In the

Supreme Court of the United States

DWIGHT GEDULDIG, etc.,)
)
Appellant,)
)
v.) No. 73-640
)
CAROLYN AIELLO, et al.,)
)
Appellees.)

Washington, D. C.
March 26, 1974

Pages 1 thru 46

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Appellant,	
v.	No. 73-640
CAROLYN AIELLO, et al.,	
Appellees.	

Washington, D. C.,

Tuesday, March 26, 1974.

The above-entitled matter came on for argument at 10:57 o'clock, a.m.

BEFORE:

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

APPEARANCES:

MRS. JOANNE CONDAS, Deputy Attorney General of California, 6000 State Building, San Francisco, California 94102; for the Appellant.

MRS. WENDY W. WILLIAMS, Legal Aid Society of San Mateo County, 2221 Broadway, Redwood City, California 94063; for the Appellees.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 73-640, Geduldig against Aiello.

Mrs. Condas, you may proceed whenever you're ready.

ORAL ARGUMENT OF MRS. JOANNE CONDAS,

ON BEHALF OF THE APPELLANT

MRS. CONDAS: Mr. Chief Justice, and may it please the Court:

This case is here, brought by California, on appeal from the decision of a three-judge court holding unconstitutional the exclusion of section 2626 of the California Unemployment Insurance Code, which excludes pregnancy from coverage under the disability insurance program.

The cost impact of this decision is estimated to be a minimum of $120 million annually, based on the current level of operations of the disability fund.

The question we present to this Court is whether a State can establish a disability insurance program which compensates wage loss from illness and injury but not for normal pregnancy without violating the equal protection or due process clauses of the Constitution, when there is neither discriminatory intent in the creation of the fund nor discriminatory impact in its operation.

In order for the Court to understand how this case arises, I'd like just very briefly to describe how the fund

was originated and developed.

In 1946, California became the second State to adopt a disability insurance program. This was primarily because during the Second World War enormous surpluses had built up in the Unemployment Insurance Fund in California, because there was virtually no unemployment during the war years.

And the Governor proposed that the one percent which employees had to contribute to that fund should be shifted to provide disability insurance instead, and the Governor, in his message, explained why he thought the one percent should be the figure and why, since it was coming from employees, it should be kept low.

That is, that an employer can always pass along whatever is charged to him in terms of the cost of doing his business, in terms of providing a service or costs of goods; but to an employee there is no one else to pass the charge, and as to him it amounts to a gross income tax.

It should be borne in mind, of course, that there is no employer contribution to this particular fund. That was an illustrative example only.

Well, the disability insurance program has been financed within the limits of that one percent, and this was accomplished primarily as a result of incorporating certain features in the California plan that were different from the Rhode Island plan, which was the only model that California

had to go by at that time.

Rhode Island had begun paying benefits in 1943, and by 1946, in the middle of the year, they had gone from a $2.7 billion surplus to a $1.5 million deficit. And there were primarily two factors, omissions, really, from the Rhode Island plan that accounted for this financial problem.

The first was that they had not provided for the prevention of double recovery. It was possible under the Rhode Island plan to recover both Workmen's Compensation Disability and Unemployment Disability for the same illness.

And, secondly, they had included pregnancy coverage.

Pregnancy benefits posed the larger problem for Rhode Island, and really amounted to more than twice what was paid for the Workmen's Compensation duplication.

The California plan made changes in both of those features. Section 2929 -- pardon me, 2629 of the California Unemployed Insurance Code prevents the double recovery, and section 2626 excluded normal -- excluded pregnancy until 28 days after the termination of pregnancy.

Now, the reason I used that in the past tense is that last year that section was amended, and it now provides for coverage for complications of pregnancy, instead of the exclusion.

QUESTION: Mrs. Condas, you told us about the Rhode Island experience and the fact that Rhode Island was the first

State to have any such plan as this and California the second. There are now, what, a total of five States or six?

MRS. CONDAS: Yes, Mr. Justice Stewart. Would you like an explanation of the five States?

QUESTION: Well, I just wondered if any of the States that now have the plan do provide maternity benefits, currently?

MRS. CONDAS: Yes, currently, perhaps the best example of the potential problems that we're discussing is the State of Hawaii. And Hawaii, in May, amended its law to provide coverage for pregnancy.

The situation there is that premiums for men employees have remained $3.25 per employee per month. The rate for women was always a little higher, and this simply is standard in the disability insurance field. The rate for women was four dollars per female per month.

QUESTION: It doesn't go on a percentage out there, it's a fixed sum in dollars?

MRS. CONDAS: It's a disability insurance premium charge.

QUESTION: Right.

MRS. CONDAS: And, as a matter of fact, all but a certain base period, as California has a limitation on what the employee can be charged, --

QUESTION: Unh-hunh.

MRS. CONDAS: -- Hawaii has a limitation on what the employee can be charged. And so the increase in cost in Hawaii will be picked up by a charge to employers.

But that charge is enormous. As I say, in the case of men the rate has not changed, it's $3.25 per man per month; for a woman it's gone from $4.00 per woman per month to $8.76 per woman per month.

And the only thing that has changed is the inclusion of pregnancy.

I might also mention that New Jersey provides a maximum of eight weeks of benefits: four weeks before birth and four weeks after birth. That's the maximum. And the New Jersey experience is that between 49 and 57 percent of its funds go to pay for pregnancy benefits.

