Briefs file

In the

Supreme Court of the United States

October Term, 1973

No. 73-640

Dwight Geduldig,

Appellant,

—v.—

Carolyn Aiello, individually and on behalf of all others similarly situated,

Appellees.

Dwight Geduldig,

Appellant,

—v.—

Augustina D. Armendariz, Elizabeth B. Johnson, Jacqueline Jaramillo, *et al.*, individually and on behalf of all other women similarly situated,

Appellees.

CONSOLIDATED CASES ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE CENTER FOR CONSTITUTIONAL RIGHTS AND THE NATIONAL ORGANIZATION FOR WOMEN

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BRIEF *AMICI CURIAE*

Interest of *Amici*[1]

The American Civil Liberties Union is a nationwide, nonpartisan organization of over 250,000 members dedicated to defending the right of all persons to equal treat-

[1] This brief is filed with consent of the parties. The letters of consent have been filed with the Clerk of the Court.

ment under the law. Recognizing that discrimination against women is a pervasive problem at all levels of society, and is often reinforced by governmental action, the American Civil Liberties Union has established a Women's Rights Project to work toward the elimination of sex-based discrimination. The American Civil Liberties Union believes that these cases concerning the rights of members of the work force disabled due to pregnancy pose constitutional issues of great significance to the achievement of full equality under the law between the sexes.

Lawyers for the American Civil Liberties Union have participated in a number of cases involving gender discrimination in employment and employment-related benefits. We acted as *amicus curiae* in *Frontiero* v. *Richardson,* 411 U.S. 677 (1973), which involved automatic dependency benefits for the wives of servicemen, while servicewomen were required to prove that their husbands were dependent on them for more than half of their support before they could qualify. This sex-based differential was held by the Court to constitute invidious discrimination in violation of the fifth amendment. We also acted as *amicus curiae* in *Cohen* v. *Chesterfield County School Board* and *Cleveland Board of Education* v. *La Fleur,* —— U.S. ——, 42 U.S.L.W. 4186 (Jan. 21, 1974). Lawyers for the American Civil Liberties Union were counsel in *Struck* v. *Secretary of Defense,* 460 F.2d 1372 (9th Cir. 1971, 1972), *cert. granted,* 409 U.S. 947 (1972), Brief for Petitioner filed December 8, 1972 (No. 72-178), judgment vacated and remanded for consideration of mootness when the Air Force rescinded its order directing involuntary discharge of Captain Struck for pregnancy. With regard to the general problem of sex-based discrimination, lawyers for the American Civil Liberties Union presented the appeal in *Reed* v. *Reed,* 404 U.S. 71 (1971).

The National Organization for Women (NOW) is a national membership organization of women and men organized to bring women into full and equal participation in every aspect of American society. The organization has a membership of approximately 30,000, with over 500 chapters throughout the United States. Its membership consists of large numbers of working women who are immediately affected by California's disability program.

NOW, since its inception, has sought enforcement of the Fourteenth Amendment as part of its efforts to achieve equal protection of the laws for women. Basic to these efforts is the securing of even handed treatment of pregnant women and women suffering pregnancy-related disabilities. The decision of this Court will have significant impact on large numbers of working women, including many members of NOW.

The Center for Constitutional Rights is a non-profit, tax exempt legal and educational corporation dedicated to advancing and protecting the rights and liberties guaranteed by the Bill of Rights to the United States Constitution. Born of the efforts of lawyers in the Civil Rights Movement in the South, the Center has since that time included in its legal efforts other groups which have been the subject of systematic and pervasive discrimination.

Since 1969 the Center has devoted substantial energy to the struggle of women to effectuate their constitutional rights to procreative liberty and equal protection of the laws. It was deeply involved in litigation culminating in the recognition of abortion as a fundamental right in

Roe v. *Wade,* 410 U.S. 113 (1973), and *Doe* v. *Bolton,* 410 U.S. 179 (1973), and continues to represent women challenging a variety of official attempts to restrict that right in practice.

In addition to these efforts to assure women control over their reproductive capacity, Center for Constitutional Rights has also been active in assuring equal protection of the laws to women who chose to procreate, particularly with respect to punitive and sex-discriminatory employment policies relating to pregnancy and maternity.

The purpose of this brief is to argue that women workers disabled due to pregnancy are similarly situated to persons disabled due to all other conditions covered by California's disability program, and that the exclusion of pregnancy-related disabilities from the program therefore violates the equal protection guarantee of the fourteenth amendment. It is further contended that the exclusion of disabilities related to pregnancy heavily burdens the exercise of a woman's fundamental right to decide whether to bear a child and therefore violates the due process clause of the fourteenth amendment.

Opinions Below

The opinion of the United States District Court for the Northern District of California declaring unconstitutional the third sentence of Section 2626 of the California Unemployment Insurance Code as it existed prior to January 1, 1974, is reported at 359 F. Supp. 792 (1973). The court's summary order denying appellant's motion to reconsider and set aside the judgment, and Judge Williams' dissenting memorandum, are unreported. Copies of all

opinions below are set out in the Jurisdictional Statement at Appendices A, B, C, and D.

Statutes Involved

The statute challenged herein is California Unemployment Insurance Code Section 2626. At the commencement of this action, that statute provided:

> 'Disability' or 'disabled' includes both mental or physical illness and mental or physical injury. An individual shall be deemed disabled in any day in which, because of his physical or mental condition, he is unable to perform his regular or customary work. In no case shall the term 'disability' or 'disabled' include any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter.

Effective January 1, 1974, the statute was amended and now provides:

> 'Disability' or 'disabled' includes both mental or physical illness . . . mental or physical injury, and, to the extent specified in Section 2626.2, pregnancy. An individual shall be deemed disabled in any day in which, because of his physical and mental condition, he is unable to perform his regular or customary work.

The new Section 2626.2 provides:

> Benefits relating to pregnancy shall be paid under this part only in accordance with the following:
>
> (a) Disability benefits shall be paid upon a doctor's certification that the claimant is disabled because of

an abnormal and involuntary complication of pregnancy, including but not limited to: puerperal infection, eclampsia, caesarean section delivery, ectopic pregnancy, and toxemia.

(b) Disability benefits shall be paid upon a doctor's certification that a condition possibly arising out of pregnancy would disable the claimant without regard to the pregnancy, including but not limited to anemia, diabetes, embolism, heart disease, hypertension, phlebitis, phlebothrombosis, pyelonephritis thrombophlebitis, vaginitis, varicose veins, and venous thrombosis.

Statement of the Case

Amici incorporate the Statement of the Case set out in Brief for Appellees, No. 73-640.

Summary of Argument

I.

