OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-494

TITLE CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION, ET AL., Petitioners V. MARK GUERRA, DIRECTOR, DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING, ET AL.

PLACE Washington, D. C.

DATE October 8, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION, ET AL., Petitioners, v. MARK GUERRA, DIRECTOR, DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING, ET AL. : No. 85-494

Washington, D.C.

Wednesday, October 8, 1986

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

THEODORE B. OLSON, ESQ., Washington, D.C.; on behalf of the Petitioners.

MS. MARIAN M. JOHNSTON, ESQ., Deputy Attorney General of California, Sacramento, California; on behalf of the Respondents.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We will hear arguments first this morning No. 85-494, California Federal Savings and Loan Asscciation versus Mark Guerra.

Mr. Olson, you may proceed.

ORAL ARGUMENT OF THEODORE B. OLSON, ESQ.,

ON BEHALF OF THE PETITIONERS

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

This case comes to this Court on writ of certiorari to the Ninth Circuit Court of Appeals after that Court reversed a District Court summary judgment in favor of petitioners.

This case presents a conflict between two statutes. Federal law forbids employers to discriminate for any employment purpose on the basis of pregnancy.

California law, on the other hand, requires employers to provide special job protections to employees disabled by pregnancy.

The question presented by this case is whether the federal mandate of equal protection prevails over the state policy of special protection.

The facts of this case are as follows. Title VII of the Civil Rights Act of 1964, as amended by the 1978 Pregnancy Discrimination Act, the PDA, makes it an

unlawful employment practice to discriminate against any individual on the basis of sex, including pregnancy.

The PDA expressly requires that women affected by pregnancy shall be treated the same for all employment-related purposes as persons experiencing other disabilities similarly affecting their ability to work.

Petitioners comply with Title VII by implementing employment policies which treat pregnancy exactly the same as other temporary conditions which might affect an employee's ability to work.

Such policies vary, but as relevant here, do not provide immediate guaranteed reinstatement rights on return from disability.

In contrast, California's statute requires employers to grant up to four months' leave for pregnancy, with a right to return to the same or similar position.

As respondents' brief puts it, and summarizes the California requirement, the California statute guarantees reasonable unpaid leave and reinstatement of female employees disabled by pregnancy; and thus ensures that pregnancy disability will not cause female employees to lose their jobs.

Petitioners' declaratory relief action was

resolved in District Court on cross motions for summary judgment based on stipulated facts.

The District Court ruled for petitioners, concluding that the state law requires preferential treatment for female employees, and was therefore inconsistent with, and preempted by, Title VII.

The Ninth Circuit reversed.

There are two basic conflicts presented by this case. In summary, they are as follows.

One, the equal treatment versus special treatment issue. Petition, along with the United States, the National Organization of Women, the United States Chamber of Commerce, the American Civil Liberties Union, and numerous others contend that federal law categorically and unambiguously forbids pregnancy discrimination and requires that employers treat pregnancy on the same basis as other temporary disabilities.

California adheres to a diametrically opposed philosophy, that pregnancy requires that women be treated differently in order that may be treated equally.

QUESTION: Well, Mr. Olson, I guess in theory, an employer could comply with the California state law by offering female employees the pregnancy leave, and comply with Title VII by offering comparable leave to

other disabled employees.

And if that is the case, how is the California law preemptive? I guess in theory that's certainly one way to approach it.

MR. OLSON: It is in theory one way to approach. And it is theoretically possible, as you suggest.

We submit that that is an end run, as the United States put it in their brief, around the extension versus validation issue, which is the same -- which is the second issue that I was going to mention and summarize; that in essence, it would require employers to bring up the benefits that they are required by California law to give to female employees who are pregnant, to all employees suffering any disability that would take them away from work.

QUESTION: How would you do that?

MR. OLSON: How would -- you would do it by adopting a leave policy that would guarantee reinstatement to work.

QUESTION: Well, I know, but how about the four months?

MR. OLSON: Up to four months, the statute --

QUESTION: I mean, just any disability up to four months?

MR. CLSON: The thrust of Justice C'Connor's question, and the argument that has been presented by some of the participants in this litigation, is that there isn't tension between Title VII and the California statute because the California statute mandates treatment for pregnancy in a certain way.

And the simple answer to that is to give that same treatment to all people for all disabilities.

Our response to that, in addition to what I've already said --

QUESTION: Mr. Olson, is it quite fair to Justice C'Connor's question to say, for all disabilities, or for all comparable disabilities?

MR. OLSON: All disabilities -- well, it would have -- any -- as I understand the thrust of Title VII, as amended by the Pregnancy Disability Act, it requires that all disabilities be treated the same based upon comparableness in terms of the ability or inability to work.

So that if a broken foot, an open heart surgery, whatever it might be, would take you off for a week or a month or two months --

QUESTION: Well, if it would take you off for a week. Let's say you had a broken foot that took you off for two hours; or a sprained ankle or something.

MR. CLSON: Cf course. But pregnancy disabilities will also vary. They may be one week. They may be two weeks. They may be six weeks. They may be eight weeks.

As I understand the California statute, it does not mandate automatically four months in every case. It requires an as-necessary judgment based upon the amount of leave necessary for the individual.

If we were to comply with the theoretical suggestion that you make that benefit to all employees, it would be for all disabilities. It would have to be adjusted on any particular basis, as far as the length of time was concerned.

But the reinstatement right would have to be guaranteed.

QUESTION: Isn't the benefit here the one, the right to return to work?

MR. OLSON: Yes.

QUESTION: That is what is involved in this?