QUESTION: And those two States do pay for pregnancy -- do any of the other three -- or California -- what are there, a total of five?

MRS. CONDAS: Yes.

QUESTION: So that leaves two others.

MRS. CONDAS: Yes. I beg your pardon. Rhode Island, of course, was the first State. Now, they have had several changes in their law. At the present time they provide for a maximum lump sum for a normal pregnancy of $250 in benefits.

California now covers abnormalities and complica-

tions of pregnancy.

QUESTION: Unh-hunh.

MRS. CONDAS: I am somewhat uncertain as to the present state of New York law. Their law excludes pregnancy, but their Human Rights Commission has required employers to treat pregnancy, for all disability purposes, like --

QUESTION: As sick leave, illness or injury.

MRS. CONDAS: Yes.

QUESTION: Unh-hunh.

MRS. CONDAS: And I don't know enough about the details of the plan to know just what financial impact that has, ultimately.

Well, California incorporated the features that it could from Rhode Island, in order to enable it to carry out an essential purpose to the fund. And the essential purpose to the California disability plan is to provide, at low cost, a fund which provides benefits having significant levels of benefits. They've always been a fairly healthy wage continuation. And to provide broad coverage, to help as many employees as could be helped.

The plan pays out virtually all of its income in benefits. In the past five years, for example, the ratio or pay-out to benefits has been 90 percent -- in the range of 90 percent of income to 103 percent of income.

The plan provides for comprehensive benefits, as

I've indicated, but it does contain actually three exclusions: one is -- and they're all based on the inordinately high cost of providing them, based on actuarial standards common in the insurance industry.

The first is the short-term disability. Unless you have a waiting period of some duration, you're just swamped with small claims. So there's an exclusion of any disbility which lasts less than eight days.

QUESTION: Unless the person's in the hospital, isn't that correct?

MRS. CONDAS: That's correct.

The second exclusion is the disability that endures more than 26 weeks. That doesn't matter whether he's in the hospital or not. That's simply the maximum benefits allowable.

The third one is the pregnancy exclusion.

As I've indicated, the experience of the California fund is much like that of the disability insurance industry generally. It soon became apparent that it did result in women deriving substantially more benefits than men. This results primarily because we do have the flat rate.

And so when you have a situation in which you charge people a flat rate, and you have the standard in the insurance industry that women file more disability claims, the impact of that is that women derive substantially more

benefits than they make contributions.

QUESTION: Well, it's a flat percentage, isn't it, rather than a flat rate?

MRS. CONDAS: Well, it's a flat rate of one percent.

QUESTION: One percent?

MRS. CONDAS: Yes.

QUESTION: I was wondering if what you've just described might be a function of the lower wage levels for women. They pay in less, therefore, and even then assuming they got the same benefits as a man did, they would get greater proportionate benefits.

MRS. CONDAS: Well, our brief includes some charts. One is affixed to the affidavit of an actuary, William Smith, who is not an employee of the agency here, which shows that the claim rate, regardless of the income level, the claim rate is higher in the case of women.

QUESTION: In absolute terms.

MRS. CONDAS: In absolute terms.

And we also have that confirmed by figures from our own fund. The claim rate at every income level is greater. Indeed, we discovered recently that perhaps the highest claim filing rate of all is women who make in excess of $10,000.

QUESTION: Unh-hunh.

MRS. CONDAS: Well, that's the background of the fund.

The background of this litigation is that there were two suits: One brought in the Federal District Court; the other brought in the California Supreme Court, by petition for writ of mandate.

Both alleged that the exclusion of pregnancy amounted to a denial of equal protection.

But since the California court had already ruled on the constitutionality of its statute, in a case called Clark vs. California Stabilization Commission, the cases were transferred and consolidated in federal court. A three-judge court was convened, and the matter was heard on cross motions for summary judgment.

Now, I want to make one point from the California case, because I think its key, in terms of what we see as the rationale for exclusion of pregnancy. In the Clark case, the State court said that the Legislature was entitled to consider, quote, "whether the objects of the statute would be best served by including a disability benefit which reasonably might impose upon a majority of the employees a burden disproportionate to contemplated benefits, in order to favor the minority who are included within th- classified group."

In other words, the court was concerned that the pregnancy benefits would result in a disproportionate amount of benefits going to a sub-group. And that is exactly what

has happened in other States, and it's exactly what we predict will happen in California.

The federal court, the federal three-judge court equated the classification of pregnancy as one based on sex, and held that it denied equal protection to pregnant women, and also held that pregnancy benefits could not be excluded simply on the basis of cost.

As we've indicated, it's not simply cost, it's the combination of factors that make up the California plan. The cost, the broad coverage, and the significant level of benefits that it's desired to maintain.

QUESTION: Mrs. Condas, are there any exclusions in your plan for particular diseases at all?

MRS. CONDAS: Mr. Justice Blackmun, there are none that I'm aware of, except that, for example, in the case of a diabetic or a person with renal failure, who has to go in the hospital once a week or who has an intermittent disease. In effect, his disease is excluded because he never has a disability period that goes for eight days, but he may be critically ill and get no disability compensation at all.

QUESTION: Now, most private plans do have disease exclusions, do they not? I'm thinking mainly of psychiatric problems. Or am I wrong in this?

