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Geduldig v. Aiello, 417 U.S. 484 (1974) (Judgment)

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foundation for abortion rights, and ensured equal access to abortion care for women without economic means.[25] By severing the link between reproductive liberty and sex equality, *Geduldig* impeded both conceptual and doctrinal development of the law in ways that could have provided firmer ground for abortion rights.

Similarly, the feminist *Geduldig* opinion would likely have expanded protection for women's access to contraception. Perhaps *Hobby Lobby* would have come out differently if a more robust foundation had been laid for recognizing that women's claims to reproductive justice fundamentally intersect with sex equality. Certainly, Finley's feminist judgment would have led to reversal of lower court decisions concluding that it is not sex discrimination to exclude contraceptive coverage from employer health insurance plans.

Furthermore, *Gilbert* would surely have come out differently in its interpretation of Title VII. Even with the enactment of the PDA, Finley's feminist version of *Geduldig* could have guided courts to less stingy interpretations of legislation barring pregnancy-related discrimination.

Geduldig continues to cast a long shadow over women's interdependent claims to reproductive liberty and gender equality. It remains to be seen whether, despite *Geduldig*, the law will yet develop a richer vision of sex equality based on a less formalist and more substantive understanding of the links between women's capacity to reproduce and women's subordination.[26]

Geduldig v. Aiello, 417 U.S. 484 (1974)

Justice Lucinda M. Finley delivered the opinion of the Court.

I

Women's ability to become pregnant and bear children has long been used as a rationale to deprive them of the economic security and independence, intellectual development, societal opportunity and respect that can come from full participation in the workplace. Through the operation of employer policies and federal and state laws, women have been barred from certain professions or

[25] *See, e.g.*, Elizabeth M. Schneider, *The Synergy of Equality and Privacy in Women's Rights*, 2002 U. *Chi. Legal F.* 137, 147–54 (2002).

[26] In *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721 (2003), the Court for the first time held that legal regulation of pregnant women based on sex-role stereotypes may violate the Equal Protection Clause, but did not explicitly overrule *Geduldig*. *See also* Reva B. Siegel, *You've Come A Long Way, Baby: Rehnquist's New Approach to Pregnancy Discrimination in* Hibbs, 58 *Stan. L. Rev.* 1871, 1882–97 (2006) (discussing implications of *Hibbs* for future interpretations of *Geduldig*).

subjected to limited work hours due to assumptions about the implications of their maternal role. *Bradwell v. Illinois*, 83 U.S. 130 (1873) (prohibiting a woman from the practice of law); *Muller v. Oregon*, 208 U.S. 412 (1908) (limiting the number of hours women can work in laundries). They have been subjected to mandatory leave or discharge due to pregnancy. *Cleveland Bd. of Educ. v. La Fleur*, 414 U.S. 632 (1974); *Struck v. Secretary of Defense*, 460 F.2d 1372 (9th Cir. 1971), *vacated and remanded to consider mootness*, 409 U.S. 1071 (1972). They have been barred from returning to work for several months after childbirth. *LaFleur*, 414 U.S. at 634–35. They have been denied seniority accumulation while on forced periods of leave; they have been excluded from utilizing sick leave benefits or from receiving unemployment compensation when absent from work due to the effects of pregnancy; they have often been denied coverage under employer-provided health insurance for health care costs related to pregnancy. *See* Citizens' Advisory Council On The Status of Women, *Job Related Maternity Benefits* (1970); Colquitt Walker, *Sex Discrimination in Government Benefits Programs*, 23 Hastings L.J. 277, 282–85 (1971); Br. for Am. Fed'n of Labor and Council of Indus. Org. as Amicus Curiae; Br. for ACLU as Amicus Curiae; Trudy Hayden, *Punishing Pregnancy: Discrimination in Education, Employment and Credit* (ACLU 1973).

Indeed, it is fair to say that most of the disadvantages imposed on women in the workforce derive from the capacity of women to become pregnant and from the societal and legal responses to the real or supposed implications of this reality. Assumptions and stereotypes about the physical and emotional effects of pregnancy and motherhood, about the appropriate role of women in society and the workplace stemming from the physical fact of childbearing, and about the perceived response of women to childbearing, have contributed more than any other factor to the disadvantageous treatment of women in the workplace and to their economically subordinated position in society.