Women disabled due to pregnancy are similarly situated to persons disabled due to other conditions covered by California's disability program. For employment-related purposes disabilities due to pregnancy are functionally indistinguishable from disabilities due to other physical and mental conditions. Courts, legislatures and administrative agencies are increasingly recognizing this fact. Even historically, absent an express exclusion, pregnancy-related disabilities have long been treated by courts, arbitrators, and administrative agencies under the rubric of sickness or illness. Grounds offered by appellant for distinguishing pregnancy from illness and injury are irrelevant to the question presented by this appeal, for it is not pregnancy that is in issue, but rather and only the disabled physical condition of a worker related to childbirth, a physical condition that renders her unable to perform her regular or customary work.

II.

Exclusion of disabilities due to pregnancy from California's disability program constitutes a sex classification and also burdens the fundamental right to decide whether to bear a child. Therefore, the strictest equal protection standards of review should be applied. At the least, the Court should closely scrutinize the classification. Even under a less exacting standard of review the exclusion is unjustified, for it invokes an arbitrary means to accomplish the state objective.

Under due process principles, the state is required to show that a compelling interest justifies the substantial burden placed upon exercise of the fundamental freedom to decide whether to bear a child. Appellant has not demonstrated any such compelling interest; therefore the treatment of pregnancy-related disabilities violates the due process clause.

ARGUMENT

I.

Women disabled due to pregnancy are similarly situated to persons disabled due to other physical or mental conditions covered by California's disability program.

California's disability program provides compensation and partical income replacement for employed persons disabled due to virtually any physical or mental condition. Section 2601 of the California Unemployment Insurance Code explains that the Code sections dealing with the disability plan

> shall be construed liberally in aid of its declared purpose to mitigate the evils and burdens which fall on the unemployed and disabled worker and his family.

Despite this policy, the mythology that pregnancy-related disabilities are unique and functionally different from all other disabilities has until recently resulted in the total exclusion from disability benefits of all women disabled by pregnancy-related conditions. Not only were disabilities arising from miscarriage, ectopic pregnancy, and other abnormal pregnancy-related conditions excluded, but even a claimant disabled by a condition which would have been disabling apart from pregnancy was excluded from coverage if she incurred that condition while pregnant. 359 F. Supp. at 801.

The fact that pregnancy-related disabilities are functionally no different from any other disability for purposes of benefit programs was at least partially recognized in

Rentzner v. *California Unemployment Insurance Appeals Board,* 32 Cal.App.3d 604, 108 Cal. Rptr. 336 (1973), in which the court found that a woman disabled on account of an ectopic pregnancy was entitled to recover benefits under the disability plan. California has since revised the total exclusion of pregnancy-related disabilities and now statutorily provides disability compensation for

> abnormal and involuntary complications of pregnancy . . . [and] . . . conditions possibly arising out of pregnancy [which] would disable the claimant without regard to the pregnancy . . . Cal. Unempl. Ins. Code Ann. §2626.2(a) (Suppl. 1973)

Thus California has come part of the way in acknowledging that disabilities relating to pregnancy are functionally identical to all other disabilities. The physically disabled person is unable to work and earn a wage during the period of disability, and suffers the effects of economic dislocation on account of the existence of the biological event. The purpose of the program is to mitigate the economic dislocation of physical inability to work. That physical inability is no less real when it flows from pregnancy than when it flows from any other condition.

The mythology of pregnancy, however, has resisted rational inspection. This Court dealt with one aspect of that mythology this term in *Cleveland Board of Education* v. *La Fleur,* —— U.S. ——, 42 U.S.L.W. 4186 (Jan. 21, 1974). In *La Fleur,* the Court held that pregnant workers could not be treated as if they were disabled before their condition in fact occasioned disability. The case at bar is complementary to *La Fleur.* Here, appellees contend that when

pregnant workers do in fact become disabled, the law must respond to that reality.

The myth of pregnancy is at last eroding under the spotlight of reasoned analysis. The overwhelming modern view is that pregnancy-related disabilities are, for legal purposes, identical to all other disabilities, and that disparate treatment is not justifiable.

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e *et seq.* (hereinafter referred to as "Title VII") forbids, *inter alia,* discrimination on account of sex in employment. The Equal Employment Opportunity Commission, the federal agency charged with administering Title VII, has promulgated an interpretive guideline which provides:

> Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability or sick leave plan available in conection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities. 29 CFR Section 1604.10(b).

This guideline has been upheld and applied by all courts, save one, that have had occasion to rule on it. In *Dessenberg* v. *American Metal Forming Co.,* —— F. Supp. ——, 6 EPD ¶8813 (N.D. Ohio 1973), the court found no reasonable basis to distinguish pregnancy-related disabilities from other disabilities for which sick leave and sick pay were available.

> [S]ick leave is granted to dry out drunken employees, and to those suffering from the abuse of tobacco, although it is refused to a pregnant woman. . . . Alcoholism is at least as voluntary and deliberate as pregnancy. If sick benefits are available for one, they should be for another.

Accord, Wetzel v. *Liberty Mutual Insurance Co.,* —— F. Supp. ——, 7 FEP Cases 34 (W.D. Pa. 1974) (income protection plan excluding disability due to pregnancy discriminates against female employees in violation of Title VII); *Vick* v. *Texas Employment Commission,* 6 FEP Cases 411 (S.D. Tex. 1973) (pregnant women may not be presumed unavailable for work for unemployment compensation purposes by a state agency which, as an "employment agency" under Title VII, was bound by the statute's provisions [guidelines not specifically relied upon]). *But cf. Newmon* v. *Delta Air Lines, Inc.,* —— F. Supp. ——, 7 FEP Cases 26 (N.D. Ga. 1973).

Other federal statutes and regulations acknowledge that, for employment benefit purposes, there is no fundamental difference between pregnancy-related disabilities and other disabilities. The Office of Federal Contract Compliance, the agency authorized to enforce Executive Order 11246 prohibiting, *inter alia,* sex discrimination in employment

by federal contractors, has promulgated for comment a proposed guideline identical to the guideline under Title VII. 38 Fed. Reg. No. 247 (1973). Under the Railway Unemployment Insurance Act women disabled due to pregnancy are eligible for disability benefits. 45 U.S.C. Section 351(k) defines "a day of sickness" as "a calendar day on which because of pregnancy, miscarriage, or the birth of a child, (i) [an employee] is unable to work or (ii) working would be injurious to her health . . . ." See also 45 U.S.C. Sections 354, 362.[1a]

Finally, a growing number of state legislatures and attorneys general have acknowledged that pregnancy must be treated in the same manner as other disabilities. See *infra* at 19-22.