MR. OLSON: Yes. That is exactly what is involved. As the respondents state that in their brief, it is the right to engage in reproductive activity, and not lose your job. Or the guaranteed right to not sustain the loss of a job as a result of a pregnancy disability.

QUESTION: I don't want to have any words with you. I'm just interested in going back to work.

MR. OLSON: That's correct. That's correct.

QUESTION: And I don't think you've discussed that.

MR. OLSON: The thrust of the requirement of the California statute is that the job remain open. If you have to take leave because of pregnancy, Title VII specifically requires that women affected by pregnancy shall be treated the same for all employment-related purposes as other persons not so affected but similar in their ability or inability to work.

We submit that the -- this continues to, in part, respond to Justice O'Connor's question -- but that the federal statute -- and in addition, summarizes the first issue in this case -- is that the federal statute clearly mandates that pregnancy be treated the same as other disabilities. When this legislation was considered in the Congress --

QUESTION: Well, does it? Can an employer discriminate, for instance, in granting leave for other health problems? What about somebody with heart problems?

MR. OLSON: As I read the statute, Justice O'Connor, and as I have read the legislative history, in

the context in which this statute was passed, and as this Court has repeatedly suggested, we must start with the words of the statute themselves, and give them the meaning -- or that the words would ordinarily be susceptible to: Women affected by pregnancy shall be treated the same for all employment-related purposes as other persons not so affected, but similar in their ability and inability to work.

QUESTION: That may be a remedial provision. It may tell you what should happen in the event an employer does treat a pregnant employee differently.

I just don't think it's that clear on the face of the statute how far it reaches.

MR. OLSON: Well, I suppose we wouldn't be here unless there was some debate on the other side of that question.

At least the parties on the other side of this case have made the argument that the statute does not, in fact, say what to me is its plain meaning.

But to the extent that it's necessary to go to the context in which the statute was passed, and the legislative history which led up to the passage of the statute, those produce for me, for the petitioners, the same result.

This statute was passed in the context of

Title VII, and against a backdrop of a concept that special protections, given to women, over the decades and the centuries, in this country and elsewhere, while intended beneficially to help women, have turned out to be -- to inhibit women in the workplace.

They've created the same type of stigma and stereotype which have been so damaging to other groups which have been selected out for special classification.

Congress specifically recognized the fact that that kind of stereotype that had occurred was damaging to women. In a sense, the idea of shorter hours for women, special protections for women --

QUESTION: Well, I think to be more specific, it was passed in response to this Court's opinion in Gilbert.

MR. OLSON: There's no question that it was --

QUESTION: I mean, that was the immediate cause of the passage of this act, as I understand it.

MR. OLSON: That was the immediate cause of it. But of course it was against the backdrop of centuries, and more immediately, decades of legislation which had provided special protection to women which had been determined by many individuals, including many women's organizations, as ultimately destructive to women because they put the image of women inside this

stereotype that somehow women needed to have extra special protection in order to be brought up to the level of men.

The best way to put that, it seems to me, is what your opinion, Justice O'Connor, for the Court in the Mississippi University case was that if the -- and this is a different situation, but the words I think are appropriate -- that if the statutory objective is to protect members of one gender because they are presumed to suffer from an inherent handicap, or to be innately inferior, the objective is illegitimate.

The American Civil Liberties Union has said the same thing in its brief, and I think better put than anything that I could say. In referring to what the State of California calls its disparate impact analysis, which is in the state's brief, the American Civil Liberties responded to that in footnote 30 on page 24 of their brief with these words: It is troublesome that without proof the state is willing to confirm what has been said all along by the practitioners of discrimination, that pregnancy renders women less reliable, less productive employees, absent more often, more expensive; that is to say, fundamentally different and handicapped.

That is the backdrop against which the

Pregnancy Discrimination Act was enacted. And of course it was the Gilbert case that was the immediate impetus for Congress to pass that legislation.

QUESTION: Mr. Olson, supposing that this Court were to affirm to the California judgment and say that your employer, your client, had to treat all of its leave policies the same way that it treats the pregnancies which are required to be treated under California law.

How would that require you to change your existing policy in the concrete situation?

MR. OLSON: The concrete situation -- and I alluded to this in response to Justice O'Connor's initial question, is that it would require the change of Cal Fed's -- the addition of Cal Fed's policy, and all other employees of the State of California, with respect to every disability, their leave policy.

QUESTION: Well, how specifically, would it work?

MR. OLSON: It would have to be changed to guarantee the right of reinstatement in the same way that that's guaranteed by the State of California and as set forth in their policy as interpreted by the agency interpreting it.

QUESTION: In what situations now where a

person takes leave because of illness or disability is it common not to allow the person to go back to the job?

MR. OLSON: Well, employers policies vary, as you might understand, all across the lot. Some employers, depending on their size, might indeed give employees the right to return to the job if the job is open.

The California statute imposes a rebuttal presumption that the precise same job may be held open for the individual upon the individual's return. And if for some business necessity, which is a very difficult thing to prove in California under the regulatory standards, that job isn't available, then resort must be had to finding a similar job.

Other employers in the State of California vary their relief policies, and will make appropriate adjustments to persons returning from a broken foot or a heart attack or pregnancy based on what the circumstances that prevail at that particular employer are. But there is no guaranteed statutorily mandated and statutorily enforced right to return to the same job as California --

QUESTION: What is California Federal's policy?

MR. OLSON: California Federal's policy, which is set forth on the Joint Appendix at page 40, is to

provide reasonable leave for employees for pregnancy or for other disabilities or for personal leave up to six months, on the basis of the needs of the individual employee. And Cal Fed will attempt to find the employee a job to return to, but does not guarantee reinstatement.