It is in light of this historical context and contemporary reality that this case comes before us, and requires us squarely to decide whether exclusionary workplace policies constitute discrimination on the basis of sex when they are based on pregnancy and operate to disadvantage women. If so, does the Equal Protection Clause of the Fourteenth Amendment to the Constitution prohibit disadvantageous treatment of pregnancy and related conditions that may render women temporarily unable to work?

Plaintiff-Appellees are four women who became pregnant, were temporarily unable to work due to physical conditions related to their pregnancies, and were ineligible for payments under California's temporary disability insurance system solely because their temporary disabilities were due to pregnancy. California Unemployment Insurance Code § 2626 excludes from its otherwise

comprehensive disability insurance coverage "any injury or illness caused by or arising in connection with pregnancy up to the termination of pregnancy and for a period of 28 days thereafter." Plaintiffs challenged this exclusion as a violation of their right to the equal protection of the law.

II

Concerned about the economic hardship that workers can experience when they are temporarily unable to work due to physical or mental conditions, California enacted a comprehensive disability insurance program in 1946. The program's stated purpose is "to compensate in part for the wage loss sustained by individuals unemployed because of sickness or injury and to reduce to a minimum the suffering caused by unemployment resulting therefrom." Cal. Unemp. Ins. Code § 2601. The statute further commands that "it shall be construed liberally in aid of its declared purpose to mitigate the evils and burdens which fall on the unemployed" and their families. *Id.*

The disability program is funded by mandatory employee contributions. At present, employees must contribute 1 percent of their salary up to a maximum of $85 per year. *Id.* §§ 984, 985, 2901. In order to be eligible to receive benefits, an employee must have contributed 1 percent of a minimum income of $300 during a one-year base period previous to the time of disability. *Id.* § 2652. For up to twenty-six weeks, an eligible employee may receive a basic benefit level currently varying between $25 and $119 per week depending on the amount earned during the base period. *Id.* §§ 2653, 2655. Benefits can begin after the eighth day of disability, or can begin on the first day of hospitalization if the employee is hospitalized. *Id.* §§ 2627(b), 2802. Claims must be substantiated by the affidavit of a licensed medical practitioner attesting to the disability, and employees may also be required to submit to reasonable examinations. *Id.* §§ 2627(c), (d), 2708, 2710.

Reflecting its broad prophylactic purpose of buffering the adverse economic impact of being temporarily unable to work regardless of the reason, the program provides benefits for incapacities stemming from virtually all conditions or activities. The sole exception is that during pregnancy and for twenty-eight days after childbirth or pregnancy termination, women may not receive benefits for any temporary work incapacity stemming from the pregnancy itself or from any illness or injury caused by or arising in connection with the pregnancy. *Id.* § 2626.[27] Plaintiff-Appellees, all of whom

[27] The legislation establishing the disability insurance program restricts the eligibility of those who have been judicially ordered to be confined to an institution due to drug addiction

were denied disability benefits when they experienced temporary disabilities in connection with their pregnancies, challenge the disadvantageous treatment they suffered as a result of § 2626 as a denial of their right to the equal protection of the law.

Plaintiff Carolyn Aiello, who is self-supporting, had to stop work as a hairdresser in late June 1972, when she had to be hospitalized because she was suffering from an ectopic pregnancy. After surgery to terminate this life-threatening condition, her physician advised her to remain off work for over a month to recuperate. She promptly applied for temporary disability benefits, which were denied solely because her disability arose in connection with pregnancy.

Plaintiff Augustina Armendariz works as a secretary, and she is the sole economic support for herself, her husband, and their young son. In early May 1972, she began to bleed while pregnant, and had to be rushed to the hospital, where she suffered a miscarriage. Her physician ordered her not to return to work until the end of May. She applied for temporary disability benefits, and her claim was also denied on the sole basis that her disability arose in connection with pregnancy.

Plaintiff Elizabeth Johnson works as an operator for the telephone company, and her job provides the primary economic support for her household, which includes herself and her five-year-old son. Ms. Johnson entered the hospital on May 22, 1972, after experiencing intense abdominal pain, swelling in the legs, back pain, and general illness. She was diagnosed as having a tubal pregnancy and, in order to save her life, an operation was performed to terminate the pregnancy. She was discharged from the hospital on May 30, and her physician advised her not to return to work until July 10. Her disability insurance claim was denied for the sole reason that her disability was disqualified by § 2626's pregnancy exclusion.