Modern recognition that persons disabled due to pregnancy are similarly circumstanced to persons suffering other disabilities has considerable historical support as well. In a line of cases beginning nearly a century ago, courts have applied to women disabled by pregnancy the rule applicable to similarly circumstanced persons disabled on account of any other physical condition.[2] A sub-

[1a] The statistic in Brief for Appellant at 35 n. 57 regarding yearly claimants for these benefits is out of date and reflects the post World War II baby boom. Only 3% of all female benefit recipients applied for pregnancy-related disabilities in both 1971-72 and 1972-73. ANNUAL REPORT OF RAILROAD RETIREMENT BOARD (1972) Statistical Supplement at 80-81, Table C-18; "Beneficiaries and Average Creditable Days for 1972-1973 Sickness By Type of Sickness," unpublished table available from Railroad Retirement Board, Chicago, Illinois.

[2] *See Queen* v. *Wellings,* 3 Q.B. Div. 426 (the Law Reports 1877-1878) (woman disabled by pregnancy was "so ill as not to be able to travel" under statute permitting use of deposition in that circumstance); *People* v. *Board of Education,* 82 Misc. 684. 144 N.Y.S. 87 (Sup. Ct. 1913), *reversed on other grounds,* 212 N.Y. 463, 106 N.E. 307 (1914) (absence from work on account of pregnancy must be treated like absence due to illness); *Auran* v. *Mentor School District No. 1,* 60 N.D. 223, 233 N.W. 644 (1930) (where absence due to illness discharges school board's duty to continue to employ teacher, so does absence due to pregnancy); *Schlueter* v. *School District No. 42 of Madison County,* 168 Neb. 443, 96 N.W.2d 203 (1959) (pregnant teacher discharged prior to disability was entitled to recover wages to the same extent as one whose subsequent illness would have precluded performance of entire contract).

stantial body of labor arbitration authority also treats disabilities related to pregnancy under the rubric of sickness, illness or injury.[3]

Although there is plainly no functional difference for employee benefit purposes between disabilities related to pregnancy and all other disabilities, appellants claim that discrimatory treatment of disabilities arising in connection with normal pregnancy is justified on the ground, *inter alia,* that pregnancy is "substantially different from illness or injury." Jurisdictional Statement at 11-15.

The issue in this case, however, is not whether pregnancy is an illness or an injury. Nor is it whether California is obligated to pay maternity benefits or benefits to "females who are absent from work due to normal preg-

[3] *See National Lead Co.,* 18 Lab. Arb. 528 (1952) (sickness and pregnancy, both resulting in a temporary physical inability to work, must be treated similarly for leave of absence purposes). *Accord, Republic Steel Corp.,* 37 Lab. Arb. 367 (1961). See also *Washington Publishers Association,* 39 Lab. Arb. 159, 160 (1962), arbitrator said that absence due to disability related to normal pregnancy is an "absence due to illness" because the disability "was a substantial impairment of her strength and her body functions, which made it impossible for her to perform her usual work. It would be unrealistic to hold that she was not entitled to sickness benefits." *Accord, Thornapple-Kellogg School District,* 60 Lab. Arb. 549 (1973); *Corporation of Borough of York,* 57 Lab. Arb. 758 (1971) (arbitrator pointed out that obvious intention of a sick leave plan is to provide earnings relief in periods of incapacity caused by illness, and that pain, discomfort and physical sickness associated with work, are the very things for which sick pay benefits are designed to provide).

nancy . . . " Brief for Appellant at 8.[4] The issue is whether women disabled due to pregnancy are similarly situated for disability compensation purposes to persons disabled due to the myriad other physical and mental conditions covered by California's program. Disability compensation for the period of actual disability, and only the period of actual disability is the relief sought by appellees.

None of the grounds asserted by appellant for distinguishing pregnancy-related disabilities from other disabilities constitutes a reasonable basis for differential treatment. Appellant's protracted explanation that pregnancy is a "normal biological function," Brief for Appellant at 17-19, hardly justifies the singular exclusion here at issue. No other category of disability is excluded from the program solely because it relates to a "normal biological function." For example, fertility is biologically normal, but disability due to a vasectomy is not excluded. Disability arising from a circumcision is not excluded though the uncircumcised state is normal. A hooked or flattened nose is biologically normal, but disability due to cosmetic surgery is not excluded. Thus, biological normality is not a general criterion used to determine eligibility for compensation. It cannot be invoked to justify the pregnancy exclusion when it is irrelevant in all other situations.

[4] For the vast difference between "maternity benefits" and the disability compensation here in question, see *e.g.*, the 1952 INTERNATIONAL LABOR ORGANIZATION MATERNITY PROTECTION CONVENTION (revised) (cash benefits sufficient for full and healthy maintenance of mother and child during lengthy maternity leave); GUTBERGER, SERVICES DESIGNED TO HELP WOMEN TO COMBINE OCCUPATIONAL AND FAMILY RESPONSIBILITIES, IN ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT REGIONAL TRADE UNION SEMINAR 229 (1970) (describing Austria's one-year maternity leave benefit for working women).

Appellant's attempts to distinguish pregnancy-related disabilities on the ground that they are "voluntary and subject to planning," Brief for Appellant at 19, founder on the same shoal. Cosmetic surgery and vasectomy are normally voluntary and planned, yet disabilities relating to these conditions are fully covered by California's program.

The contention that pregnancy-related disabilities do not fit within the concept of "sick role," Brief for Appellant at 18-19, is similarly infirm. If one views "sick role" as involving the attendance of a physician, the performance of surgical procedures, the administration of anesthesia, and hospitalization, a woman disabled by pregnancy and childbirth clearly does fit within the "sick role." Even measured by the selected "sick role" criteria cited by appellant, pregnancy-related disability often fits the description. Pregnancy and childbirth are still a leading cause of female morbidity and mortality,[5] so in the broad sense, pregnancy does jeopardize survival. Furthermore, some pregnancies are not "desirable"[6] and, following even an uneventful delivery, a woman's motivation to recover from the ordeal may be critical to her physical and mental health. Finally, appellant does not require any other category of claimant to conform to the cited "sick role" criteria in order to

[5] WARREN M. HERD, M.D., *Is Pregnancy Really Normal?*, 3 FAMILY PLANNING PERSPECTIVES 5, 8 (Jan. 1971); cf. *Wiesenfeld v. Secretary of Health, Education and Welfare*, 367 F. Supp. 981 (D. N.J. 1973).

[6] A study by Bumpass and Westoff indicates that from 750,000 to more than 1,000,000 births annually in the United States are unwanted. *The "Perfect Contraceptive" Population*, 169 SCIENCE 1177 (1970). See also WESTOFF AND WESTOFF, FROM NOW TO ZERO: FERTILITY, CONTRACEPTION AND ABORTION IN AMERICA at 68-69, 293-94 (1971).

qualify for disability compensation. Examples of covered disabilities that do not so conform have been set forth above: cosmetic plastic surgery and contraceptive sterilization.

