19          (Laughter.)

20          QUESTION: Oh, yes, there is and it was a tax  
21 case. It was a State tax case.

22          (Laughter.)

23          MR. JONES: But -- but the -- it was -- it was a  
24 tax case. But in that case, the Court -- you were -- the  
25 Court was persuaded that the distinction was invidious.

1 The Court didn't say that a different treatment of  
2 unmarried men and unmarried women in this particular  
3 deduction context was irrational. The Court said it was  
4 invidious. So I believe that the only tax -- Federal tax  
5 case that has -- well, I don't believe there is a Federal  
6 tax case that this Court has decided that violated --  
7 failed to meet the rational basis test.

8 The -- the court below made -- the Iowa Supreme  
9 Court -- where it went wrong was looking to only one of  
10 the purposes of the statute. There were many purposes.  
11 They looked to just the purpose of whether it aided  
12 racetracks, which just kind of strikes me as an  
13 unrealistic way to look at what the purpose of a  
14 legislation that imposes a tax on racetracks would be.

15 But to answer a question that Justice Stevens  
16 raised earlier, when -- in applying the rational basis  
17 test, the courts are to look to any plausible or  
18 conceivable theory. And -- and in *FCC v. Beach*, as well  
19 as other cases we've cited, in applying that test, the  
20 Court has said that you don't look -- you're not bound by  
21 the facts of the particular case. And indeed, you're not  
22 supposed to make fact findings as to what these legitimate  
23 interests might be. Instead, you're supposed to allow the  
24 State any rational legitimate interest that the Court  
25 might -- might be able to perceive and -- and nail down

1 that point in that case by saying that -- and I'm quoting  
2 -- it is entirely irrelevant whether the conceived State  
3 purpose actually motivated the State's decision.

4           So you don't have -- the State doesn't have to  
5 show that these rational, legitimate State interests, in  
6 fact, motivated the decision. It doesn't have to show  
7 that they are, in fact, the basis for the decision because  
8 this is a Federal constitutional question. This is not a  
9 question of interpreting the State law. If we wanted to  
10 interpret the State law, we'd want to know what its  
11 purpose was, but that's not this task. In looking at the  
12 constitutional limitation, it only -- it only takes effect  
13 if the State has no conceivable or plausible legitimate  
14 interest in the classification.

15           One other point to mention briefly is they say  
16 Allegheny Pittsburgh points another direction. Allegheny  
17 Pittsburgh was the rare case that this Court said in  
18 Nordlinger -- was the rare case where there was a West  
19 Virginia State constitutional provision that said all  
20 assessment -- all property taxes will be levied based on  
21 market value. A local assessor in that State didn't like  
22 that and he -- he assessed taxes based on acquisition,  
23 which is prices, which is the last sale price of each  
24 property, and that resulted in -- in a differential  
25 treatment of each taxpayer. And what this Court held in



1 -- in Allegheny Pittsburgh was that because the State  
2 constitution prohibited any taxation other than market  
3 value, there was no legitimate State interest to justify  
4 the -- the distinguishing tax rates.

5 Well, that case doesn't have any application  
6 here because there's no provision in the Iowa constitution  
7 that says that the Iowa Legislature cannot, in regulating  
8 commerce, prefer or promote riverboat traffic and  
9 riverboat --

10 QUESTION: Do you read Allegheny as saying that  
11 the -- if the State had enacted exactly the scheme that  
12 was being administered there, that it would pass equal  
13 protection review?

14 MR. JONES: It -- well, in Nordlinger, the Court  
15 -- if I understand your question right, in Nordlinger, the  
16 Court upheld an acquisition -- last sale price tax scheme  
17 I think in California where there was no constitutional  
18 provision in California that required market value  
19 taxation.

20 QUESTION: Would the answer in this case be  
21 different if the Iowa Supreme Court told us that the Iowa  
22 constitution requires that all slot machines be taxed  
23 alike?

24 MR. JONES: I think that you would make -- I  
25 think in that -- in looking for a legitimate State

1 interest, you would make an inquiry into whether the Iowa  
2 constitution prohibited preferring riverboats --  
3 preferring riverboat commerce because a legitimate State  
4 interest for Federal purposes -- and the Court made this  
5 very point in response to a dissent of yours in -- in the  
6 opinion by Justice Brennan in the Minnesota v. the Clover  
7 Leaf Creamery case.