The final individual plaintiff, Jacqueline Jaramillo, works to provide the sole economic support for herself, her husband who is a student, and their infant. While she did not experience any of the life-threatening pregnancy complications endured by the other plaintiffs, she did require a period of rest and recuperation after her normal vaginal delivery, during which she could not work. She seeks disability benefits for the period she was incapacitated from working due to the delivery of her child.

or sexual psychopathology. *Id.* § 2678. At oral argument, however, counsel for Appellant California conceded that such judicial orders are artifacts no longer used, so that this exclusion does not in fact exclude anyone. Tr. of Oral Arg.

Plaintiffs sued, seeking a declaratory judgment that § 2626 violated the Equal Protection Clause of the Fourteenth Amendment by excluding pregnancy, a condition that only women experience. They also sought to enjoin enforcement of the statute as well as to recover the disability insurance payments they would be entitled to if § 2626 is invalid. Because their suit sought to enjoin a state statute, it was heard by a three-judge court pursuant to 28 U.S.C. § 2281.

The lower court, in a divided 2–1 opinion, concluded that the exclusion of pregnancy-related conditions constituted discrimination on the basis of a sex-linked condition. The district court also ruled that the appropriate standard of review to determine whether the pregnancy exclusion was a denial of equal protection of the law was the "heightened scrutiny" we applied in *Reed v. Reed*, 404 U.S. 71 (1971), for sex-based classifications, where we did not simply accept, without critical examination, any proffered rational basis put forth by the state. The lower court determined that the exclusion was based on the same sort of stereotypes about women's maternal role versus their public and workplace role that led us to invalidate the automatic preference for male estate administrators in *Reed*. Under this more rigorous standard of review, the exclusion of pregnancy was not at all related to the statutory purpose, since women who are experiencing temporary disability related to pregnancy are just as much in need of economic support as are workers who are experiencing temporary work disruption because of the physical effects of any other condition. The lower court thus rejected California's proffered rationale that fiscal concerns for the solvency of the program under the current contribution and benefit structure warranted the exclusion of pregnancy, noting that the state had numerous sex-neutral options for maintaining fiscal solvency while covering disabilities relating to pregnancy. *Aiello v. Hansen*, 359 F. Supp. 792 (N.D. Cal. 1973).

California appealed.

III

Before turning to the merits, we must determine whether recent revisions to the interpretation of California's pregnancy exclusion render the claims of three of the four plaintiffs moot, and if so, how to reframe the issue we must decide. Just prior to the lower court ruling, the California Court of Appeal determined that § 2626 did not bar disability benefits for work absences necessitated by conditions related to complications associated with an abnormal pregnancy, such as ectopic pregnancy. *Rentzer v. California Unemp. Ins. Bd.*, 32 Cal. App. 3d 604 (1973). This decision was issued just days before the

district court ruling here, and the lower court rejected California's motion to reconsider its decision in light of *Rentzer*. The state accepted the statutory construction adopted by the court in *Rentzer*, and subsequently issued administrative guidelines that the exclusion of pregnancy-related conditions in § 2626 applied only to exclude payment for "maternity benefits," i.e., hospitalization and disability benefits for normal pregnancy, delivery, and recuperation. Based on *Rentzer* and the new administrative guidelines, Appellees Aiello, Armendariz, and Johnson, who suffered from the disabling effects of ectopic pregnancies and miscarriage, became eligible for benefits, and their claims have now been paid. Their claims are thus moot, and only the challenge of Ms. Jaramillo continues to present a live controversy. Consequently, the issue we must decide in this appeal is whether the exclusion from California's otherwise comprehensive disability insurance program of temporary disabilities associated with normal pregnancy and childbirth constitutes a sex-based exclusion that disadvantages women and perpetuates their economic and social subordination, and thus violates the Equal Protection Clause.

IV

To determine whether California's exclusion of conditions associated with normal pregnancy violates the Equal Protection Clause, we must first determine whether it is based on or related to sex, and if so, operates to disadvantage women. The lower court assumed that exclusion based on pregnancy, which only women experience, and which thus adversely impacts only women, is sex related and discriminatory. While this conclusion seems obvious, Appellant and Justice Stewart and the other dissenting justices strenuously contend that pregnancy-based classifications are not sex-based discrimination. Thus, before embracing the intuitively obvious, we must examine the issue in greater depth, being ever mindful of the historical context we outlined at the outset.