Appellant also tries to distinguish pregnancy-related disabilities on the ground of the duration of the average claim. Brief for Appellant at 20. Reserving for later discussion the alleged potential for fraudulently exaggerated claims, *infra* at 35-37, it should be underscored here that no other category of disability is excluded because it is likely to result in large claims. Heart attacks, major surgery, and loss of limb generally occasion long periods of disability, but they are not excluded on that account. A maximum period for collection of benefits applies to all covered disabilities, California Unemployment Insurance Code, Section 2653. Therefore, even if appellant's assumptions about the duration of disabilities due to pregnancy were accurate, exclusion would not be justified. Moreover, there is scant basis for hypothesizing long duration for recovery from an uneventful delivery, and clear indication that, as the mythology of pregnancy endemic to our society dissolves, claims will become increasingly modest in size.[7]

Similarly, appellant's contention that women disabled due to pregnancy may not return to the work force fails to distinguish pregnancy-related disability from covered disabilities. California apparently has not undertaken to identify and exclude other disabilities based on return to the work force prognosis. Indeed, claimants are not excluded though the likelihood is high that their disability will turn out to be permanent. Because probability of re-

[7] *Cf.* A. Montagu, The Natural Superiority of Women 16-17 (rev. ed. 1970).

turn to the work force has never been a ground for excluding any other class of claimant, it cannot be used to isolate and exclude pregnancy-related disabilities. Moreover, appellant's conjectures have all the earmarks of self-fulfilling prophecy. If women are treated by the state and their employees as detached from the work force when pregnancy disables them, denied disability compensation and other employment-related benefits, it is not surprising that some succumb to the disincentives barring the way to return, and to appellant's stereotyped vision of women's place post-childbirth.

In sum, appellant has not demonstrated any tenable distinction between disabilities due to pregnancy and disabilities due to the array of conditions covered by California's program, among them attempted suicide, self-inflicted wounds, cosmetic surgery, vasectomy, circumcision, disabilities occasioned by smoking, alcohol, drugs, limbs broken in athletic activity, and abortion.

The very fact that California provided explicitly for exclusion of pregnancy-related disability in the instant statute is instructive. It indicates that an express exclusion was thought necessary because without it, pregnancy-related disabilities would not be distinguished from other disabilities. Pregnancy-related disability, like other disabling physical conditions, requires medical care, usually includes hospitalization, anesthesia and surgical procedures and always involves some risk to life. The wage loss incurred by a pregnant employee during the period of disability is functionally indistinguishable from the loss caused by any other disability. Women disabled due to pregnancy are thus similarly situated to people disabled due to other physical and mental conditions.

II.

California's exclusion of pregnancy-related disabilities from eligibility for disability benefits violates the equal protection and the due process clauses of the Fourteenth Amendment.

Since disabilities related to pregnancy are no different, in terms of their effect on the wage earner, from disabilities connected with covered physical conditions, the issue before this Court is whether California can single out pregnancy-related disability for exclusion from coverage and burden the fundamental freedom to decide whether to bear a child. We believe the answer to this question is no. The California law, which totally excludes from eligibility for benefits disabilities related to normal pregnancy, but which includes virtually every other condition, is a clear and blatant violation of the fourteenth amendment.

A. *The Exclusion Constitutes a Sex Classification*

The California disability scheme, which compensates individuals for wage loss due to virtually any kind of physical or mental disability, imposes no limitation on the disabilities for which male workers can collect benefits. Man can recover for all the ailments which affect men and women. They can also recover for all of the ailments that affect only or primarily men, such as prostatectomies, circumcision, hemophelia, and gout. The only disabilities which California totally excludes are those related to normal pregnancy, disabilities which can be incurred only by women. Thus, the state applies a double standard. It allows men to recover for any condition which affects

them, including conditions which affect only men. But it denies benefits to women disabled by pregnancy, a condition that affects only women. A policy of this kind is overt sex discrimination. In effect, California applies one set of rules to female claimants and another set to males. In doing so, it discriminates on the basis of sex, in the same way that an employer who applies a different hiring policy to men with preschool age children than to women with preschool children discriminates on the basis of sex. *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971).

Pregnancy is a uniquely female condition. In the words of one appellate court judge, "Nobody—and this includes Judges, Solomonic or life tenured—has yet seen a pregnant male."[8] The *Aiello* court noted at the outset that discrimination of this kind, since it is based on a sex-lined characteristic, is sex discrimination. 359 F. Supp. at 795.

This view is shared by a wide range of authorities at the federal, state and local levels, including courts, legislatures and administrative agencies whose job it is to enforce federal and state laws prohibiting discrimination. Courts have found, for example, that rules declaring pregnant women ineligible for unemployment compensation discriminate on the basis of sex:

> While it is oversimplistic, it is true that only women become pregnant. It is equally clear that only women must remain barren to be eligible for and to receive unemployment compensation. This requirement . . . not only applies to only one sex but places a heavier

[8] Adapted from Chief Judge Brown's opinion dissenting from denial of a motion for rehearing *en banc* in *Phillips* v. *Martin Marietta Corp.*, 416 F.2d 1257, 1259 (5th Cir. 1969), vacated remanded, 400 U.S. 542 (1971).

> burden upon women who seek unemployment benefits. We hold that the statute discriminates against women on the basis of sex. *Hanson* v. *Hutt,* 517 P.2d 599, 601-02 (Wash. 1973).

Accord, Dessenberg v. *American Metal Forming Co.,* —— F. Supp. ——, 6 EPD ¶8813 (N.D. Ohio 1973) (sick pay); *Jordan* v. *Meskill,* —— F. Supp. ——, 1A CCH Unempl. Ins. Rep. ¶21,420 (D. Conn. 1973); *Orner* v. *Board of Appeals,* 3 CCH Unempl. Ins. Rep. (Md.), ¶8386 (Sup. Ct. Baltimore City, 1972) (Case No. 132572); *Stickel* v. *Mason,* —— F. Supp. ——, 1A CCH Unempl. Ins. Rep. ¶21,415 (D. Md. 1973); *Goodman* v. *Chrysler Corp.,* 5 CCH Unempl. Ins. Rep. (Mich.), ¶9341 (Mich. Cir. Ct. 1973) (No. 208538) (unemployment compensation).