8 QUESTION: Thank you, Mr. Jones.

9 Mr. McCormick.

10 ORAL ARGUMENT OF MARK McCORMICK

11 ON BEHALF OF THE RESPONDENTS

12 MR. McCORMICK: Mr. Chief Justice, and may it  
13 please the Court:

14 I think the Iowa Supreme Court in this case, as  
15 this Court will determine as it reviews the opinion,  
16 addressed two questions, not merely one question, in this  
17 equal protection challenge.

18 The first question the court addressed is what  
19 did the legislature have in mind in enacting this  
20 legislation. In doing so and in answering that question,  
21 the State court was doing what State courts routinely do,  
22 interpreting State law.

23 Once having determined the meaning of State law,  
24 as was its prerogative, the court then moved to the second  
25 question which is the only question that the State and the

1 United States have argued here, really, which is the equal  
2 protection issue.

3 We think the first question has to be answered  
4 before you jump to the second.

5 QUESTION: Well, what about the -- our decision  
6 in FCC v. Beach, which was just referred to earlier, where  
7 it says it really doesn't make any difference what the  
8 actual facts were?

9 MR. McCORMICK: The -- the decision in Beach, as  
10 I understand it, did require the establishment of a  
11 legitimate State purpose under the FCC provision that was  
12 at issue. In fact, the court of appeals had sent the case  
13 back to the FCC: Tell us what you had in mind, and the  
14 court of appeal -- or the FCC said, we can't think of a  
15 better reason than was given by Judge Mikva in his  
16 concurring opinion, and this Court accepted that as being  
17 a plausible basis then for the distinction that was at  
18 issue in that case.

19 QUESTION: But we have said that any conceivable  
20 rational basis is enough. We don't care what Iowa really  
21 had in mind.

22 MR. McCORMICK: I think you do, Your Honor, and  
23 I think the case that was mentioned earlier, the  
24 Weinberger case, is an illustration of how it makes a  
25 difference. In that case, as the Court ultimately found,

1 there was gender discrimination which was inappropriate in  
2 dealing with the issue survivorship benefits as to  
3 spouses, and the argument that was being proffered by the  
4 Government in that case was, this is okay because this  
5 statute was intended to take care of women who have  
6 trouble, when they are widowed, getting by in the work  
7 place.

8 QUESTION: If you think gender discrimination  
9 cases aren't different, you're just wrong.

10 MR. McCORMICK: No, Your Honor. I -- I am not  
11 saying that the analysis was the same, but I am saying  
12 that the Court looked to the actual intent as it was shown  
13 by legislative history.

14 QUESTION: Some legislatures -- some  
15 legislatures don't have legislative history. What is to  
16 be done in those cases? What, do you -- you convene a  
17 trial court to take testimony from legislators and others  
18 to find out what was the actual intent of the legislators?

19 MR. McCORMICK: What is routinely done in Iowa  
20 is what we did in this case, which is -- and what courts  
21 routinely do at the State level, at least what's done in  
22 Iowa, is that the court looks at any available materials  
23 that would bear on the concerns --

24 QUESTION: There are no materials. I mean, some  
25 States don't have legislative history. They just don't

1 keep it.

2 MR. McCORMICK: That's right.

3 QUESTION: What do you do in that case?

4 MR. McCORMICK: I'm telling you.

5 QUESTION: Do you call witnesses?

6 MR. McCORMICK: We don't have -- we do not have  
7 records or transcripts of legislative debates at committee  
8 hearings.

9 QUESTION: So were -- were -- was testimony  
10 taken from legislators asking why did you vote for this  
11 bill?

12 MR. McCORMICK: No, Your Honor, but --

13 QUESTION: Why not?

14 MR. McCORMICK: -- affidavits -- excuse me. But  
15 affidavits were obtained that explained what the concerns  
16 were that were being addressed. We have a full record.  
17 This was a summary judgment motion in which we put in  
18 information that was available to the legislature.

19 QUESTION: Affidavits from legislators?

20 MR. McCORMICK: Yes, Your Honor, but not saying  
21 why they voted as they did, but explaining the legislative  
22 history. And the Iowa court routinely, in dealing with  
23 the meaning of State law, has accepted the kinds of  
24 materials that we put in the summary judgment record.