The capacity to become pregnant and bear children quintessentially distinguishes women from men. Thus, pregnancy is inextricably a sex-based distinction – only women can become pregnant. Appellant contends that this biological fact makes pregnancy unique and that as a result, pregnant women simply are not similarly situated to men, and so classifications based on pregnancy thus do not inevitably constitute sex discrimination. As Justice Stewart puts it in his dissent, by excluding only pregnancy from the covered risks, "there is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." 417 U.S. at 496–97.

There are several flaws in this reasoning. First, Appellant's and the dissenters' focus on the "uniqueness" of pregnancy, and their comparison of the physical risks women are protected from with those that men are protected from, are irrelevant to the purpose and structure of California's disability insurance program. As explicitly stated in California Unemployment Insurance Code § 2601, the program's broad purpose was to protect workers from the economic hardship of periods of being physically or mentally unable to work, regardless of the reason for the disability or the nature of the underlying physical condition that caused the disability. California's program simply was not structured to protect workers only from some physical risks, and not others. The uniqueness of a physical condition to one sex or the other is of no import. Indeed, with the notable exception of pregnancy, the program covers disabilities stemming from several sex-specific risks, including prostatectomies, hysterectomies, and treatment for endometriosis.

The question whether the exclusion of pregnancy-related disabilities leaves women similarly situated to men cannot be answered by facile resort to the uniqueness of pregnancy. It must be answered solely with reference to the purpose of the program, not to the nature of the underlying risk or cause of the temporary disability. *See Reed*, 404 U.S. at 76. Thus, the relevant comparison to determine whether women are treated equally is whether women have as comprehensive coverage as men do for all the normal and likely conditions and risks that may render them temporarily unable to work. Using the purpose of the insurance program as the frame for analysis, the relevant comparative group is not, as the dissent proposes, the women-only group of pregnant persons versus the mixed gender group of non-pregnant persons. Rather, it is the male-only group of workers who receive disability payments when temporarily unable to work due to any condition or risk that they might conceivably face, and the group, including only women, who receive a much less comprehensive level of protection, since women cannot receive insurance payments when temporarily disabled due to a condition they commonly experience. Normal pregnancy, like all the other conditions whose effects men are protected from, requires medical care, can lead to periods of sickness, hormonal imbalance, hospitalization, and surgery such as episiotomies, and can require periods of rest and absence from work in order to recover from its physical and mental effects. Absences from work due to the effects of pregnancy and childbirth can lead to economic hardship for women and their families. The effects of pregnancy, physical and economic, are no different from the effects of all the conditions for which men receive disability insurance payments. By excluding pregnancy-related conditions, California creates a vast difference in the comprehensiveness of coverage for men and women, and fails to treat

the uniquely female condition of pregnancy the same as any and all conditions that render male workers temporarily unable to work. This constitutes sex-based discrimination.

This framework of comparison for determining whether women workers are treated equally to male workers is consistent with the interpretation of the Equal Employment Opportunity Commission (EEOC), the federal agency charged with interpreting and enforcing Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e *et seq.* (1970 ed. Supp. II), the federal statute prohibiting employment discrimination, including discrimination on the basis of sex. The EEOC has declared:

> 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 insurance or sick leave plan available in connection 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.
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> 29 CFR § 1604.10 (b).

The EEOC adopted this interpretive guideline for Title VII's ban on sex discrimination in employment after carefully scrutinizing both employer practices and their crucial impact on women. Based on this examination, "it became increasingly apparent that systematic and pervasive discrimination against women was frequently found in employers' denial of employment opportunity and benefits to women on the basis of the childbearing role, performed solely by women." Br. for EEOC as Amicus Curiae at 10.

While this case requires us to interpret the Constitution, rather than Title VII, the EEOC's expertise in what constitutes sex discrimination in employment is highly instructive. The agency's conclusion that the failure to treat pregnancy-related disabilities the same as all other conditions that render workers temporarily unable to work constitutes sex-based discrimination bolsters our similar determination that California's exclusion of pregnancy-related conditions deprives its women workers of equal treatment under the law.