MRS. CONDAS: I have not made a very deep study of private plans. I know that there are various combinations of

exclusions, which I would like to point out are generally based on premium cost. I think perhaps one can get almost any kind of health coverage he wants on a private insurance basis, provided he is willing to pay the cost of obtaining that coverage. And I believe that --

QUESTION: But doesn't California exclude drug addiction, for example?

MRS. CONDAS: Well, there is this one Code section which deals with dypsomania, drug addiction, and sexual psychopaths.

QUESTION: So you do have some exclusions.

MRS. CONDAS: Well, except that it requires that they be under court commitment, --

QUESTION: I see.

MRS. CONDAS: -- and that's a fairly archaic practice. Those provisions are still in the law, but it would be unrealistic to say that they constitute valid exclusions.

QUESTION: So, absent court commitment, they are covered.

MRS. CONDAS: That is correct.

QUESTION: Unh-hunh.

MRS. CONDAS: Although the issue in all of the briefs has been discussed in terms of the sex-limited characteristic, the California plan covers any kind of sex-

limited disability, of either sex, with the exception of pregnancy.

So that what this case boils down to is the question of what provision of the United States Constitution compels us to include pregnancy in our disability insurance plan.

We say, California says that the equal protection doesn't compel it, because the equal protection clause requires another class similarly situated. And the majority below acknowledged that pregnancy is unique and that no one is situated similarly to a pregnant woman.

Judge Williams, in dissent below, had difficulty finding any equal protection factors involved here, on the basis that women derive significantly more benefit from the operation of the program than men do. They contribute only 28 percent of the withholdings, and they draw 38 percent of the benefit payments.

Now, whether you wish to attribute that to lower pay for women or not, it's apparent that there is no disparate impact in the operation of this fund upon women.

This Court did not treat the pregnancy question before it recently in Chesterfield Board of Education vs. LaFleur, in the equal protection context. It rather based its decision on due process considerations, and that's the test that we urge the Court to adopt here.

It's California's contention that we have a valid

State interest in maintaining the solvency of this insurance program, and also in providing comprehensive benefits to the maximum number of workers who can be served.

This Court has said that in the area of economics and social welfare legislation that the Court will just the relationship of the means and ends on the rational basis test.

If the Court is willing to do that, I would like to discuss the five factors which, in combination, we believe amply justify the exclusion of pregnancy.

Certainly, questions could be raised and qualifications made on any one of these factors individually. It's the combination of factors which California urges requires the exclusion.

The first is the relative cost factor.

The second is that the condition of pregnancy is generally voluntary, and subject to planning.

The third is that pregnancy disabilities have a significantly longer duration.

The fourth is that treating physicians apply a different medical standard.

And finally, the fifth, that there is a major difference in the return-to-work rate following disability from pregnancy.

First, in terms of the relative cost, the majority

of the three-judge court accepted the appellant's estimate that pregnancy benefits would add 40 percent to the operation of this plan. It simply regarded that increase as irrelevant.

As I've indicated, the experience of New Jersey is that it costs even more than that, in terms of half of their benefits, approximately, going to pay complications and benefits of one category of disease.

This cost estimate is also consistent with a joint statement filed with the Office of Federal Contract Compliance on February 11th, 1974, by the Health Insurance Association of America and the American Life Insurance Association. This group represents 500 insurance companies who, together, write 90 percent of the health insurance in the United States.

And in that joint statement, they indicate that for an employer providing a typical disability income plan -- this is not just medical benefits while you're in the hospital; this is the income protection kind of plan -- that covering pregnancy would add between 40 and 50 percent to the cost.

I have already given you the impact in terms of what it has done to Hawaii.

I would also note with regard to the voluntariness of pregnancy, that the appellees have conceded that most births are desired.

On the other hand, the disability fund which compensates for illness and injuries involves misfortunes and

accidents, and the kind of thing, disease and accident are the kinds of things which no one ever desires. And because of that basic distinction in the desirability and the voluntariness of the condition, there is a significantly greater incidence of planned use of the program.

While it's true you may put off a cataract operation until next year, so, to that extent, you could plan the timing; you certainly can't plan not to have a cataract. That's something which befalls you.

QUESTION: What about cosmetic surgery?

MRS. CONDAS: We conducted a brief study which indicates that this is truly a de minimis proposition. It's the kind --

QUESTION: Even in California?

[Laughter.]

MRS. CONDAS. Even in California. At least during the three months that were surveyed, November through February of this past period, a three-month survey was made of all disability claims, and it was found that 0.12 percent of all claims filed were for purely cosmetic surgery and 85.5 percent of those claims were filed by women.

QUESTION: Of course, I suppose some of those would run into your short-term disability proposition, anyway.

MRS. CONDAS: Well, these were claims that were filed, so they would have to be either for hospitalization

benefits, in which there is not the seven-day exclusion, or for disabilities that ran into the eighth day.

QUESTION: Mrs. Condas, before you sit down, some of these original plaintiffs have been fully paid off after your interim decision in the State court, haven't they?

MRS. CONDAS: Yes, Mr. Justice.

QUESTION: So that, so far as they are concerned, the case is moot?

MRS. CONDAS: Yes, Mr. Justice. The only claimant alive, in effect, is Mrs. Jaramillo, whose claim would be for a normal pregnancy disability.

I should like to reserve whatever time there is remaining to me for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

Mrs. Williams.