25 QUESTION: Why didn't they explain why they

1 voted as they did? If, as you say, the -- the intent of  
2 the legislature is the criterion, why didn't you ask them  
3 why did you vote the way you did?

4 MR. McCORMICK: Because Iowa, like this Court,  
5 suggests that an individual legislator is incompetent to  
6 say that, but Iowa, like this Court, will permit  
7 legislators to explain legislative history, which is what  
8 was done here. That's what we did with these legislator  
9 affidavits. The Iowa Court used the kinds of materials  
10 that States use when they --

11 QUESTION: The whole is the sum of its parts.  
12 If you're really interested in why the legislature did it,  
13 you ought to get affidavits from every legislator saying  
14 this is why I voted for it, and if 51 percent voted for it  
15 for a certain reason, that was the reason.

16 MR. McCORMICK: In a State like Iowa, where we  
17 don't have the kind of information that's available from  
18 Congress, what we do is we ask our court to determine what  
19 the legislature intended as it must in many, many cases,  
20 including this kind of case, and offer the court the kind  
21 of information, the background information that's  
22 available.

23 QUESTION: If that's how it's done in Iowa, it  
24 can be done that way. This Court, when it's dealing with  
25 tax cases, it doesn't do it that way. It doesn't look for

1 the actual purpose.

2 And in -- and in the Wiesenfeld case, the whole  
3 thing was driven by it being a gender classification, and  
4 the Government's argument was this was pure favor to  
5 women. And the argument is that, no, that was not the  
6 actual purpose.

7 MR. McCORMICK: This Court has said in several  
8 cases -- it has said in the Nordlinger case and also in  
9 Heller against Doe -- that even in a rational basis case,  
10 to be plausible, a justification must not be precluded by  
11 the record.

12 And, for example, that is how Nordlinger  
13 distinguished Allegheny Pittsburgh because Allegheny  
14 Pittsburgh had determined that the West Virginia property  
15 tax scheme was a market value valuation or appraisal  
16 system. And in Nordlinger, the position was being  
17 advocated, well, this case is governed by Allegheny  
18 Pittsburgh. You can't have an acquisition value system  
19 like California. The Court distinguished Allegheny  
20 Pittsburgh by saying that the record in Allegheny  
21 Pittsburgh precluded the legislative goal of having a  
22 market value -- excuse me -- having an acquisition value  
23 tax system. That's how the case was distinguished.

24 QUESTION: But if you're looking at what -- what  
25 the legislature did, they did one thing great for the

1 racetracks. They gave them permission to have these slot  
2 machines, which they didn't before, so they're preferring  
3 the racetracks by giving them this, but they say not too  
4 much because we're going to let you make money from these  
5 slot machines, but not too much. We're going to take a  
6 piece of it.

7           So you like what they did, the permission to  
8 have the slot machines, but then say, ah, but once -- they  
9 have to give us as sweet a deal as they gave the  
10 riverboats. They didn't have to give you anything. They  
11 didn't have to let you have the slot machines.

12           MR. McCORMICK: Well, Your Honor, our argument  
13 about that is that they -- they threw us a lifeline when  
14 we were faced with economic disaster, just as they were  
15 throwing a lifeline to the riverboats, but it had an  
16 anchor attached to it. What they did, of course, was have  
17 a 2-year moratorium before the first escalation of tax  
18 occurred and they provided for a total of 10 years before  
19 the 36 percent is effective. It will be effective next  
20 year.

21           QUESTION: But it was -- it all came in in the  
22 same legislation, didn't it --

23           MR. McCORMICK: That's correct, Your Honor.

24           QUESTION: So they gave you something you never  
25 had before and it was pretty good, but you didn't --



1           MR. McCORMICK: The Iowa Supreme Court said what  
2 they did by that legislation was put us in a class the  
3 same as the riverboats with respect to slot machines,  
4 which was the main activity at both -- both venues, and  
5 that they treated us differently by imposing this  
6 draconian --

7           QUESTION: Well, then to treat you the same, I  
8 think that they would have to raise the parimutuel betting  
9 from 5 percent, whatever it was, to 20 percent.