In addition to using an irrelevant comparative framework focused on the nature of the risk rather than the effect of the condition, Appellant's and the dissent's focus on the "uniqueness" of pregnancy raises the question of why

women should be deprived of workplace benefits for engaging in procreative activity when men are not. Surely a better justification than the uniqueness of women's way of procreating compared with men's should be required before women are disadvantaged. Moreover, the assertion that pregnancy is unique and that pregnancy's "uniqueness" removes it from the reach of the Equal Protection Clause simply enshrines male biology, needs, benefits, and privileges as the supposedly objective norm against which all equal protection claims for sex discrimination should be assessed. Pregnancy is "unique" only because it is not something that males experience. The physical risks that men are protected from – even those that are biologically unique to men – should not become the sole yardstick for assessing whether women are adequately covered for all the risks they might experience. While failing to accord women who are similarly situated to men the same treatment as men can certainly violate the Equal Protection Clause, *see Reed*, 404 U.S. at 76, it is not the only type of gender-based distinction that can deprive women of the equal protection of the law. An equality doctrine that implicitly says that women can claim equality only insofar as they are just like men is an impoverished concept of equality, unable to protect women from the disadvantages they have long suffered because of sex role stereotypes often based on their biological, reproductive "uniqueness." Being biologically different from men does not have to mean that women should be disadvantaged or subordinated due to their difference. Women are entitled not only to equal treatment with men, but also to equal opportunities for education, employment, and civic participation without barriers emanating from laws and policies that are based on stereotypes about women's "natural" roles. *See* Pauli Murray and Mary Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 Geo. Wash. L. Rev. 232 (1965).

The way in which women contribute to procreation, by becoming pregnant and giving birth to a child, has accompanying physical risks that can lead to a period of physical inability to work. The way in which men contribute to procreation, by impregnating, does not have similar physical risks. Thus, a disability insurance plan that excludes physical conditions related to pregnancy imposes an economic penalty on women who engage in procreative activity, but imposes no such economic deprivation on men. As we intimated earlier this term in *LaFleur*, when we found it unconstitutional to make unpaid maternity leave mandatory at a predetermined point during pregnancy regardless of an individual's ability to work, laws and policies that deny equal employment opportunities to women because of their procreative role can infringe on their right to reproductive liberty. The present case makes it evident that denial of equal employment opportunity to women because they are pregnant not only

infringes reproductive liberty, but it also undermines equality between the sexes. Men are not at risk of loss of employment, disability protection, seniority, or economic security when they decide to procreate. Women too often are, not because of the uniqueness of their procreative role, but because of the way laws and workplace policies choose to treat that role. Laws such as California's exclusion of pregnancy-related conditions from the disability insurance plan place economic burdens on women for procreating that no man ever has to face for his procreative activity.

For all these reasons, we reject as fatally flawed the arguments against regarding differential treatment on the basis of pregnancy as a form of sex discrimination. The focus on the unique biological differences between men and women distracts from the salient question of whether the state may enact laws that make women's biological difference a justifiable reason for economic and social inequality. The "uniqueness" of pregnancy does not exempt from the scrutiny of the Equal Protection Clause the kind of policies and laws that single out pregnant workers for adverse treatment. Indeed, pregnancy's unique association with women, and the long history of stereotypes about women's capacities and proper roles that have led to so many forms of excluding women from the workplace due to the capacity to bear children, make it all the more essential to determine whether the sex discrimination effectuated by such policies and practices violates women's right to equal protection of the laws.

V

Having concluded that California's exclusion of pregnancy-related disabilities from its disability insurance program constitutes discrimination on the basis of sex, we must determine the appropriate standard of review for analyzing whether this discrimination violates the Equal Protection Clause.

California argues that as a social welfare program, exclusions from coverage should be reviewed under the deferential rational basis standard of review. *Dandridge v. Williams*, 397 U.S. 471, 483 (1970). Under this standard of review, absent a showing that the distinction involving pregnancy is a mere pretext intended invidiously to discriminate against women, the state's lawmakers are constitutionally free to include or exclude pregnancy from the coverage of this social welfare legislation on any reasonable basis, just as with respect to any other physical condition.

The state's argument for the rational basis standard of review, however, is inextricably linked to its rejected contention that the exclusion of pregnancy is not a form of sex-based discrimination. As our recent decisions in *Reed*, 404 U.S. 71, and *Frontiero*, 411 U.S. 677, make clear, when a legislative

classification is based on sex, as the exclusion of pregnancy in § 2626 undoubtedly is, we must apply a standard of scrutiny more strict than the mere rational basis review accorded to general social welfare legislation.