ORAL ARGUMENT OF MRS. WENDY W. WILLIAMS,

ON BEHALF OF THE APPELLEES

MRS. WILLIAMS: Mr. Chief Justice, and may it please the Court:

The issue in this case is not as appellant states, whether women should receive benefits for normal pregnancy under California's disability insurance program.

We do not and could not contend that pregnancy itself is a medical disability.

Rather, the issue in this case is whether a denial

of benefits to otherwise qualified workers is justified solely because their illn ess or injury arises from normal pregnancy and childbirth.

The purpose of the California disability program is to compensatein part for wage lost because of sickness or injury and to reduce to a minimum the suffering caused by the resulting unemployment.

In carrying out the program's liberal purposes, California compensates every conceivable disability without regard to its voluntariness, uniqueness, predictability, or cost.

Thus the program compensates workers disabled by costly disabilities, such as heart attacks, sex and race unique disabilities, such as prostatectomies or sickle-cell anemia; voluntary disabilities such as cosmetic surgery, sterilization, or orthodontia; and pre-existing conditions which will inevitably result in disability such as degenerative arthritis or cataract operations.

QUESTION: But it also covers, on peculiarly feminine conditions: hysterectomy, --

MRS. WILLIAMS: That's correct, yes.

QUESTION: -- mastectomy.

MRS. WILLIAMS: The sole exclusion under the program is the exclusion for pregnancy and birth-related disabilities.

QUESTION: But does it or does it not cover voluntary abortion?

MRS. WILLIAMS: There's some question under the new statute whether it does or does not cover abortions. Apparently, as I read that statute, it covers non-voluntary abortions, medically indicated abortions, but does not cover voluntary abortions.

That raises an interesting point, which is that when a woman chooses to have a child and she's a California worker, or when she chooses to have an abortion and she's a California worker, she is not covered in either case by the California program. And I think this raises some question under the recent Roe and Doe decisions of this Court.

QUESTION: Well, of course, her choice is not final in the abortion aspect. Is this not correct?

MRS. WILLIAMS: I'm sorry, Your Honor. Could you clarify that question?

QUESTION: I say, you referred to a woman having an abortion when she chooses, and I merely ask whether, under our decisions, her choice is not the solitary factor that enters into that decision.

MRS. WILLIAMS: As I understand the Roe opinion, it's a doctor's decision, a medically --

QUESTION: Well, it would depend upon the California law, which would be limited by the Roe decision; but,within

those limits, the California law could take a variety of different forms and impose a variety of different limitations.

MRS. WILLIAMS: Yes, Your Honor.

I think the primary point here is that the only group chosen to bear the burden of an exclusion under the fund is a group whose choice with respect to pregnancy is a protected one. Whether the person chooses to terminate the pregnancy or carry the pregnancy out, under the California program she uniquely bears the burden of an exclusion from a program that assists every other worker who might be disabled.

The sole criterion for granting benefits for any of the disabilities that I just mentioned, that are covered by the program, is whether the worker is medically disabled. Women disabled by childbirth meet this medical criterion, and, like other workers, suffer from the attendant wage loss.

Given that this disabled class of women is similarly situated with respect to the program's stated major purposes, we might ask whether scrutiny of the program structure and operation reveals unstated but no less clear evidence of legislative purposes which would explain this singular exclusion.

Quite plainly, they do not.

California has created a wholly pooled risk program. Workers contribute a flat percentage of their income to the

fund and benefits are paid according to a statutory scale based on wages.

The California program excludes no adverse risk groups, and in fact prohibits groups of low-risk workers from belonging to separate plans at lower cost.

Rather than categorize workers on the basis of actuarial factors, California has chosen to pool high and low-risk workers in one comprehensive fund.

Age and income level, two of the most accurate predictors of disability risk, according to California's own and national statistics, are irrelevant to an individual worker's contribution rate or eligibility for benefits.

California does not even compile statistics on disability experience by race, although national health survey statistics, published by HEW, indicate that the gap between disability days on the basis of race is significantly greater than that based on sex.

QUESTION: Has there been some litigation on differential disability rates between women and men?

MRS. WILLIAMS: Yes. As I understand it, there are now lawsuits in the New York area challenging the application of an actuarial basis as between men and women in the granting of insurance benefits.

QUESTION: So that if California departed from the pooled risk approach and took the differential approach, it

wouldn't be out of the woods, I take it?

MRS. WILLIAMS: Minimally it would face lawsuits. What the conclusion of those might be, I couldn't say.

Under a pooled risk system, none of the actuarial considerations arise that would be relative there.

QUESTION: Well, I suppose an ingenious lawyer under California's present system could bring a class suit on behalf of all men, couldn't he, that they are discriminated against because they get less for what they pay in?

MRS. WILLIAMS: Well, that really brings me to my next point.

QUESTION: Because they're men.

QUESTION: Because they're men.

Is that correct? I mean, isn't that factually true that men as a class, under the existing California plan, pay in more and get less under this system?

MRS. WILLIAMS: Men, per se, do not pay in more and get out less. That is not the predicted factor, under the program.

The first and major predictive factor is of course wage level. The California program is structured so as to benefit low-wage earners at a disproportionate rate to high-wage earners. So that a low-wage earner would receive a 65 percent wage replacement, whereas a high-income wage earner would receive approximately 55 percent wage

replacement.

For this reason the difference in the income level between men and women explains almost wholly the difference in the contributions received from the fund -- in the benefits paid by the fund.