10          MR. McCORMICK: Your Honor, the record here  
11 shows that parimutuel betting has invariably been a losing  
12 proposition at the tracks, and the legislature, when it  
13 passed this statute, specifically and expressly required  
14 that the riverboats use the revenue first to pay their  
15 debt, because they were in terrible circumstances, but  
16 secondly to subsidize the purses at the parimutuel betting  
17 and to promote the -- the horse industry. And such --  
18 these are mandated goals which were -- which the  
19 legislature required.

20          QUESTION: That the riverboats do that or that  
21 the tracks do that?

22          MR. McCORMICK: No. That the racetracks do  
23 that.

24          QUESTION: Oh, okay. You said the riverboats.

25          MR. McCORMICK: I'm sorry. I meant the

1 racetracks are required by the statute to -- to do those  
2 things. Parimutuel betting has -- has never been a source  
3 of net revenue in -- at least since the bankruptcy of the  
4 main racetrack in 1992.

5 QUESTION: As I understand, the riverboats  
6 wouldn't make money either if they didn't have the slot  
7 machines.

8 MR. McCORMICK: Well, that's certainly arguable.  
9 They've had them since they were initiated. Their problem  
10 in 1994 was getting rid of the betting and loss limits.

11 But the -- the Iowa court -- and it's our  
12 contention that this was a matter that was within the  
13 prerogative of the court -- in ascertaining the  
14 legislative intent in this case, said it was not the  
15 intent of the Iowa Legislature to benefit riverboats at  
16 the expense of the racetracks.

17 QUESTION: So how does this work? I mean, I  
18 thought there was a distinction between your trying to  
19 show in a case like this that the rational purposes that  
20 are advanced simply are not served -- that's a factual  
21 matter. And I take it that's Allegheny. They showed that  
22 the -- that this wasn't a way to bring about what they  
23 claimed.

24 MR. McCORMICK: Yes.

25 QUESTION: All right. But it's not open to you

1 to show that the legislature didn't really have that  
2 motive for the reason that if the courts permitted you to  
3 show it, there would be no end to that. People would be  
4 arguing about legislative theories in State cases like  
5 this forever.

6 So if that's right -- I -- I mean, you're not --  
7 I don't think you can show the first. Maybe you can.

8 MR. McCORMICK: Well, our contention is that --

9 QUESTION: Yes -- is you can.

10 MR. McCORMICK: -- this Court left that open to  
11 us in Allegheny Pittsburgh.

12 QUESTION: Yes. I think it did leave it open,  
13 but you see, they come in with some rational purposes, and  
14 you think you've showed here that -- that they don't --  
15 that this -- this particular statute could not serve those  
16 purposes as a matter of the world of fact?

17 I mean, one is, for example, they say if we  
18 don't have a lower rate -- you've heard it -- they'll go  
19 off to some other place, and they have one that went to  
20 some other place. And you don't deny they went to some  
21 other place.

22 MR. McCORMICK: Well, the question is not only  
23 legitimacy of the goal, but whether there is a rational  
24 relationship and whether the classification involved is  
25 reasonably related to any differential treatment.

1           As in Allegheny Pittsburgh, our complaint here  
2 is a comparative one. It's the comparative treatment for  
3 the same activity essentially in the same place because  
4 we've got racetracks in two of the cities that -- that are  
5 the cities where two of the three riverboats were in fact,  
6 and -- and on the same activity, which is what the Iowa  
7 Supreme Court found when it determined that for  
8 classification purposes, it saw no difference except that  
9 one was a facility that was fixed and the other floated.

10           And then having -- having made that  
11 determination of the equal situation, the court looked at  
12 differential treatment too and said --

13           QUESTION: But there was another factor that --  
14 that was part of it, isn't it? There was a 20 percent  
15 rate across everything, all the kinds of games that they  
16 have on the riverboat. So that's nice and  
17 administratively convenient. You don't want to have one  
18 rate for the slot machines and another one for blackjack.

19           MR. McCORMICK: Yes, Your Honor. And that rate  
20 was in place in 1994. There wasn't any change in the tax  
21 paid by riverboats. The legislation imposed for the first  
22 time, because it authorized for the first time, a tax on  
23 slot machine usage and activity at the racetracks.