And the other petitioners, which are thousands are California employers, have varying degrees of reinstatement policies, none of which comport necessarily with the requirement of California that it be a guaranteed return to the same position.

QUESTION: And also I suppose that if you can imagine an employer without any disability leave policy, in order to comply with both California and the federal law they would have to adopt one.

MR. OLSON: They would have to adopt a California policy. And the other aspect of the answer to the question, if one looks at the practical consequences, if suppose California, as it does, requires the reinstatement of the employee, and if an employer decides voluntarily to reinstate other employees, and if suppose a pregnant employee and a person returning from a bypass surgery arrived back at the same day, and if suppose circumstances, economics, any situation might occur that there's only one job

available at that particular time, now, which person is the employer going to give the job back to? Under the California statute if that exists and the employer is in California, the employer is going to prefer the employee returning from pregnancy. That is the effect of the statute.

There is no question, I should say, that the California authorities recognize that their statute is different --

QUESTION: Mr. Olson, let me just ask you a question about that example again. If, in response to Justice O'Connor's suggestion, you say both statutes apply, I suppose the employer would have to give both of those people jobs, and then there'd be no violation of either statute?

MR. OLSON: Well, that's theoretically correct. There may only be one job, which means that the employer will have to create another job.

QUESTION: But under the California statute, if we didn't have Title VII, there might be no job; and you'd still have to make one available, wouldn't you?

MR. OLSON: Maybe I misunderstand the statute.

QUESTION: With the limitations that are built into the statute from a standpoint --

QUESTION: But it's the same problem. I mean

the difference between zero and one, and one and two, is exactly the same, isn't it?

MR. OLSON: Well, I think the practical effect of that, Justice Stevens, is that these situations in the real world, and we're talking about thousands of employers and large workforces and so forth, are going to differ when one statute -- the whole California mechanism for enforcement, to bring actions and provide penalties and so forth, requires that you treat the pregnant employee a certain way, and the employer is deciding to voluntarily give certain rights to other employees, it should be --

QUESTION: No, but your hypothesis -- under your hypothesis, I think you're assuming that the federal statute applies and requires equal treatment, requires that the male who has just had a bypass operation coming back at the same time as a female who just had a child must be treated alike.

And the minimum treatment for them is defined by the California statute.

MR. OLSON: Well, it would create practical problems, because you would have --

QUESTION: Well, Title VII created a lot of practical problems.

MR. OLSON: -- California would have the

responsibility to enforce the federal law, as it does, as well as the state law. Its own state law requires it to separate out -- it is decided that pregnant returning employees are a favored class.

California itself says that its requirements exceed and go beyond --

QUESTION: Well, the statute doesn't require that they be treated as a favored class. It just -- supposing we had a minimum wage -- and it might well be unconstitutional -- but supposing we had a minimum wage for male elevator elevators that was higher than the prevailing wage elsewhere.

MR. OLSON: I think that if -- let's suppose --

QUESTION: Would that be preempted?

MR. OLSON: -- let's take that example, that the State of California decided that people of Asian background be, for whatever reasons the California legislature might select, should have a different minimum wage, a higher minimum wage than presently prevails in California. I do not -- I submit that the decision by California to select out a group of people on the basis of race or nationality or religion or any other basis for preferential treatment, and then put the weight of the State of California behind that treatment,

you're right in the sense that everybody could say, well, now we've got to raise the minimum wage for everyone else as well.

But the State of California will have been selecting out a group to put itself behind.

Now I must say --

QUESTION: Mr. Olson, that may well be unlawful, but not unlawful under Title VII. I mean, that might be unlawful under the Constitution.

Here, we do not have -- at least you're not arguing that we have -- a form of discrimination by the state that is constitutionally unlawful. You're not saying that it's unconstitutional for the state to treat pregnant women specially in its statutes.

Title VII does not apply to states; it applies to employer. And I don't see how --

MR. OLSON: Title -- well, Section 708 of Title VII in fact suggests, states, that employers are exempt from requirements imposed by the state of -- by the states, if the state permits or requires an unlawful employment practice.

The State of California is stating that you must treat pregnant individuals in a certain way --

QUESTION: But not differently.

MR. OLSON: When the full force, I submit, of

the State of California comes out and selects a group on what has been determined in Title VII by the national legislature to be an impermissible basis for classification, then they're selecting --

QUESTION: By employers. To make the argument you're making, you have to make the leap to say that Title VII prevents action by the state as a state, as a governing institution, that discriminates on the basis of pregnancy.

MR. OLSON: I submit, Justice Scalie, that Section 704 -- it isn't a leap, that Section 704 of Title VII, and Section 1104 of Title XI specifically make that link, that what is happening here is the State of California is authorizing or permitting employers to provide specific benefits to one class of individuals.

And I should go on to say --

QUESTION: I thought you were going to say, special benefits. It doesn't authorize or require them to do that. It just says, provide these benefits.

Now, maybe they have to provide to everybody else, and that may be very expensive, which means it may be a very silly law.

But what we're talking about here is whether the law violates Title VII.

MR. OLSON: We submit that when a state

government selects out a class of individuals and determines that those individuals shall have certain benefits, and sets up an enforcement mechanism for that purpose, that that is special treatment.

QUESTION: But Mr. Olson, the statute in California does not prevent an employer from extending benefits to other employees on a similar basis, and in comparable situations, does it?

MR. OLSON: No, it does not. We submit that Section 704, the preemption provision of Title VII, specifically refers to laws of the states which purport to require or permit the doing of any act which would be an unlawful employment practice under Title VII.