Several courts have held that rules requiring dismissal of pregnant employees from their jobs or requiring them to take an unpaid leave of absence are sex discriminatory. In *Cerra* v. *East Stroudsburg Area School District,* 450 Pa. 207, 213, 299 A.2d 277, 280 (1973) the court said:

> Male teachers, who might well be temporarily disabled from a multitude of illnesses, have not and will not be so harshly treated. In short . . . pregnant women are singled out and placed in a class to their disadvantage. They are discharged from their employment on the basis of a physical condition peculiar to their sex. This is sex discrimination pure and simple.

Accord, Buckley v. *Coyle Public School System,* 476 F.2d 92, 95 (10th Cir. 1973); *Green* v. *Waterford Board of Education,* 473 F.2d 629, 634 (2d Cir. 1973); *La Fleur* v. *Cleveland Board of Education,* 465 F.2d 1184 (6th Cir. 1972), affirmed on other grounds, —— U.S. ——, 42 U.S. L.W. 4186 (Jan. 21, 1974); *Heath* v. *Westerville Board of Education,* 345 F. Supp. 501 (S.D. Ohio 1972); *Williams* v. *San Francisco Unified School District,* 340 F. Supp. 438, 442 (N.D. Cal. 1972). Federal opinion to the contrary has dwindled to a small minority. *See Schattman* v. *Texas Employment Commission,* 459 F.2d 32 (5th Cir. 1972), *cert. denied,* 93 S. Ct. 901 (1973); *Cohen* v. *Chesterfield County School Board,* 474 F.2d 395 (4th Cir. 1972), reversed on other grounds, —— U.S. ——, 42 U.S.L.W. 4186 (Jan. 21, 1974).

The Guidelines under Title VII, as noted *supra* at 10-11, treat discrimination against pregnancy as sex discrimination, and have been upheld by courts that have ruled on them.[9] In addition, state agencies administering state fair employment laws have also decided that singling out pregnancy for disadvantageous treatment constitutes discrimination on the basis of sex. For example, the New York State Division of Human Rights has ruled that arbitrary leave rules for pregnant teachers constitute sex discrimination. *State Division of Human Rights* v. *Board of Education of Union Free School District #22,* Case Nos. CS-2105-70 (June 29, 1971). Similarly, the Washington State Human Rights Commission has declared: "It is an unfair practice to . . . penalize [a woman] in terms or conditions of employment because she is pregnant or may require time away from work for childbear-

[9] The Guidelines reflect the studies and recommendations of the presidentially-appointed Citizens' Advisory Council on the Status of Women, which, as early as 1963, identified special state rules disqualifying pregnant women from unemployment and disability benefits as one of the key problems of sex discrimination facing working women. REPORT OF THE TASK FORCE ON SOCIAL INSURANCE AND TAXES, April 1968, at 22 and 44.

ing." Washington State Human Rights Commission, Maternity Leave Policy, 3 EPG ¶28,574 (Jun. 22, 1972) (WAC 162-30-020(2)). Most recently the State Human Rights Commission of New York ruled that under New York Human Rights Law, N.Y. Exec. L. §296.1(a) (McKinney 1972), employers must treat disabilities caused or contributed to by pregnancy as temporary disabilities. N.Y. State Division of Human Rights, R.C.-2067 (March 1, 1974).[10]

Finally, in addition to judicial and administrative authority, recognition is increasing among state legislatures and attorneys general that policies, like California's, which exclude pregnancy-related disabilities from state benefit schemes discriminate on the basis of sex and are illegal under the fourteenth amendment and state antidiscrimination laws. In Michigan, the Attorney General has ruled that arbitrary limits on the period of time a pregnant woman is eligible for unemployment benefits unconstitutionally discriminate against females on the basis of a physical condition unique to that sex. MICH. OP. ATT'Y GEN. (Feb. 18, 1972). Similarly, the Attorney General of Oklahoma has concluded that a "statute which discriminates on the basis of pregnancy is discriminating on the basis of sex." OKLA. OP. ATT'Y GEN. No. 72-211 (November 22, 1972). And since 1969, at least four states have repealed or revised local laws singling out pregnant women as ineligible to receive unemployment benfits. These states include Connecticut,[11] Maine,[12] New Hampshire,[13] and Washington.[14]

[10] For other examples, *see* Ill. Sex Discrimination Guidelines, 3 EPG (Ill.) ¶22,497.10 (1971); Md. Commission of Human Relations Sex Discrimination Guidelines §8, 3 EPG (Md.) ¶23,820 (1972); Minn. Sex Discrimination Guidelines §5, 3 EPG (Minn.) ¶24,490.06 (1971); N.Y. State Division of Human Rights Guidelines: Pregnancy, 3 EPG (N.Y.) ¶26,059 (1973); Pa. Sex Discrimination Guidelines, §2 (D), 1 Pa. Bull. 2359, 3 EPG (Pa.) ¶27,296.02 (1971); Wisc. Sex Discrimination Guidelines, 3 EPG (Wisc.) ¶29,100 (1972).

Indeed, the conclusion that California's disability scheme discriminates on the basis of sex is inescapable, for appellant admits to a discriminatory motive. Throughout this litigation, California has contended that, in its view, women already receive a disproportionately high share of benefits because they contribute 28% of the funds and receive 38% of the benefits. Hence, the state legislature, to prevent an even greater distortion between male and female claimants, may exclude disabilities due to pregnancy. Brief for Appellant at 26-27. Appellant ignores the fact that women constitute 40% of the work force. Their contribution of only 28% of the fund is reflective of the typically low wages received by women. Women in fact receive less in benefits than their percentage in the work force would lead one to expect. However, even if they did use the fund disproportionately, that would not justify an exclusion directed solely at women. One may wonder if disproportionate use of the fund by blacks or Catholics would be thought by appellant to be sufficient justification for limiting access of those groups to the fund. While appellant's argument is clearly without merit, the fact that it is pressed insistently leaves no doubt on the point considered here: exclusion

[11] Conn. Gen. Stat. Rev. §31-236(5) (1958), repealed by P.A. 140, L. 1973, effective Oct. 1, 1973.

[12] Me. Rev. Stat. Ann. tit. 26, §1192 (3) (Suppl. 1973).

[13] N.H. Rev. Stat. Ann., §282:4 (J) (Suppl. 1973).

[14] Wash. Rev. Code Ann., §50.20.030 (1962), as amended, Ch. 167, L. 1973, effective July 16, 1973.

from eligibility for benefits of women disabled due to pregnancy is expressly designed to discriminate against women as a class. The presence of a discriminatory motive should be taken into consideration by the Court in its analysis of whether the classification is constitutionally infirm. *Shapiro* v. *Thompson,* 394 U.S. 618 (1969).

In sum, the ruling below, that California's denial of benefits for disability due to pregnancy constitutes sex discrimination, is well supported by federal and state judicial, administrative and legislative authorities. Pregnancy is a sex-linked characteristic; only women can be injured by California's policy. Given this fact, and in view of appellant's own admission that the exclusion was motivated by a purpose to limit benefits for female claimants, characterization of the exclusion of sex discriminatory is beyond question.