There is an additional factor, however, that I would mention, since the State has put considerable emphasis on it, and that is that,wage level aside, women suffer a far larger number of disabilities than men do.

This is simply not borne out by the facts. The State's own facts or any others.

The actual difference in the disability rate is, in California, that women receive 44 percent of the benefits, and they are 40 percent of the work force.

I'm sorry, let me correct that. They filed 44 percent of the claims, and they are 40 percent of the work force.

In addition, the average duration for disabilities between men and women is approximately the same.

Now, I think that the other factor that's important in determining whether sex is the predictive factor is to look at the disability rates of persons at different income levels. And there again we find that the low-wage earners have a higher disability rate, and of course women are among the low-income group and consequently do suffer higher disability rate.

Now, what this all amounts to is that sex is not the primary predictive factor here. The primary predictive factor in both respects that I mentioned is the wage level. And for California to urge that women receive a disproportionate amount of the funds is another example of using the sex of women against them, when it really has nothing to do with the benefits they receive or the contributions they make.

Now, appellant's main contention, as I understand it, really its sole contention is that the cost of coverage of childbirth-related disabilities is so extraordinarily expensive that it would be impossible to maintain a program supported by employee contributions if these disabilities were included.

As the District Court found, even using appellant's estimate of cost, it is clear that including these disabilities would not destroy the fund. The Legislature could accommodate these costs quite easily by making reasonable changes in the contribution rate, the maximum benefits allowable, or other factors affecting the solvency of the fund.

Even by appellant's own estimate, the difference that any individual worker would have to pay per month to the fund amounts to two dollars. Under our estimate, which is about half as large, that amount would be one dollar in addi-

tion per month.

Now, the primary factor which accounts for the difference in our estimate of the cost of this particular disability is the duration estimated by the appellant as compared to the estimate of duration which we derive from common medical understanding.

A conservative estimate made by the American College of Obstetricians and Gynecologists is that the disability resulting from childbirth will average six to eight weeks. This is approximately half of the duration estimated by the appellant.

In fact, many of the doctors surveyed by appellant, in the survey which he attaches to his primary brief, estimate that the average duration of disability is less than six weeks. We don't ask this Court to make a finding of the average number of weeks of disability due to childbirth, we simply point out that doctors almost uniformly agree that the average is, at most, half of the estimate of the appellant.

In a twelfth-hour attempt to justify his cost estimates, appellant attaches, as Appendix B to his brief, a chart purporting to show that one-half of New Jersey's benefit payments are paid for pregnancy-related disabilities.

Because this figure so distorts the actual situation in the State of New Jersey, appellees would request the opportunity to submit, within ten days, a short explanation

of the true facts, when they can be gathered.

Briefly explained, the figures submitted by appellant are misrepresentative because they show benefit payments under only one of New Jersey's three separate disability funds.

The fund mentioned, or shown in the chart attached to the reply brief, is the disability during unemployment fund, which pays out only ten percent or so of all benefits; but almost all pregnancy claims.

Employers commonly lay off pregnant women some weeks prior to disability in that State, thereby necessitating their claims go under this unemployment fund.

New Jersey's total experience is that childbirth-related benefits comprise only eight or nine percent of total program benefits, according to the figures which we've been able to derive and will submit to the Court within ten days.

In the final analysis, the exclusion of birth-related disabilities is solely a matter of cost, as I've indicated before. The meager legislative history available to us suggests no other basis.

The California Legislature, which enacted the program in 1946, looked to and learned from the only State disability program then in existence, the Rhode Island program created four years earlier.

Rhode Island's program, in its early years, had

severe financial problems which California sought to avoid. One major drain on the Rhode Island program's funds was the cost of paying benefits for pregnancy.

The major reason for this high cost was the fact that Rhode Island paid benefits to a woman simply because she was pregnant, without requiring a showing of actual physical disability.

California, rather than control for this over-generous interpretation of pregnancy-related disability, excluded such disabilities from the fund altogether.

The desire to save money cannot justify an otherwise invidious classification.

In Shapiro vs. Thompson, this Court confronted the determination of Congress in at least forty States, that public money should not be spent on welfare aid to new residents. The primary reason for that one-year residency requirement was the Legislature's desire to save welfare costs.

This Court held that the Constitution required inclusion of the class deliberately excluded by the Legislature significantly, although this Court closely scrutinized the classification in Shapiro, it indicated that the one-year residence requirement was vulnerable even under the traditional more lenient rational basis standard of equal protection review.

Similarly, both in Reed v. Reed, 404 U.S., and Frontiero, at 411 U.S., considerations of economy were rejected as a basis for discriminating against women.

Indeed, --

QUESTION: Didn't Shapiro have a footnote in it indicating that insurance claims might be treated differently than ordinary welfare payments?

MRS. WILLIAMS: I believe you're referring to footnote 6 in Shapiro, and that --

QUESTION: Well, you know more about it than I do.

MRS. WILLIAMS: -- and that footnote states that a State disability program would be entitled to tie benefits to contribution rate, which California now does; by its flat one percent rate.

That is not inconsistent with our position here.

Indeed, to permit differential treatment on the basis of sex, solely because the State wishes to save money, when perhaps the most pervasive form of discrimination against women is economic, is to perpetuate the historical discrimination against them.