In addition, Section 704 says that the federal statute preempts any provision of state law which is inconsistent with the purposes of this Act or the provisions thereof.

Now, we submit that the selection by the State of California of a racial group, and stating that that particular group cannot work certain hours or need not be bartenders, or must get special benefits in the workplace, is a provision which is inconsistent with the purposes and provisions of Title VII, and the philosophy of Title VII, which is, that we must eliminate stereotypes --

QUESTION: (Inaudible)

MR. CLSON: I agree with that. The --

QUESTION: Well, Mr. Olson, could California pass a general law that says, if an employer is going to have a disability policy, or indeed, it passes a law and says, all emplcyers shall have a disability plan which shall be as follows. And it covers everybody including pregnancy. Cculd California do that?

MR. OLSON: Yes, unless I missed scme element of your questicn, I believe that California definitely could do that.

QUESTION: Sc that if you win this case, California could just say, well, we're going to extend these disaility provisions that we have said apply tc pregnancy to everyone?

MR. OLSON: Yes, exactly, and that bill, AB 3340, was in fact introduced, and was pending before the California legislature, and the California legislature adjourned this year without its passage.

In fact, a bill which on the national level would accomlish the leave of absence and the right to return has been pending in Congress for some period of time, and has not been passed.

So the legislature can deal with these

problems. And if that is an appropriate solution, that is the appropriate place for it to occur. Because I submit that a leave policy --

QUESTION: Well, it could be that -- it could be Congress doesn't pass it because they don't think it's necessary. They've already got Title VII.

MR. OLSON: That could be the case, Justice White.

QUESTION: And that all you have to do is comply with both statutes.

MR. OLSON: That could be the basis for what is happening in Congress. But the legislative history of the Pregnancy Disability Act is replete with references, over and over again, by members of the legislature, saying, what is the Pregnancy Disability Act going to accomplish? Is it going to require employees -- employers to adopt leave programs, to adopt disability benefits, is it going to require that?

And the testimony -- Congress is often, as we're all aware, is often inscrutable. The legislative history is usually mixed in one way or another. In this case, the legislative history is uniform and absolutely clear that the addition of leave programs or disability benefits was not going to be a requirement that resulted from the adoption of the Pregnancy Discrimination Act.

The legislature is quite clear there. And thus an extension of any sort --

QUESTION: Well, is it clear from the legislative history that employers would not have to adopt a pregnancy leave policy?

MR. OLSON: It is clear to me from the legislative history that that is exactly what --

QUESTION: Employers would be perfectly free not to have any disability?

MR. OLSON: Yes, those -- the same question, in virtually those same words, was asked and answered in various different ways during the hearings, in the committee reports, and in various different ways.

Ultimately, of course -- thus, any kind of an extension of the benefits that California has determined should be available to a certain class of individuals would be something that was inconsistent with what the Congress of the United States thought it was accomplishing when it adopted the Pregnancy Disability Act.

It would be inconsistent with what California itself is urging. Because the State of California, in its brief here today, says that it is not in favor of extension; it does not think that's necessary.

The California Supreme Court has said, with

respect to the doctrine of extension, as opposed to invalidation, that it is a drastic alternative that should be resorted to only when there is clear evidence to support that the legislature intended that outcome.

QUESTION: But this wouldn't be a judicial extension. This would be an action by employers to bring their policies into conformity.

MR. OLSON: I suspect that's why the state of -- the United States in its brief called it, an extension, an end run. Because it would be a declaration by this Court that the effect of the existence of the California statute and the federal statute, in tandem, is to require exactly what the Congress of the United States thought it was not accomplishing, what the California legislature, the California courts, and the California executive branch don't seem to want, don't seem to be in favor of.

It would be imposing costs and burdens on California employers that may affect seniority policies; it may affect the economics of the employers in the State of California; it may affect whether employers in the State of California can compete as well with other employers elsewhere.

In other words, those are legislative judgments --

QUESTION: Well, Mr. Olson, I suppose, though, that whenever state law and federal law operate in the same field, as under a scheme like this, where Congress has said states may legislate, the result of the combination may be one that isn't entirely intended by either the state or Congress.

I guess we have some other examples of that.

MR. OLSON: Well, all of the examples that I have read, and to the extent that there has ever been an outcome -- to the extent that I've been able to find one -- in this Court which would come to that conclusion, would be a very narrow extension under very narrow circumstances.

California acknowledges in its brief on page 41 that the policy enunciated by the Pregnancy Discrimination Act, that pregnancy be treated like any other disability, had been in operation in 22 states prior to the PDA's passage in 1978.

It says in its brief: Many states then were ahead of the Federal Government in adopting an important social policy. The same can be said today of the maternity leave policies of California, Massachusetts, and so forth.

In other words, California recognizes that with respect to an important social policy, it is ahead

of the Federal Government. Because that important social policy involves discrimination on the basis of a class determined by Congress not to be a permissible basis for discrimination, if there is to be such a change, we submit it should be done by Congress.

With the Court's permission, I would like to reserve the balance of my time for rebuttal.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Olson.

We'll hear from you now, Ms. Johnston.

ORAL ARGUMENT OF MARIAN M. JOHNSTON, ESQ.,

ON BEHALF OF THE RESPONDENTS

MS. JOHNSTON: Mr. Chief Justice, and may it please the Court:

The Pregnancy Discrimination Act amended Title VII to ensure that equality of employment opportunity would not be denied on the basis of pregnancy.

And the only issue in this case is whether California's guarantee that pregnant employees not lose their jobs is in any way inconsistent with that federal goal.