B. *The Exclusion Burdens the Exercise of a Fundamental Freedom*

The exclusion of disabilities relating to pregnancy burdens a fundamental right protected by the fourteenth amendment—the right to decide whether to bear a child. This Court said in *Roe* v. *Wade,* 410 U.S. 113, 131 (1973).

> In a line of decisions . . . going back perhaps as far as *Union Pacific R. Co.* v. *Botsford,* 141 U.S. 250, 251 (1891), the Court has recognized that a right of personal privacy . . . does exist under the Constitution. . . . These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty" . . . are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities

> relating to marriage . . . , procreation . . . , contraception . . . , family relationships . . . and child rearing and education . . . . (Citations omitted.)

The Court decided in the *Roe* case that the decision whether to continue or to terminate a pregnancy, at least during the first and second trimesters of pregnancy, must be left up to the individual and her doctor lest the state unconstitutionally intrude into the zone of privacy protected by the Constitution.

The Court has recently recognized that this zone of privacy with respect to child bearing is unconstitutionally infringed by governmental action which has the effect of burdening women who chose to continue pregnancy rather than terminate it. In *Cleveland Board of Education* v. *La Fleur,* —— U.S. ——, 42 U.S.L.W. 4186 (Jan. 21, 1974), overly restrictive maternity leave rules for pregnant school teachers were struck down because they encroached unjustifiably upon the teacher's right to decide whether to bear a child. The Court noted that maternity leave rules directly affect "one of the basic civil rights of man" and that

> the Due Process Clause of the Fourteenth Amendment requires that such rules must not needlessly, arbitrarily or capriciously impinge upon this vital area of a teacher's constitutional liberty.

In the instant case, the exclusion of disabilities related to normal pregnancy burdens the fundamental right to decide to bear a child as surely as an overly restrictive maternity leave policy does. As one writer stated with

spect to denial of unemployment benefits to pregnant omen:

> By denying benefits, the state is weighing the choice toward abortion, and continued employment and away from bearing a child and facing economic disaster. Auchincloss, *Unemployment Benefits,* WOMEN'S RIGHTS LAW REPORTER 38, 39 (Spring, 1973).

As in *La Fleur,* the appellees in this case are women who ve chosen to continue their pregnancy. The state, how- er, punishes that decision by denying them, during the eriod of their disability, the income protection not denied any other class of disabled persons. This treatment nstitutes a clear burden on the right articulated by this ourt in *Roe* and in *La Fleur.*[15]

Appropriate Standard of Review

In examining the gender classification present in this se, the Court should identify the applicable review stand- d under the equal protection clause. In determining hether legislative schemes violate the concept of equal otection, the courts have applied standards of review

[15] In contrast to *Johnson* v. *Robison,* 42 U.S.L.W. 4313 (Mar. 5, 74) it is plain that exclusion from income protection during egnancy-related disability is a substantial burden and that no terest of a kind and weight sufficient to justify the burden has en demonstrated. *See infra* at 32-37. Nor can the burden be stified as a measure to limit family size, for it is well documented at where the woman worker is discriminated against on the basis child-bearing and is not treated as a full member of the labor rce, her incentive to delay, space or limit her births is reduced. e Woman's Rights and Fertility, paper prepared by the United ations Secretariat Agenda Item 6, Symposium on Population and e Family (Honolulu, 6-15 August 1973), text following note 29 d at notes 30-33.

ranging from lenient to stringent. *See Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065 (1969). Two standards are generally contrasted: (1) the lenient or "rational relationship" test applicable in the generality of cases; (2) the "rigid scrutiny" test met only by demonstration of a "compelling state interest," applicable when the legislative scheme relates to a "fundamental right or interest" or invokes a "suspect" criterion.

To survive the "rational relationship" test, a classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike." *F. S. Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415 (1920), cited with approval in *Reed* v. *Reed,* 404 U.S. 71, 76 (1971). The more stringent test is exemplified in cases dealing with fundamental rights such as the right to vote and the right to travel, *e.g., Harper* v. *Virginia Board of Elections,* 383 U.S. 663, 667, 670 (1966) (poll tax in state elections); *Memorial Hospital* v. *Maricopa County,* —— U.S. ——, 42 U.S.L.W. 4277 (Feb. 26, 1974) (durational county residence requirement for non-emergency medical care to indigents), and in cases involving classifications based on race or national origin, *e.g., Graham* v. *Richardson,* 403 U.S. 365 (1971); *McLaughlin* v. *Florida,* 379 U.S. 184 (1964); *Takahashi* v. *Fish and Game Comm'n,* 334 U.S. 410 (1948).

In addition to the two commonly articulated review standards, some of the decisions of this Court suggest an intermediate standard: the legislation is "closely scrutinized," and the proponent of the challenged classification is required to show that it is "necessary to the accomplish-

ment of legitimate [legislative] objectives." *Bullock* v. *Carter,* 405 U.S. 134, 144 (1972); *cf. Weber* v. *Aetna Casualty & Surety Co.,* 406 U.S. 164 (1972).

The appropriate standard of review under the due process clause of the fourteenth amendment also requires California to demonstrate a compelling interest to justify the burden placed by the disability exclusion on the decision whether to bear a child. *Cleveland Board of Education* v. *La Fleur, supra.* This Court has made it clear that state benefit schemes affecting the exercise of a fundamental freedom cannot withstand constitutional review unless justified by a compelling state interest. In *Sherbert* v. *Verner,* 374 U.S. 398, 406-407 (1963), a disqualification for unemployment insurance which affected the exercise of first amendment liberties was struck down. The Court said:

> We must next consider whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant's First Amendment right. It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation," *Thomas* v. *Collins,* 323 U.S. 516, 530.

Because the instant case has both equal protection and due process implications, *amici's* position with respect to the appropriate standard of review is three-fold: First, California's sex discriminatory treatment of disabilities related to pregnancy establishes a suspect classification and relates to a fundamental right; no compelling justification

can be shown for the classification. Alternately, the classification at issue, closely scrutinized, is not reasonably necessary to the accomplishment of any legitimate legislative objective. Finally, without regard to the suspect or invidious nature of the classification, or the fundamentality of the interest affected, the line drawn by the California legislature, distinguishing between disabilities related to normal pregnancy and disabilities related to all other conditions, lacks the constitutionally required fair and reasonable relation to a permissible legislative objective.