24           QUESTION: May -- may I address a -- a slightly  
25 different argument that you were making, I think you were

1 making a minute ago? And that is, now -- it had two  
2 premises.

3           Number one, you said our own cases show that a  
4 -- a conceivable rational basis cannot be relied upon when  
5 the record indicates that in fact that was not the basis  
6 for the legislation. So fact limits what is -- what can  
7 be considered as conceivable.

8           Number two, you said a moment ago that the Iowa  
9 Supreme Court made a determination about the -- the  
10 purpose of the statute, and -- and at least they  
11 determined that the purpose of that statute was not to aid  
12 riverboat gambling.

13           So I take it your argument is you can't argue  
14 that this differential treatment is rationally related to  
15 the promotion of -- of riverboat development or river  
16 development because the Iowa Supreme Court has  
17 definitively determined that that was not the case. Is  
18 that a fair statement?

19           MR. McCORMICK: That's certainly part of our  
20 argument, yes, Your Honor.

21           QUESTION: All right. My -- my question I guess  
22 is this. There is no question that the Iowa Supreme Court  
23 in the construction of the Iowa constitution can approach  
24 matters that way. If this Court approaches matters that  
25 way, then in effect we're going to have two different

1 methodologies, one for Federal cases, I guess, and -- and  
2 one for -- for State cases. And we're going to have to  
3 take every State case subject to fact determinations made  
4 by the State courts, and that's going to limit the  
5 application of this conceivable rational basis test.

6           Why would it not be wiser for us to say, just to  
7 keep the systems running smoothly, look, we are not going  
8 to be bound by State court determinations of legislative  
9 intent or purpose? The State courts are perfectly free to  
10 do that under their own constitutions, but when it gets to  
11 us, we will not accept, for example, the determination in  
12 a case like this by Iowa that the purpose was not to aid  
13 riverboat gambling. Why wouldn't that be a sensible way  
14 for us to -- to go, leaving the State courts to run their  
15 systems any way they want to?

16           MR. McCORMICK: We think, Your Honor, that the  
17 question of the meaning of State law has always been  
18 within the domain and prerogative of -- of the State  
19 courts.

20           QUESTION: But this isn't a question of State  
21 law. It's a question of State fact in applying a Federal  
22 law, i. e., the -- the rational basis scrutiny under the  
23 Federal -- the Equal Protection Clause.

24           MR. McCORMICK: Yes, Your Honor. I'd invite  
25 your attention to Metropolitan Life Insurance Company

1 against Ward, which came out of Alabama, dealt with  
2 burdensome taxes placed on out-of-state insurers that  
3 wanted to do business in Alabama. That case, like this  
4 one, involved a summary judgment proceeding where  
5 information was put into the State court record. The  
6 State in that case advanced, as I understand it, something  
7 like 17 reasons as rational bases for that  
8 differentiation.

9 Now, this Court reviewed two of them because the  
10 State court held that they were valid justifications under  
11 that summary judgment record. This Court reversed,  
12 finding that those justifications were not valid or  
13 supportable. They were not rational. But this Court did  
14 not go further than to look at the other proffered  
15 justifications by the State. The Court sent the case back  
16 for completion of the summary judgment proceedings.

17 And what was being done in that Alabama case is  
18 exactly what we did in this case by looking at the summary  
19 judgment record.

20 QUESTION: I thought that was -- involved  
21 interstate discrimination against out-of-state actors.

22 MR. McCORMICK: That was the -- that -- that was  
23 the issue that was being reviewed on equal protection --

24 QUESTION: But here you have everybody internal  
25 in the same -- the same State. So I think that's a

1 different case.

2 MR. McCORMICK: Excuse me, Your Honor?

3 QUESTION: Well, you're not discriminating  
4 against out-of-staters, which is a Federal concern.

5 MR. McCORMICK: Yes, Your Honor. I'm not  
6 talking about the -- the equal protection issue there.  
7 I'm talking about the manner in which the record was  
8 determined and the State court was given the prerogative  
9 of telling this Court what it determined the purposes were  
10 of the law.

11 QUESTION: But if you're -- if you're right  
12 about how Iowa goes about doing things, then you go back  
13 and tell the Iowa court, the Supreme Court has this any  
14 conceivable purpose test. You have what's the real  
15 purpose test. So now say we'll apply our own State notion  
16 of what equal protection is and -- and that's the end of  
17 it.