And California submits that common sense, in addition to the statutory language and history, requires that the answer be no; that all that the two laws do is to ensure that discrimination on the basis of pregnancy

does not exist.

And as the Court noted in its questioning of Mr. Olson, nothing in California's law requires employers to violate Title VII.

What I would like to do this morning is, first, to describe California's law, and then to describe the PDA in Title VII, and correct what I believe is Cal Fed's erroneous interpretaton of the federal law; and finally, to show how California's law does promote equality for both men and women and prevent discrimination, once those concepts, equality and discrimination, are properly understood.

California Government Code 12945(b)(2) helps insure that working women do not lose their jobs because of pregnancy disability. And when women employees become pregnant -- and approximately 85 percent of working women will become pregnant at some time during their working lives -- that inevitably causes them to be absent from their jobs for some limited period of time.

Now, what California has done, and all that California has done, is to say that women may return to their work once that period of pregnancy disability is over. And for most women, for 95 percent of women, that's approximately a six week period.

So basically it's a right to keep your job.

It's not a guarantee as to any paid benefits, or any type of compensation. It's not a guarantee of any additional voluntary time off for child care or parenting needs --

QUESTION: But it is something that the petitioner doesn't provide for in its plan.

MS. JOHNSTON: That's correct. Petitioner --

QUESTION: So to comply, the petitioner will certainly have to change its leave policy.

MS. JOHNSTON: Well, that's not necessarily true, Your Honor. Because the way this case came up, before the Fair Employment and House Commission could rule on the validity of the claim against Cal Fed, they brought this federal action to enjoin the state statute.

So if and when the state statute is finally declared valid, it would go to a proceeding before the Fair Employment and Housing Commission.

QUESTION: But on its face, petitioners' --

MS. JOHNSTON: On its face --

QUESTION: -- disability leave policy does not provide for it.

MS. JOHNSTON: Except that the state statute does permit employers not to return pregnant employees to work if there are sufficient business reasons that make it truly impossible not to keep that job open.

So we don't know, at this point, whether or not the application of Cal Fed's statute actually discriminates against the real party in interest, Lillian Garland.

QUESTION: Did you raise any question in the action of the District Court as to whether the District Court should have gone ahead with the proceedings if there was something pending before the California Commission?

MS. JOHNSTON: Initially we did, Your Honor. But since it was a facial challenge to the statute, and in light of this Court's deicision Shaw v. Delta Air Lines, footnote 14, which clearly gave you the right to bring a declaratory relief action as a facial challenge against a state statute as approved by federal law; we did not pursue that.

So what the state statute does is really a very minimal intrusion on any employer's practices. All it requires them to do is to keep the job available for the woman once she returns to work.

On the other hand, if an employer fails to have such a policy, it obviously has disastrous effects on the woman who, in effect, will lose her job due to her pregnancy.

Cal Fed's claim is that Title VII preempts the

California statute. And I think --

QUESTION: Ms. Johnston, can you help me because I really didn't have this point well in mind before, where do I find in the papers the text of the California statutory provision that allows the business justification defense?

MS. JOHNSTON: It's in the Joint Appendix at page 50.

QUESTION: Thank you.

MS. JOHNSTON: Now, since this is a Title VII preemption question, I think the Court understands that Title VII has a very limited preemptive effect on state laws.

And Congress has said in effect that states may make practices unlawful, whether or not such practices also violate federal law.

And the only restriction is that you cannot require employers to violate or purport to excuse violations of Title VII. It would be inconsistent with the purposes of Title VII.

And in our circumstances, warranting preemption of the state statute under Title VII, simply don't exist here, since Title VII forbids discrimination on the basis of pregnancy. And nothing in the California statute is inconsistent with that.

Now, what Cal Fed claims Title VII says is that Title VII is satisfied. But more than being satisfied, that it requires employers to treat pregnancy exactly the same as persons with other medical conditions.

In particular, they reserve the right to terminate any employee on a disability leave.

But that interpretation of the Pregnancy Discrimination Act is invalid for several different reasons. First of all, it ignores the first clause of the PDA, which defines sex discrimination to include pregnancy discrimination.

And once that substantive definition is substituted in 7038, which gives content to what's an unlawful practice under Title VII, it then becomes unlawful for an employer to adversely affect an employee's status because of that employee's pregnancy.

QUESTION: Well, if you insert the word "pregnancy" in the statute, I suppose the federal act would then say that women affected by pregnancy shall be treated the same as other persons not so affected but similar in their ability or inability to work.

MS. JOHNSTON: That's correct, but --

QUESTION: And of course, their argument, then, is that that would require employers to give all

similarly disabled workers the same benefits it gives pregnant workers.

MS. JOHNSTON: I believe that's a misreading of the statute to say that pregnancy discrimination is forbidden the same way as discrimination on the basis of other disabilities is forbidden.

What it says is that you are to treat pregnancy the same as other persons in their ability or inability to work. What California's statute says is that once women are once again able to work, they should be given their jobs back just as anyone who has not suffered from pregnancy.

And in fact, Cal Fed's analysis would lead to the absurd result that the guarantee against pregnancy discrimination would have no substantive content; you could treat pregnant employees as harshly as you treat employees with other medical conditions.

For example, there is nothing unlawful under Title VII if an employer chose to fire all employees with, say, diabetes, whether or not that person was able to work.

Clearly, they couldn't do that under the PDA. The flaw in Cal Fed's analysis, I think, is to equate pregnancy discrimination with discrimination against other disabilities.

And what Title VII did is to equate pregnancy discrimination with sex discrimination. And it's a very crucial difference.