D. *Sex Classifications Are Impermissible Under the Equal Protection Clause*

In 1971 this Court for the first time struck down a gender line drawn by a state statute on the ground that the classification denied women equal protection. The Court in *Reed* v. *Reed* said, 404 U.S. 71, 75 (1971):

> [The statute] provides that different treatment be accorded to the applicants on the basis of their sex; it thus establishes a classification subject to scrutiny under the Equal Protection Clause.

The Idaho statute struck down gave men a preference over women for appointment as estate administrators based upon the stereotyped assumption that men have more business experience than women. *Reed* v. *Reed,* 93 Idaho 511, 514, 465 P.2d 635, 638 (1970). Although this Court found Idaho's interest in support of the statute "not without some legitimacy," 404 U.S. at 76, it nonetheless termed the classification "arbitrary" and found the legislation constitutionally infirm because it provided "dissimilar treatment for men and women who are . . . similarly situated." 404 U.S. at 77.

The careful scrutiny of sex as a line-drawing criterion evident in *Reed* was confirmed last term in *Frontiero* v. *Richardson,* 411 U.S. 677 (1973). In *Frontiero,* Mr. Justice Brennan declared for a plurality of the Court that sex classifications are subject to strict judicial scrutiny:

> [S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility. . . ." *Weber* v. *Aetna Casualty & Surety Co.,* 406 U.S. 164, 175 (1972). And what differentiates sex from such non-suspect statuses as intelligence or physical disability and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. 411 U.S. at 686.

The message of *Frontiero* is clear: persons similarly situated, whether male or female, must be accorded even-handed treatment by the law. Recently, the Solicitor General, speaking officially in his Memorandum for the United States as *Amicus Curiae* in *Cohen* v. *Chesterfield County School Board* and *Cleveland Board of Education* v. *La Fleur,* U.S.S.C. Nos. 72-777 and 72-1129, at 8, filed October, 1973, expressed with precision the significance of the *Reed* and *Frontiero* decisions:

> It is now well settled that the Equal Protection Clause of the Fourteenth Amendment . . . does not tolerate discrimination on the basis of sex. *Frontiero* v. *Richardson,* 411 U.S. 677 (1973); *Reed* v. *Reed,* 404 U.S. 71 (1971).

The Court is urged to apply in this case the standard of review applied in the plurality opinion in *Frontiero,* that is, to declare and treat sex as a suspect classification.

However, the classification herein fares no better under the *Reed* standard of review. A number of courts have struck down sex-based classifications relying upon the desion in *Reed. See, e.g., Moritz* v. *Commissioner of Internal Revenue,* 469 F.2d 466 (10th Cir. 1972), *cert. denied,* 412 U.S. 906 (1973) (income tax deduction classification based primarily on sex); *Lamb* v. *Brown,* 456 F.2d 18 (10th Cir. 1972) (sex/age differential for juvenile offender treatment); *Brenden* v. *Independent School District,* 477 F.2d 1292 (8th Cir. 1973) (exclusion of girls from athletic program); *Bray* v. *Lee,* 337 F. Supp. 934 (D. Mass. 1972) (higher admission standards for females in Boston Latin Schools). Specifically, a number of courts have relied on *Reed* to invalidate as impermissible sex discriminatory classifications based on pregnancy. *Green* v. *Waterford Board of Education,* 473 F.2d 629 (2d Cir. 1973); *La Fleur* v. *Cleveland Board of Education, supra,* 465 F.2d 118, *affirmed on other grounds* —— U.S. ——, 42 U.S.L.W. 4186 (Jan. 21, 1974); *Heath* v. *Westerville Board of Education,* 345 F. Supp. 501 (S.D. Ohio 1972); *Williams* v. *San Francisco Unified School District,* 340 F. Supp. 438 (N.D. Cal. 1972); *cf. Shull* v. *Columbus Municipal Separate School District,* 338 F. Supp. 1376 (N.D. Miss. 1972).

The weight of authority is now evident: classifications drawn on the basis of sex rarely survive, however the court articulates the constitutional measuring rod. *See generally* DAVIDSON, GINSBURG & KAY, SEX-BASED DISCRIMINATION at 1-116 (West 1974).

E. *The Exclusion Is Not Justified by Reasons of Economy or Avoidance of Fraud*

Appellant's primary justification for the exclusion of disabilities related to normal pregnancy from the disability scheme is that covering such disabilities would be too expensive. It is clear that cost alone, however substantial, does not constitute the compelling state interest necessary to justify an invidious classification or the burdening of a fundamental liberty. *Memorial Hospital* v. *Maricopa County,* —— U.S. ——, 42 U.S.L.W. 4277, 4281 (1974); *Graham* v. *Richardson,* 403 U.S. 365 (1971); *Shapiro* v. *Thompson,* 394 U.S. 618 (1969). As the Court said in *Memorial Hospital,*

> [A] State may not protect the public fisc by drawing an invidious distinction between classes of its citizens . . . so appellees must do more than show that denying [the benefit] saves money. The conservation of the taxpayers' purse is simply not a sufficient state interest to sustain a . . . requirement which . . . penalizes exercise of . . . [a fundamental] right. . . . 42 U.S.L.W. at 4281-4282.

In particular, this Court and others have rejected cost as a justification for discrimination on the basis of sex. See, e.g., *Frontiero* v. *Richardson,* 411 U.S. 677, 691 n. 25 (1973), where the annual cost factor for the benefit extended was an estimated $3.5 million in the Air Force and $1 million in the Navy. And in *Wiesenfeld* v. *Secretary of Health, Education and Welfare,* 367 F. Supp. 981 (D. N.J. 1973), defendant contended that the annual toll for eliminating sex-based differentials in the Social Security Act at 1973

benefit rates would be $325 million.[16] Nevertheless, the court struck down the sex classification in the challenged statute.[17]

Even where no suspect classification or fundamental right is at stake, cost alone does not justify a classification that is not fairly and substantially related to the object of the legislation. In *New Jersey Welfare Rights Organization* v. *Cahill,* 411 U.S. 619 (1973), the Court found that the benefits in question were as indispensable to the group excluded as to the group covered, hence the exclusion was not rationally related to the purposes of the legislation. See also *U.S. Dept. of Agriculture* v. *Moreno,* 413 U.S. 528 (1973).