18 MR. McCORMICK: We're going to say that we  
19 thought the -- this Court would say if the record showed,  
20 whatever the record was, in this case our summary judgment  
21 record, that the rational speculation by the Government is  
22 not supported by the realities of the situation, then that  
23 the court -- that sort of justification is not plausible.  
24 We thought that's what this Court's view was.

25 We certainly will argue to the Iowa court that



1 it is within its prerogative initially first to decide  
2 what the legislative purposes were, as it does in many  
3 cases and as this Court has in many cases respected when  
4 it is doing Federal constitutional review where the  
5 meaning of a State law is a threshold issue. We'll be  
6 then inviting the Iowa court, if this Court remands the  
7 case, to reconsider the case under the Iowa constitution.

8 QUESTION: Mr. McCormick, why isn't there a  
9 categorization problem in this case? I mean, there is no  
10 Iowa law pertaining to slot machines in particular. There  
11 is a law taxing table games at -- the revenues from that,  
12 at 20 percent. Right?

13 MR. McCORMICK: Yes, Your Honor.

14 QUESTION: Why isn't it perfectly reasonable to  
15 look upon these laws this way: Iowa is taxing a business  
16 which has nothing but table games at 20 percent on all the  
17 table games. It is taxing a business which has parimutuel  
18 betting plus slot machines at 5 percent for the parimutuel  
19 betting and 34 percent for the slot machines.

20 I mean, you certainly wouldn't be complaining if  
21 they taxed racetracks at a combined rate of 15 percent or  
22 -- or a combined rate of -- of 30 percent for that. Now  
23 you -- you would have no complaint. So why does it make  
24 any difference if they simply, instead of picking one  
25 percentage, charge 5 percent on the parimutuel and 34

1 percent on the slot machines? But they're two different  
2 businesses. One is just table games. The other one is  
3 horse -- horse racing and slot machines. They're --  
4 they're different businesses. They're taxed differently.

5 MR. McCORMICK: Well, the -- at least the view  
6 of the Iowa court was that these two enterprises, the  
7 riverboats and racetracks, are engaged in the same  
8 business. They are in the same class. And singling one  
9 of those taxpayers out for differential treatment violates  
10 equal protection in the view of our court.

11 The -- the --

12 QUESTION: Your court is entitled to -- to view  
13 it that way from State law, but they were -- they've said  
14 that State law mirrors Federal law, and just because they  
15 choose to look at it that way, that doesn't mean I have to  
16 look at it that way.

17 MR. McCORMICK: No, Your Honor. That's --  
18 that's certainly correct.

19 But in terms of the classification here, we  
20 think that the State court was warranted in finding that  
21 these two taxpayers are in the same class. Parimutuel  
22 revenues have -- have not, from 1994 -- actually  
23 immediately preceding that and subsequently, ever been a  
24 factor in the revenues of racetracks except a negative  
25 factor.

1           The table games -- that's an advantage that the  
2 riverboats have over racetracks, not a justification for  
3 differential treatment for putting a heavier tax on the  
4 same activity at the racetracks.

5           QUESTION: It's an odd position when you say  
6 there was no obligation whatever for the State to allow  
7 slot machines at racetracks, but if they allow it, they  
8 have to be as generous to the racetrack as they were to  
9 the riverboats. What didn't come in as a discrete item  
10 came in as part of the whole gambling operation. It is  
11 strange to say not only -- once you give it to us, you  
12 have to give us the best deal.

13           MR. McCORMICK: We're not -- we're not really  
14 saying that. We're saying that -- that any differential  
15 treatment cannot be of the magnitude that exists here and  
16 be consistent --

17           QUESTION: But you'd have no equal protection  
18 argument at all if they didn't let you have the slot  
19 machines.

20           MR. McCORMICK: That's correct, Your Honor.

21           QUESTION: Iowa -- the Iowa court made the  
22 statement, as I understand it, that the Iowa Equal  
23 Protection Clause and the national Equal Protection Clause  
24 had identical requirements at least for the purposes of  
25 this case.