And the other flaw in Cal Fed's interpretation of the PDA is that if the same treatment always satisfies Title VII, and nothing more is ever required, that you can treat pregnancy as badly as you treat every other medical condition, then that undercuts this Court's line of reasoning beginning with Griggs v. Duke Power, which is applied to pregnancy in the Satty case, saying that you cannot have an employment practice which adversely affects a group of pregnant women because of their pregnancy, because that is inevitably sex discrimination.

Now, the two terms, equality and discrimination --

QUESTION: Well, it's your position that an employer, even absent California state law, an employer who does not provide reasonable pregnancy leave would be in violation of Title VII.

MS. JOHNSTON: Well, since this is a preemption case, Your Honor, we don't need to decide what Title VII requires the way that Cal Fed violates it.

QUESTION: Well, is that your position, if we were faced with that?

MS. JOHNSTON: Well, various possibilities exist. It would depend on what this Court chooses to do with the second clause of the PDA and --

QUESTION: Is that your position?

MS. JOHNSTON: California doesn't care which way the Court comes out on that. I think --

QUESTION: But your argument of a disparate treatment analysis would lead to that result, would it not?

MS. JOHNSTON: We do argue that the disparate impact analysis has to be available and that a plaintiff in a Title VII case would have to be able to establish that an inadequate leave policy had a disparate impact on the basis of sex, including pregnancy.

And not just California has that position, but the EECC takes that position in their guidelines 29 CFR 1604.2 et seq. So if a plaintiff, apart from the California statute, but if a plaintiff were simply trying to prove a Title VII violation, then I think they have the option available of proving a disparate impact and proving that Title VII has been violated, despite equal treatment.

But I don't think it's necessary to go that far in this particular case. Since it is a preemption case, all we have to do is prove that Title VII does not

forbid what the state is trying to achieve, which is simply to insure that pregnant employees keep their jobs the same as nonpregnant employees are able to keep their jobs.

And I think that's very crucial, to realize that the distinction is protection on the basis of pregnancy.

And there were some questions during Mr. Olson's argument about what the effect is on persons with other disabilities.

California submits that that is not a distinction which it's only California that's chosen to make. But Congress itself has chosen to make that same distinction in Title VII in forbidding discrimination on the basis of pregnancy, and not forbidding discrimination on the basis of other disabilities.

And I think that true of discrimination on the basis of pregnancy is difficult to understand without focussing on what it means as far as providing pregnancy disability leave.

QUESTION: May I just interrupt to ask a hypothetical case?

Let's assume that an employer had a man and a women doing identical work, and that each on approximately the same day left the employment because

of disability, the woman because of pregnancy and the man because of an accident or an operation or whatever; and they come back to work three months later on the same day.

The woman is returned to her job. The man is told they're sorry, they've refilled -- or they've filled his position with another satisfactory employee, so you go somewhere else.

Your brief says that's perfectly fair. Is that your position today?

MS. JOHNSTON: No, I don't think it's perfectly fair. I think that it's not unlawful. And I think that there's a distinction, Your Honor.

QUESTION: Well, you say, it simply guarantees equality for all workers.

MS. JOHNSTON: Women as compared to men, in that neither lose their job due to pregnancy and child birth. On the other hand, both men and women can face losing their jobs due to other disabilities. And that may, in fact, be unfair, but it's not unlawful under either federal or state law.

QUESTION: Well, you're saying it's --

QUESTION: Now certain types of disabilities that men have that need not be mentioned that women do not have.

MS. JOHNSTON: That's true. And I think that one interpretation of the second clause of the PDA, and a very logical interpretation in view of this Court's dissent in Gilbert, which the PDA was intended to affect, is that where there are other disabibilities, other traits, which are inevitably linked to a prohibited basis of discrimination, such as sickle cell anemia and race, that it would be as unlawful to discrimination on those characteristics as it is to discriminate on the basis of pregnancy.

QUESTION: Why does the State of California resist amending its statute to provide for complete equality based on disability?

MS. JOHNSTON: It simply hasn't gone that far, Your Honor, and neither has Congress. So --

QUESTION: Well, Congress under Title VII, at least the language of Title VII can be read, I think -- and this is the argument presented to us here today, and I'm not suggesting what the answer is -- that state statutes must treat employees equally.

MS. JOHNSTON: And if that is the interpretation that the Court chooses to adopt of Title VII, California has no problem with that. Our concern is in maintaining our state statute. And whatever Title VII also requires, obviously, employers also have to

comply with.

So, since it's a preemption case, we really don't advocate one interpretation of Title VII or another, except to say that our statute is not preemptive, because we don't make any practices unlawful.

But when you consider providing pregnancy disability, I think it's important to keep in mind that Title VII forbids sex discrimination, including pregnancy discrimination. And providing pregnancy disability leave doesn't discriminate on the basis of sex.

And maybe it doesn't even make sense to talk about disability -- pregnancy disability even in terms of whether or not it discriminates against men. I think that may be why in the Newport News case, this Court found that it was ordinary sex discrimination, not pregnancy discrimination, to provide the same benefits to male employees and their spouses as was provided to female employees and their spouses.

But here, it's really irrelevant to male employees whether or not an employer provides pregnancy disability leave. The male employee is going to keep his job when he has a child. There's no interruption of his work life. There's no problem with him keeping his job despite the fact that he's decided to have a child.

On the other hand, it would be disastrous to women if they risk losing their jobs if they decide to have families.

So when it's viewed in that light, it's neither preferential nor prejudicial to either men or women; it's simply an equalizer making sure that women, like men, don't have to choose between employment and childbirth, that they can combine both, and that women can compete equally with men on that basis.