Equality for women, as equality for black persons, has done and will continue to do, costs money as the experience under Title VII in the Equal Pay Act demonstrates.

Nowhere is the economic discrimination against women more apparent than in the rules and practices surrounding

the reality that women are the bearers of children. This role, which calls for stereotyped notions that women belong in the home with their children, that women are not serious members of the work force, and that women generally have a male breadwinner in their families to support them, has resulted in laws which force able-bodied women off the job, which denies them unemployment insurance once they've gone on mandatory maternity leave, denies them sick leave when their disability results from pregnancy, and disability insurance as well, which does not permit them to return to work at the time when they become physically able; often denies them seniority and other benefits which accrue to workers normally disabled, and finally, when they try to return to the job often the jobs themselves are denied.

In light of these realities, Judge Haynsworth's conclusion in Cohen vs. Chesterfield County School Board, 474 F 2d, that: "The fact that only women experience pregnancy and motherhood removes all possibility of competition in this area" is simply false.

Rather, women who become pregnant suffer a serious competitive disadvantage, not because their physiological state renders it inevitable and unavoidable, but because of overbroad and arbitrary rules concerning that physiological state.

An example of the kind of discriminatory notions

which -- upon which the State has focused and made its arguments, are two examples: one of the kind I just mentioned; and another kind which I will describe.

The first is that the reason for the fifteen-week duration is that women will have to go on mandatory maternity leave before they're physically disabled, and the doctors will provide for compensation during that time.

The second is that doctors, being sympathetic people, will take into consideration grounds other than medical grounds in determining whether a woman continues to be disabled.

This first ground, or rather both grounds assume that doctors will not make medical judgments in determining whether or not a woman is physically disabled because of childbirth.

I think there's no basis for that. In fact, as Mr. Chief Justice Burger mentioned in the Roe opinion, doctors are a group likely to carry out their professional responsibilities.

There may well be problems at first in California, as there were in Rhode Island, in educating people as to what a disability related to pregnancy is; and what I mean by that is the State itself has shown confusion between child-bearing leave and disability leave. And it may be that doctors will have to be informed as to what's expected

of them in submitting disability verifications.

That doctors will collude with women in order to get the benefits which they don't deserve, I think is contrary to reality, however.

Now, it has been said that disability -- that discrimination based upon pregnancy should not be considered to be sex discrimination, for several reasons. The main one being that women are not in competition with men in this area, and, in addition, that it's a unique characteristic. And those arguments are related.

It's only true that pregnancy is unique and there is no competition in situations in which the law is narrowly and carefully drawn, so that the purposes are so stated that all that could possibly be covered in that situation is pregnancy, and pregnancy exclusions would not be irrationally categorized.

Let me give you an example.

A law which said that a woman was entitled to nursing leave after the birth of her child would be a rational statute. The reason for that is that only mothers can nurse children. If it was a leave which said mothers can take time off to care for their children after birth, that may well discriminate against fathers, who are perfectly capable of taking care of their children in ways other than nursing.

Most of the laws which we have discussed here today,

and which are exemplified by the practice struck down in Cohen and LaFleur, however, affect women in an area where they truly do compete with men, and put them at a serious disadvantage, not just at the time that they go out of the work force, but sometimes in terms of their whole working lives.

Now, there are a number of reasons why discrimination on the basis of pregnancy should be considered sex discrimination.

Historically we have seen, in cases like Bradwell, in cases like Muller, in cases like Hoyt the very justification for the discrimination against women in those cases was primarily based on their child-bearing function, and the role which was assumed to grow out of that function.

Now, as time has gone on, these generalized discriminations based on pregnancy, which, for example, kept women out of the legal profession for a number of years, have gradually been struck down. But what remains is the narrow area in which these unique sex characteristics prevent women from full participation in the labor force, not because of their physical state but because of rules which exclude them.

Now, in Frontiero vs. Laird, the plurality in that case stated that the reason for scrutinizing sex-based classifications in part was that stereotypes and generaliza-

tions had so grown up around the status of women that laws often discriminated against them not on any real factors, but because of these stereotypes.

Pregnancy presents a primary example of that. Women are thought of, on the one hand, as completely disabled during the whole pregnancy; and, in the next moment, the State can assert that women are not disabled at all and should be excluded from a disability program.

QUESTION: Well, have they said that they're not disabled, or that this isn't the kind of a disability contemplated by the statute?

MRS. WILLIAMS: They have said that normal pregnancy -- that pregnancy is a normal physiological function, and that it does not give rise to illnesses or injuries.

I think this is clearly contrary to fact. Any common medical text will indicate that when a woman goes through the birth process her entire birth canal is, to some extent, damaged by her giving birth; that when the child emerges she often has a surgical procedure, called an episiotomy, which is disabling to her for some period of time.

Interestingly enough, the State will compensate if the child is delivered through a surgical incision in the abdomen, but will not do so when there's a surgical incision at the end of the birth canal.

That women suffer disabilities for other physical

reasons, such as a change in their hormone level immediately following birth, is also clear and well-established in the medical texts.

The centrality of women's biological reproductive role to historical and current discrimination against women on the basis of sex stereotypes concerning that role leads to the inescapable conclusion: so long as classifications based upon pregnancy are thrust outside the bounds of judicial scrutiny, so long will women suffer unwarranted and arbitrary discrimination because they are women.