1           MR. McCORMICK: What they said was that they  
2 applied the same analysis as this Court.

3           QUESTION: Okay.

4           Now assume, for the sake of argument, that we  
5 don't accept the analysis for purposes of Federal equal  
6 protection. Do you understand the Iowa decision to be  
7 that there is -- despite that finding on our part or that  
8 conclusion on our part, that there is no question that  
9 what they said in that opinion does reflect the Iowa Equal  
10 Protection Clause and the result that they reached will be  
11 and -- and can be found on the basis of this opinion to be  
12 the result under the Iowa clause?

13          MR. McCORMICK: Yes, Your Honor. We --

14          QUESTION: So that what we do will make no  
15 difference in the -- in the ultimate result in this case.

16          MR. McCORMICK: If the Iowa Supreme Court, if  
17 this case were remanded, determines through the use of the  
18 same analysis, the same result --

19          QUESTION: Unless they change their rationale,  
20 there is no question, as I understand it, on the basis of  
21 this opinion what the result will be. Is that correct?

22          MR. McCORMICK: Well, it -- I sure hope so.

23          QUESTION: I mean, you're going to -- yes. I  
24 mean, that's what I --

25          QUESTION: They can't blame it on us.

1 QUESTION: No, that's quite right.

2 QUESTION: I mean, right now they're blaming it  
3 on us, and if they want to take the blame themselves --  
4 how -- how are they appointed? Are they appointed or  
5 elected?

6 MR. McCORMICK: They're through a Missouri Plan  
7 appointed, Your Honor.

8 QUESTION: Missouri Plan appointed.

9 QUESTION: Well, the Supreme Court of Iowa in --  
10 in its opinion in this case said that the Iowa Equal  
11 Protection Clause and the Federal clause were the same or  
12 subject to the same analysis, didn't they?

13 MR. McCORMICK: Yes, Your Honor.

14 QUESTION: And I suppose if we decide that it's  
15 wrong on the Federal section, it goes back to the Supreme  
16 Court of Iowa, they could just as easily say, well, our --  
17 our State equal protection follows Federal equal  
18 protection. If the Supreme Court of the United States  
19 says the Federal is one, we're going to follow the  
20 Federal.

21 MR. McCORMICK: We think that the court has --

22 QUESTION: It's not foreordained what they will  
23 do.

24 MR. McCORMICK: No. You're -- you're right,  
25 Your Honor. I'm just --

1           QUESTION: So you think -- you think that is  
2 open to them --

3           MR. McCORMICK: I think that --

4           QUESTION: -- the way -- the way they wrote it.

5           MR. McCORMICK: Oh, I think so. I think it  
6 would be available to the Iowa court.

7           QUESTION: Well, they'd have to eat their words.

8           MR. McCORMICK: Yes, Your Honor.

9           QUESTION: I mean, they'd have to say we're  
10 changing our law.

11          MR. McCORMICK: That's right.

12          QUESTION: And I doubt that this is the first --  
13 is this the first case in which they've said we -- we  
14 follow Federal law on equal protection?

15          MR. McCORMICK: No, Your Honor.

16          QUESTION: I didn't think so.

17          MR. McCORMICK: In fact, there are cases where  
18 our court, in applying exactly the same analysis that this  
19 Court has done, has reached different results. We have  
20 Bierkamp against Rogers in our brief in which our court  
21 invalidated the Iowa --

22          QUESTION: Judges don't like to eat their words.

23          MR. McCORMICK: We're hopeful.

24          QUESTION: But as I understand it, they didn't  
25 say, we follow the Feds. They said, they are identical.

1           MR. McCORMICK: Well, what they said is the  
2 scope and the import of the two constitutional provisions  
3 are the same. Actually part of that -- if one looks at  
4 the history in Iowa, there's an old case, 1911 case, State  
5 against Fairmont Creamery. The Iowa court for years in  
6 interpreting the Iowa equal protection provision never  
7 made any reference to Federal law. And that case, for the  
8 first time in 1911, cited a couple of cases from this  
9 Court and said our decisions are in harmony with the  
10 decisions of the United States Supreme Court.

11           I believe the evolution shows and history shows  
12 that what the court has done since then is for  
13 convenience, because of the availability of the precedent  
14 of this Court, said we use the same analysis. And we --  
15 we do the same thing in antitrust law. We do the same  
16 thing in civil rights law, even though we have some  
17 statutory differences.