And the concept of equality that California would like the Court to keep in mind is that although the basic principle is that similarly situated persons are to be treated alike, something very different has to occur when persons are not similar situated.

Because in those circumstances, similar treatment may in fact lead to inequality. And maybe in most circumstances, men and women are equally situated regarding pregnancy. That was certainly true in Newport News, where both male and female employees had pregnancy-related expenses. But it's not true regarding the need for pregnancy disablity leave, which once again, is simply that is irrelevant to men. They keep their jobs anyway. But it's very essential for women.

So that providing pregnancy disability leave is consistent both with the goal of providing equality

of employment opportunity without discrimination on the basis of sex, and insuring that discrimination on the basis of pregnancy does not occur.

The PDA was intended to give effect to the Court's dissent in Gilbert. And one very critical statement in that dissent, which the Ninth Circuit relied upon in upholding the California statute, was the statement that a realistic understanding of today's labor environment warrants taking pregnancy into account.

And that's precisely what California has done as well as either other states. And in passing the PDA, Congress specifically noted two of those states, Montana and Connecticut, that at that time already had a statute very similar to the one that's under consideration here.

So Congress was obviously aware of those statutes, and said, federal law may not go that far. But we're not preventing states, if they wish to, to do something in addition.

And the state obviously has a very strong interest in protecting the rights of both men and women employees to keep working and not to lose their jobs on a basis that the other group is not subject to.

But it's not just an adverse effect upon pregnant employees. It would be an adverse upon their

families, upon the state's disability and employment insurance compensation programs, and on the right to procreation itself, if for any reason, women faced a choice between keeping their jobs or having a child.

And what the California statute says is that women, just like men, don't have to face any conflict between the two; that they have the same opportunity as men to combine childbirth and employment; and can become parents without risking job loss.

So it removes an unequal burden that men never face.

QUESTION: Ms. Johnston, could I interrupt you and go back for a moment to the business justification defense?

You referred me to page 50 of the Joint Appendix, which I gather is part of the regulations rather than the statute.

MS. JOHNSTON: That's correct, Your Honor.

QUESTION: And were those regulations in effect at the time this controversy arose?

MS. JOHNSTON: They were in the process, Your Honor. And because of --

QUESTION: The answer is no, they were not in effect; is that right?

MS. JOHNSTON: They were not. But parties

have stipulated that that --

QUESTION: And is there statutory authorization for that particular defense?

MS. JOHNSTON: Not any more than there's statutory authorization for the business necessity defense under Title VII. It is a judicially recognized defense.

QUESTION: The answer is -- under your California statute, I mean, there's no -- is there any judicial -- would it be a business defense for the employer to come in and say, we didn't have a job open at the time? Say just exactly what -- how do we know that you would have won this case against Cal Fed, in other words, if these regulations had been in effect?

MS. JOHNSTON: We don't know. What we're saying is that -- what Cal Fed is saying is they shouldn't have to go through the administrative hearing process and prove whether or not they had a legitimate defense, because they don't have to reach that point. So --

QUESTION: Well, I understand that. But if your -- but it may be there's no conflict. If a defense is that there was no job available, which may be a defense under your regulations, we may be deciding a hypothetical case.

MS. JOHNSTON: Well, it's not simply that there's no job available, but that the employer did not make reasonable efforts, sufficient efforts, to maintain the job.

I think that it is a live controversy, in that Cal Fed is claiming that no employer has to make any effort to keep a job open; that if an employer has a blanket policy of reserving the right to terminate all disabled employees, that it may simply treat pregnant employees the same. And clearly that would not be lawful under the California statute.

QUESTION: An employer? Or Cal Fed itself. They can't just come in and say, if an employer wants to do it. Is Cal Fed saying that they were such an employer?

MS. JOHNSTON: Cal Fed says, and it's in the Joint Appendix at page 40, I believe Your Honor, that it says that it reserves the right to terminate -- Cal Fed reserves the right to terminate an employee on leave of absence if a similar or suitable position is not available.

QUESTION: Yes, but it previously says, if this happens -- so forth and so on -- the personnel division will make every effort to provide similar and suitable position.

Don't we have to presume they did make every effort? And that still wasn't enough, I guess.

MS. JOHNSTON: I don't think that's enough, Your Honor. Because they're saying they don't have any obligation to. And the state statute clearly says you do have an obligation to, unless you can prove --

QUESTION: Well, even if they don't have an obligation do, if they always do, which they say they do --

MS. JOHNSTON: Well, they didn't in this case, Your Honor. Lillian Garland was, in fact, out of work for about three months while she had a Casarean birth. And when she was ready to come back to work, Cal Fed said to her, we do not have another receptionist position open. And in fact, she did not go back to work for another seven months.

QUESTION: Which is the first time they had a job available, I gather.

Well, I shouldn't get off into this.

QUESTION: What if California, Ms. Johnston, were to pass a statute that provided that all people who had immigrated to the United States from some other country within the last three years were to be paid a minimum wage of $9. And the employer comes in and objects and says, the federal policy is to pay a

particular minimum wage that's specified in a federal statute. California has no business singling out this group for a higher minimum wage.

And California's response is, well, the employer can pay everybody $9 an hour if he wants to.

Is that an adequate answer in that case?

MS. JOHNSTON: Well, in fact, Your Honor, I believe it's still correct that California does have a higher minimum wage than the federal minimum, and all employees have to receive that.

The problem with a statute that singled out persons from other countries, for example, for a higher minimum wage, is that it would probably be unconstitutional.