QUESTION: Mrs. Williams, what is your comment on the question I asked opposing counsel; do you concede that some of these named plaintiffs have a moot case?

MRS. WILLIAMS: Yes, we do.

QUESTION: But you think that the one, Mrs. Jaramillo, still is live as far as the controversy is concerned?

MRS. WILLIAMS: Yes, I believe it is. She has not been paid disability benefits.

The aspirations of women are inextricably linked to fair and realistic treatment of pregnancy in the public sector. This case presents one example of a situation where mythology overcomes rationality, as to the duration of the disability, as to the nature of the disability, and as to the nature of the woman's participation in the work force.

We agree with appellant that pregnancy is not a disability. At the same time, it does give rise in certain situations to verifiable medical disabilities. In a program that compensates for work loss due to every conceivable disability: normal, voluntary, unique to one sex, expensive, frequent, or whatever consideration, the exclusion of pregnancy-related disabilities unconstitutionally discriminates against women.

We urge that this Court affirm the decision of the District Court.

QUESTION: Mrs. Williams, as I understood your argument, it depends entirely upon the claim that this is discrimination based upon gender. Am I mistaken about that? What if we had -- what if California should decide that it would exclude, let's say, all emotional or mental illnesses, and compensate only physical illnesses or injuries; presumably, again, at least an ingenious lawyer could make an equal protection claim challenge upon that sort of exclusion. But yours, you don't make that sort of claim, do you? Yours is entirely based upon the proposition that this is gender discrimination, sex discrimination.

MRS. WILLIAMS: No, Your Honor, it is not. We do believe that this is gender discrimination, but we also believe that the classification here is totally irrational under the stated purposes and operation of the program.

Mrs. Condas gives, as --

QUESTION: So you are that ingenious lawyer.

[Laughter.]

MRS. WILLIAMS: Well, in this particular case I don't think it's a matter of being ingenious, --

QUESTION: No, I know.

MRS. WILLIAMS: -- I think it's a matter of seeing whether there's a fair and substantial relationship between the --

QUESTION: Definitely.

MRS. WILLIAMS: -- differences, in light of the purpose of the program. And it doesn't exist here.

QUESTION: In other words, it wouldn't be an answer to your argument to conclude that this is not gender discrimination. That's what my question was --

MRS. WILLIAMS: No, it would not.

QUESTION: -- directed to.

MRS. WILLIAMS: No, it would not.

QUESTION: Unh-hunh.

MR. CHIEF JUSTICE BURGER: You suggested that you might want to respond to some material. If you respond in that sense, rather than introducing new matter, you may submit it to your friends on the other side and in due course submit it to us.

MRS. WILLIAMS: Thank you, Your Honor. I will do

that.

These statistics which came in in the reply brief are statistics that we had never seen before, and came into the record very late. And we would like the opportunity to respond.

MR. CHIEF JUSTICE BURGER: I believe there's another question here, too.

QUESTION: Mrs. Williams, I'd like to ask a question that's irrelevant to a legal argument perhaps, but has the California Legislature been requested to reconsider the exclusion of normal pregnancy?

MRS. WILLIAMS: It recently of course considered complications of pregnancy in the passage of the bill.

QUESTION: Yes.

MRS. WILLIAMS: To my knowledge it has not been directly requested by anyone that I know of, but I would have no reason to know, to change its law. There have been no bills forthcoming on this subject recently.

QUESTION: At the time of that change, were there legislative hearings, public hearings, with the opportunity for members of the public to appear and testify?

MRS. WILLIAMS: I believe so, yes.

I would like to point out that in terms of the interest of the workers in this case, which I believe goes to your point, the California workers appear to be in support of

this suit, at least a large proportion of them. A number of labor unions are parties to this lawsuit, both originally and as intervenors. And I think it's clear that, to them at least, the one percent contribution rate that the State argues is so important to the concept of the program is not so important to them that it couldn't be somewhat altered to cover this kind of disability.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mrs. Williams.

Do you have anything further, Mrs. Condas?

REBUTTAL ARGUMENT OF MRS. JOANNE CONDAS,

ON BEHALF OF THE APPELLANT

MRS. CONDAS: I should like to respond to the question concerning further legislative consideration of inclusion of pregnancy.

It's a matter that comes up every year because, of course, the Legislature is always confronted with the request to reallocate benefits among groups, in different ways.

And I should like to call the Court's attention to Judge Williams' discussion in his dissent from the opinion, which is contained in the Appendix to our Jurisdictional Statement at page 22 and 23.

He discusses the transmogrifications that Senate

Bill 419 went through, and there were statistical presentations made to the Senate Committees that considered that, so that from a bill which began by offering maternity benefits of fifteen weeks, at a cost increase up to 73 percent in the premium, the bill finally emerged in the form of one treating only abnormal and involtunary complications of pregnancy.

And I would also like to respond to the discussion about involuntary terminations or involuntary complications, and why that word is used in the existing law.

There is still a good deal of social controversy over granting a woman the right to have an abortion, must the public pay for it when a significant segment of the public still has philosophical objections to doing so.

As a consequence, the bill emerged that way after full legislative discussion and a good deal of interplay among interested groups.

I would like to reiterate the five factors that I discussed before, and it seems to me in a way that what I'm talking about is sort of like the blind man examining an elephant: that if you just talk about the voluntariness, you can find other conditions that are somewhat voluntary; and if you just talk about the duration, you can find other conditions that have long duration; and if you just talk about the cost, you can probably find others that somewhat approach the cost of pregnancy.