18           But the court is still free to arrive at a  
19 different result under that analysis, and in this case  
20 certainly the court arrived at the decision that it did  
21 not only under the Federal Constitution but the State  
22 constitution.

23           QUESTION: It would mean they were wrong twice,  
24 both in their interpretation of Federal law and also in  
25 their interpretation of Iowa law, right?

1           MR. McCORMICK: I don't believe so, Your Honor,  
2 because I think what they have said is that they use the  
3 same analysis. They don't say the same result is  
4 foreordained. This -- our court, for example, doesn't  
5 follow the Lyon case on the issue of the good faith  
6 exception to the exclusionary rule. The court has been  
7 independent, treated State grounds as being adequate and  
8 independent in appropriate cases, even though generally,  
9 as it said here, it tracks with the Federal cases under  
10 similar provisions.

11           One thing I'd like to mention to you because I  
12 think it is a little bit of a misinterpretation of reality  
13 to suggest that these riverboats were created in Iowa to  
14 -- to sit on our border rivers. The statute involved and  
15 the implementing regulations will allow a riverboat in  
16 Iowa on any river in Iowa, on any lake in Iowa, or on any  
17 reservoir. And -- and there is, in fact, as the record  
18 shows, a riverboat on a landlocked lake in southern Iowa  
19 such that for comparison purposes, comparing these  
20 racetracks, two of which are in river cities, and --  
21 actually all three of them in river cities, but two of  
22 them in river cities where there were also riverboats at  
23 the time of this --

24           QUESTION: How do you get the boat to the  
25 landlocked lake?



1 (Laughter.)

2 MR. McCORMICK: It's an interesting process.

3 One either builds it there or carries it with --

4 QUESTION: Humphrey Bogart. Humphrey Bogart  
5 gets it there I think.

6 (Laughter.)

7 MR. McCORMICK: Yes. It's African Queen.

8 And the notion that there is any particular  
9 navigation or -- or sailing involved with these -- with  
10 these methods of housing gambling activities is -- is more  
11 imaginary than real.

12 I appreciate very much your attention. We  
13 believe that this Court in reviewing past State court  
14 equal protection decisions and more recently in the -- in  
15 the tax area in Williams against Vermont and Hooper  
16 against Bernalillo County has -- has respected the -- the  
17 determinations that have been made by the State courts as  
18 to what legislative intent was, as we ask the Court to do  
19 in this case, and in those cases, and applying -- after  
20 that threshold determination, applying equal protection  
21 analysis, found the statutes under a rational basis  
22 analysis did not comport with equal protection. We think  
23 this is a case where the record will support this Court in  
24 finding that the Iowa Supreme Court got it right and that  
25 the State and Solicitor General have it wrong under this

1 record.

2 Thank you.

3 QUESTION: Thank you, Mr. McCormick.

4 Mr. Miller -- General Miller, you have four --

5 REBUTTAL ARGUMENT OF THOMAS J. MILLER

6 ON BEHALF OF THE PETITIONER

7 MR. MILLER: I would just point out that

8 Minnesota v. Clover Leaf Creamery Company is the -- is the  
9 case where this Court decided that in -- in a case before  
10 this Court that comes from a State court, that the Federal  
11 process, the Federal analysis applies, and that the total  
12 work, the total decisionmaking done by the State court is  
13 reviewable here, so much so that in that case they  
14 reversed a factual finding in -- in the court.

15 I would emphasize too that -- that the Iowa  
16 Supreme Court has said that -- that the analysis is -- is  
17 -- always is the same between the State provision and --  
18 and the Federal provision, and has only departed, as a  
19 matter of result, only one time, the Bierkamp case, in the  
20 130 years that the two provisions existed at the same  
21 time.

22 With that, I would respond to any questions that  
23 you might have or -- or conclude by asking you to uphold  
24 the constitutionality of this -- of this act because there  
25 are multiple legitimate State interests developed by

1 rational speculation to support the legislation. Thank  
2 you.

3 CHIEF JUSTICE REHNQUIST: Thank you, General  
4 Miller.

5 The case is submitted.

6 (Whereupon, at 12:11 p.m., the case in the  
7 above-entitled matter was submitted.)

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25