It should be apparent from these decisions that appellant has not sufficiently justified the exclusion of pregnancy-related disabilities on the ground of economy. The state has failed to show that the exclusion is fairly related to the primary object of the legislation. Disability benefits are as indispensable to women disabled by pregnancy as

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[16] Affidavit of Lawrence Alpern, Deputy Chief Actuary, Office of the Actuary of the Social Security Administration, June 19, 1973, filed with the court in *Wiesenfeld.*

[17] Similarly, cost saving is not a defense to sex discrimination under Title VII. The Guidelines provide that "It shall not be a defense under Title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other." 29 CFR §1601.9(e). *See also Robinson* v. *Lorilliard Corp.,* 444 F.2d 791, 199-800, n. 8 (4th Cir. 1971), *cert. dismissed,* 404 U.S. 1006 (1971); *Joncs* v. *Lee Way Motor Freight, Inc.,* 431 F.2d 245 (10th Cir. 1970); *United States* v. *St. Louis-San Francisco Ry. Co.,* 464 F.2d 301 (8th Cir. 1972), *cert. denied sub nom. Transportation Union* v. *United States,* 409 U.S. 1107 (1973) (increased cost of required training no defense).

they are to all other disabled workers, and the overall purposes of the program are disserved by the exclusion. As the court below noted, California's legitimate interest in fiscal economy could have been served through a variety of means, none of them involving classification of the invidious kind here involved. 359 F. Supp. at 798-99.

Moreover, appellant has not in fact demonstrated that coverage of pregnancy-related disabilities would substantially burden the program. First, California's cost figure is based on an unfounded and very much disputed assumption that the *average* period of disability for a woman with a normal pregnancy is 13-15 weeks. Brief for Appellant at 31. The evidence upon which the state bases its estimate consists of claims received since the opinion of the court below, many of them for pregnancies involving complications, now covered by the statute. Nor did appellant review these claims to determine the extent to which they involve periods of actual disability before tendering them as evidence. Affidavit of Betty Kathleen Kidder, Appendix, pp. 62-64. Therefore it cannot be assumed that the full period claimed in any of these cases would be compensable if pregnancy disabilities were covered. To the contrary, evidence submitted to the court below indicated that the period of actual disability for a normal pregnancy varies widely. Many doctors estimated the average period of disability as no longer than three to six weeks. See affidavits of Drs. Hellegers, Crisp, Calderwood and Goldstein, Appendix, pp. 43-44, 45-46, 37, 38-39.

Furthermore, throughout this litigation, appellant has exaggerated the cost problem by misrepresenting appellees' claim entitlement to disability benefits only for pe-

riods of actual disability and not, as the state asserts, "for that period of time when [because of child-rearing obligations or for other reasons] they have *chosen* to be absent" from work. (Emphasis supplied.) Jurisdictional Statement at 10-11, n. 12. The period of actual disability may be the relatively short period associated with a normal pregnancy, or it may be a longer period of incapacity caused by a pregnancy with complications—but in either event it is not an unlimited or prolonged period of "maternity leave" [18] for which appellees seek coverage under California's plan.[19]

And finally, studies indicate that the cost of covering pregnancy-related disabilities on the same basis as other disabilities, whether in state or private programs, is not likely to be substantial. *See* GREENWALD, *Maternity Leave Policy,* NEW ENGLAND ECONOMIC REVIEW (Jan.-Feb. 1973) in which the Federal Reserve Bank of Boston concluded that increased costs would average out to a 4 cents raise in hourly wages in 1971 and a 2 cents raise in 1972, or an increase of 1.2 percent in hourly wage costs in 1971 and 0.6 percent in 1972. *See also supra* at 12, n. 1a.

Appellant's final justification for the exclusion in this case is that pregnant women will exaggerate the duration of their disability in order to collect disability compensation to which they are not entitled. But the potential for cheating cannot be assumed to be greater for pregnant

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[18] See *supra* at 14, n. 4.

[19] This case is unlike the Rhode Island program, much-cited by appellant, where pregnant women were allowed to recover benefits for extensive periods of time, whether or not they were disabled. Koontz, *Childbirth and Child Rearing Leave: Job-Related Benefits,* 17 N.Y.L. FORUM 480, 484-85 (1971).

women and their physicians than for anyone else. Also, that potential does not cause California to exclude from coverage other categories of claimants, such as the proverbial "whiplash" victim, who might exaggerate claims. Rather, safeguards are built into the system to prevent abuses. Claimants must file initial claims with a physician's statement indicating the existence and probable duration of the disability. If questions arise, the state agency may visit the applicant's home and submit a second questionnaire to the attending physician. A second medical opinion may also be secured from an independent medical examiner who sits on a state board for the express purpose of resolving disputes over claims. Affidavit of Betty Kathleen Kidder, Appendix, pp. 62-64. There is no reason to suppose that these procedures will not be as effective for disabilities relating to pregnancy as they are for all other disabilities.

Furthermore, barring some who will cheat has been held by this Court not to be a sufficient justification for excluding an entire class from benefits in cases involving invidious classifications, *Memorial Hospital* v. *Maricopa County, supra,* at 4283, in cases involving the burdening of a fundamental right, *Sherbert* v. *Verner,* 374 U.S. 398 (1963), and in cases involving classifications that did not meet the rational relationship test, *U.S. Dept. of Agriculture* v. *Moreno, supra,* 413 U.S. at 535-38. Eliminating from benefits an entire class of otherwise eligible claimants just to avoid paying cheaters is thus constitutionally indefensible whether strict scrutiny or a more lenient standard of review is applied. As this Court said in *Memorial Hospital*:

> [O]ther mechanisms . . . are available which would have a less drastic impact on constitutionally protected interests.

In sum, appellant's exclusion of disabilities related to normal pregnancy cannot be justified on the basis of cost or on the basis of avoidance of fraudulent claims. The classification is at least unreasonable—pregnant women are as severely affected by unemployment due to disability as are other workers[20]—and more appropriately characterized as invidious, since it heeps further disadvantage upon a class already subject to pervasive discrimination in the labor market.[21] At the time a woman becomes disabled by pregnancy, she has as great a need for income protection as does any other disabled worker. A state scheme which excludes her from coverage burdens the decision to continue the pregnancy, and draws an arbitrary and irrational line which is impossible to justify.

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[20] Nearly two-thirds of all women who work do so because they must. They are either unmarried, widowed or divorced and often the sole wage earner for the family, or their husbands earn less than $7,000.00 a year. WOMEN'S BUREAU, UNITED STATES DEPARTMENT OF LABOR, WHY WOMEN WORK 1 (rev. ed. 1973).

[21] According to the conservative estimate of the Council of Economic Advisers to the President a differential, perhaps on the order of 20 percent, between the earnings of men and women remains after adjusting for factors such as education and work experience. Women's Bureau, UNITED STATES DEPARTMENT OF LABOR, WOMEN WORKERS TODAY 6 (rev. ed. 1973).

CONCLUSION

For the reasons stated above, the decision of the court below should be affirmed, California's exclusion of disability compensation to women disabled due to normal pregnancy should be declared unconstitutional, and the benefits available to persons on account of physical and mental disabilities under California's disability program should be made available on the same terms and conditions to females disabled due to pregnancy.

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