But if you take all of those five factors together, --

QUESTION: That's only three.

MRS. CONDAS: I beg your pardon, well --

[Laughter.]

MRS. CONDAS: -- all right. The difference in medical standards, and I would like to respond particularly to the statement which is in the appellees' brief concerning the position of the American Physicians and Gynecologists on this point.

It may be that they say one thing in one context, and they do another thing in another context.

For example, the Railroad Retirement Board provides full pregnancy benefits for disability from pregnancy. And the statistics contained in the report of the Railroad Retirement Board, covering 1970 and 1971, average, per beneficiary, 110 days per pregnancy. Now, those are all based, again, on medical certification.

So it's clear that doctors are willing to be a little bit more generous. And I submit to you that one of the reasons is, it's not unlike what Professor Thomas Reed Powell said in connection with having a legal mind: that if you can think of one thing and not think of the other thing that's inextricably interwoven with it, then you have a legal mind.

Well, I believe that's the condition that a physician is in in treating a mother with a newborn child. And in that respect let me call to your attention the brief, the amicus curiae brief filed in this case by the Physicians Forum, and at page 2 of that brief, in discussing why they have an interest in this case, they say, three times, the health of the prospective mother and child, the health of working women and their children, and the health of the woman or the fetus, all are reasons why the disability of pregnancy should be included.

Well, I think that's just a fairly clear indication that doctors have, in conservative medical judgments, quite proper concern for the mother and the newborn child together, and they're simply not going to be able to sort out the mother is not disabled but the newborn baby would be better of if she were with it.

I just believe that's not going to happen.

I should also like to comment that California has always had a concern about the higher cost of covering women under disability. There's no dearth of legislative history here. There has been in the regulations from almost the very beginning a restriction that relates to private plans, which were a significantly greater factor in earlier days; and that regulation, which is in the California Administrative Code, Title 22, section 3254(h), required that private plans

include at least 20 percent women. And that was obviously, perhaps an inartful, but it was certainly an effort to require that funds have some balance to compensate for the fact that women simply cost more to cover under disability plans.

Herbert Denenberg, the Commissioner of Insurance of the State of Pennsylvania, who is no friend of the insurance industry, has consistently acknowledged that it cost between two and three times the same amount to cover women as it does men, without covering pregnancy.

But, finally, I'd just like to leave this one thought: that we're not talking about adding a new class of beneficiaries, there's not a single woman who would be brought into the class of beneficiaries who is not there now. Every woman who's eligible for disability insurance in California is getting disability insurance coverage.

The result of this decision would be to skew that benefit package so that a small percentage of the women get the lion's share of the benefits.

And when our State court had this question before it in 1958, that was exactly the problem that they foresaw, and exactly why they felt it was a legislative decision to decide how to treat pregnancy, whether to exclude it entirely, to put a long durational requirement, which is all they did in the beginning, to extend the durational requirement, or simply to compensate complications of pregnancy.

That was a decision that the Legislature made and has consistently re-examined with legislative bills that come up just about every year.

And it just seems to me to be almost inconceivable that we could allow this disproportion to grow larger.

I submit that if pregnancy is required to be covered, we can expect that approximately two percent of the work force in California will collect more than thirty percent of the benefits.

Now, this is arrived at very simply. It is established that approximately five percent of the women in the work force become pregnant each year, and even if you were to assume that the work force is made up of fifty percent women, which it is not, but let us assume that for the sake of argument, you then have a condition where you know what the pregnancy benefits are going to be. They are going to be an admitted thirty to forty percent increase in the cost, so you have whatever small percentage of women who become pregnant each year taking down a total of thirty percent of the added cost of the administration of the fund.

And I submit that to do that under the guise of equal protection or due process would seem to me to be a very surprising result.

For that reason, California urges that the District Court decision be reversed.

QUESTION: Mrs. Condas, I interrupted you there. I wonder if you could just summarize again these five parts of the elephant.

[Laughter.]

MRS. CONDAS: Be happy to.

First of all there is the relative cost. There is no question the majority below accepted our estimate. They simply said we couldn't exclude it simply because it was a high-cost item.

Every State, every private plan has had the same experience with the high cost of pregnancy coverage.

There is also the factor that because it is a voluntary condition and because it is a desired condition, conceded to be desired condition, by the appellees, that it lends itself to planned use; as illnesses and accidents do not.

That, thirdly, it has a longer duration. In California the average duration of disability is eight weeks, and that includes those which go well beyond the 26 weeks and exhaust their benefits.

QUESTION: Well, that's one aspect of cost, isn't it?

MRS. CONDAS: It -- yes. Yes, it is.

The different medical standard which necessarily pertains. We don't believe that that's a matter of fraud and

collusion. We believe it's a matter of sound medical judgment in the interest of the mother and child. A physician in that area of medical practice would be remiss not to take that into account.

And also the rate of return to work following pregnancy.

Since we have not covered pregnancy, we admittedly have no statistics of our own on that point. The amicus curiae briefs filed by the American Telephone and Telegraph Company and by General Electric Company in this case indicate that their experience is approximately a fifty percent rate of return.

QUESTION: Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, ladies.

The case is submitted.

[Whereupon, at 11:58 o'clock, a.m., the case in the above-entitled matter was submitted.]