There has not been any constitutional challenge to this statute.

QUESTION: Well, why would it be unconstitutional? Supposing the California legislature said, these people are particularly needy. They have a hard time bargaining well with employers. And we think we can legislate as to this particular class.

MS. JOHNSTON: Well, at the very least they would have to show a sufficient state interest in order to justify such a state statute.

Assuming that more rigorous standard of review

were applied to pregnancy discrimination, I don't think there's be any problem with the state having to -- being able to justify its needs to insure that pregnant employees don't lose their jobs.

The other problem with your hypothetical, I believe, is that it probably would violate Title VII, which forbids national origin discrimination, because you would be treating people --

QUESTION: Well, but supposing California comes in in a case like this, where that question is raised, and says: The employer doesn't have to violate it at all. It can just pay everybody $9 an hour.

MS. JOHNSTON: And I think that that's a perfectly reasonable interpretation of Title VII. And as I said earlier, California has no problem if the Court chooses to interpret Title VII to say that other employees shall get that same benefit. That's a question of federal law. And we're simply concerned with preserving our state law.

The other difference, I think, is that your hypothetical raises a problem of the legislature making an assumption about an entire group of people, saying, because you come from another country, you're in need of higher wages.

QUESTION: That's what most laws are based on,

isn't it, assumptions that the legislature makes?

MS. JOHNSTON: But the California statute is quite different in that it doesn't assume that pregnant employees are going to need any specific time off.

What it does is cover exactly the period of pregnancy disability; no more and no less. So that by moving pregnancy disability from a factor in your ability to keep your job, what California is doing is preventing discrimination on the basis of pregnancy.

It's not a stereotype --

QUESTION: Well, but the California legislature has specified a period of four months, which is certainly a generalization that may not apply in every single case, isn't it?

MS. JOHNSTON: Well, what it is is a limit, though, on the amount of leave that a woman can receive. What she actual receives is her actual period of disability.

QUESTION: Yes, but isn't it conceivable that some women might need more than four months of --

MS. JOHNSTON: That's correct.

QUESTION: -- or something like that?

MS. JOHNSTON: And if that happens, Your Honor, then this particular California statute does not apply. What would happen then would be what Justice

O'Connor was suggesting, in that you would have to prove a typical Title VII or employment discrimination case in showing that failing to give more than four months had an adverse impact.

Whether it does or doesn't is really irrelevant to this case.

QUESTION: What I wanted to point out by my question is that there is an area of general legislation in the California statute where they specify four months as the period that the limit can't exceed.

MS. JOHNSTON: That is true. They have made a presumption that four months will take care of the majority of the cases. And there may be some pregnant employees that -- for which that is not sufficient.

But what we would like the Court to keep in mind is that California's guarantee is purely for job retention. And in being sure that pregnant employees keep their jobs, it not only is not inconsistent, but we believe it's perfectly compatible and consistent with Title VII's goal of equality for both and women, despite the fact that only women become pregnant.

It doesn't require employers to violate Title VII in any way. It simply corrects for a biological burden that only women, and not men, in the workforce face.

And, finally, that it is a legitimate exercise of California's authority to ensure that equal employment opportunity will not be denied.

Unless the Court has any further questions, thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Ms. Johnston.

Mr. Olson, do you have any more? You have about two minutes.

ORAL ARGUMENT OF THEODORE B. OLSON, ESQ.,

ON BEHALF OF THE PETITIONERS - REBUTTAL

MR. OLSON: Thank you, Mr. Chief Justice.

This case is about assumptions regarding groups. The United States Congress decided that assumptions on the basis of pregnancy were impermissible in the workforce.

California has made an assumption about pregnant individuals that they need some extra assistance in order to be equalized in the workplace.

The effect of the California statute is inconsistent with the Federal law.

The purpose of the California statute is squarely inconsistent with the federal law.

And the philosophy of the California statute is inconsistent with the federal statute.

The federal law, and Congress, throughout the legislative history in hearings relative to this matter, assumed that discrimination on the basis of pregnancy was wrong.

The assumption here in part of this debate has been that there's some sort of favorable discrimination going on in the State of California.

Congress assumed, and stated, that discrimination was wrong; and that there is no, in this context, favorable discrimination. Because it requires and causes people to have assumptions about groups.

It is the point that the ACLU is making in footnote 30 which I read, and I believe it's the point that Justice O'Connor was making for the Court in the Mississippi University case, that those assumptions about groups, that they need some extra help, in order to be equal with everyone else, ultimately causes damage.

QUESTION: But Mr. Olson, at the time the California statute was passed, immediately after the Gilbert decision, it was true, was it not, that this group did need some extra help to be equalized in the employment market?

MR. OLSON: The Congress addressed the means of providing that assistance. I'm not --

QUESTION: Well, I'm saying at the time that

California enacted its statute.

MR. CLSON: California enacted its statute shortly before the Pregnancy Discrimination Act, but it was not effective until after, Mr. Justice Stevens.

QUESTION: I understand. But at the time they enacted it, there was a need to equalize the employment opportunities of the group affected by this statute?

MR. CLSON: Yes, but I believe that Congress selected the means to solve that problem.

QUESTION: After the California statute was passed?

MR. CLSON: But before the California statute became effective.

QUESTION: Okay.,

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Olson.

The case is submitted.

(Whereupon, at 10:56 a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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#85-494 - CALIFORNIA FEDERAL SAVINGS AND LOAN ASSOCIATION, ET AL.,
Petitioners V. MARK GUERRA, DIRECTOR, DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING, ET AL.

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anscript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)