In *Reed*, we unanimously applied what an eminent constitutional scholar has labeled a heightened rational basis test "with bite" to invalidate a statutory preference for males as estate administrators over females. Gerald Gunther, *The Supreme Court, 1971 Term – Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection*, 86 Harv. L. Rev. 1, 12, 20 (1972). We ruled that the Equal Protection Clause denies "to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of the statute." 404 U.S. at 75–76. "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.'" *Id.* at 76. We then concluded that the preference for men over women was rooted in irrational stereotypes about the relative capabilities and experience of men and women, and bore no relation to the purpose of achieving efficient administration of estates.

In *Frontiero*, a plurality of this Court went further, and declared that "classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny." 411 U.S. at 682. We reached this conclusion based on our nation's long history of discrimination against women, noting that the discrimination was often based in romantic paternalism and stereotypes about women's capacity due to their maternal roles and household responsibilities. We further noted that sex-based classifications, like racial classifications, often bear no relationship to the ability to perform or to contribute to society, or to the actual capabilities or needs of individual women and men. *Id.* at 686–87.

It is now time to take the next step in the natural evolution from *Reed* to *Frontiero*, and definitively hold that sex-based legislative distinctions that rest on stereotypes that constrain equal opportunity, or that cause or perpetuate economic or social disadvantage or subordination, should be subjected to strict scrutiny. The need for heightened scrutiny is especially warranted when a sex-based distinction affects the fundamental right to reproductive liberty, as in the area of pregnancy, and the decision whether or not to bear a child without government-imposed restrictions or burdens. *See, e.g., Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Roe v. Wade*, 410 U.S. 113 (1973); *LaFleur*, 414 U.S. 632. The government must advance a compelling interest when it makes a sex-based classification, and the classification must be necessarily related to achieving that compelling interest.

This does not imply that any sex-based classification or benefit or program should automatically be invalid, or that the sexes must always be treated exactly the same for all purposes. After all, while inequality can result from not treating men and women as alike when they are, it can also result from treating men and women as the same when they are in fact differently situated for a relevant purpose. Heightened scrutiny does not mean blindness to the fact that differences between the sexes may warrant policies or practices supporting truly different needs, such as job-protected pregnancy leave, or opportunities to breast feed at work, or to take breaks in order to pump milk. Nor would strict scrutiny automatically invalidate laws or programs intended to facilitate participation in the public sphere in order to alleviate historical discrimination. *See, e.g., Kahn v. Shevin*, 416 U.S. 351 (1974). Laws aimed at overcoming structural impediments that have caused or exacerbated traditionally subordinated status or denial of opportunity stemming from real differences or from stereotypes about the import of differences may also be justified under a heightened standard of review. Nor does strict scrutiny mean that widely accepted social practices resting on notions of privacy and safety, such as sex-segregated public restrooms, which, unlike racially segregated public facilities, do not seem to subordinate or stigmatize any group, would be invalid.

As we recounted at the outset of this opinion, the long history of women's exclusion from equal opportunities in employment, education, and civic participation – most often due to their reproductive capacity – demonstrates the need to subject the purported justifications for sex-based distinctions to searching examination, ever sensitive to the potential that stereotypes about women's capacity and supposed natural role lurk beneath the law. There is a persistent, deeply entrenched ideology in our society and legal system that men and women are naturally suited to different roles and prefer to, or should, primarily occupy different, separate spheres. The male sphere has been the public world of the workplace, of politics, and culture, while the female sphere is the private world of family and home. Ingrained stereotypes, cultural attitudes, institutional structures, and legal classifications that seem natural actually operate to entrench the separate spheres, thus constraining and limiting the lives of women and men. The presumably well-meaning celebration of women's unique role in bearing children has, in effect, denied women equal opportunity to develop their individual talents and capacities, and has constrained them to accept a dependent, subordinate status in society. See Br. for the ACLU as Amicus Curiae. Women are often pushed out of the public sphere of the workplace when they exercise their reproductive capacity, relegated to the home, dependency, and economic insecurity. The "male breadwinner" ideology also limits men from more active engagement in the

realm of the home and the joys and challenges of child-rearing, often to the detriment of their emotional and physical well-being.

California offers two principal justifications for excluding pregnancy from its disability insurance program. First, the state asserts that normal pregnancy is a voluntary condition, and thus pregnancy does not conceptually fit within a program to compensate for illness and injury. This argument is a variant of the focus on the difference or "uniqueness" of pregnancy. Second, and most prominently, California contends that the exclusion is based on cost concerns, and the need to maintain the fiscal solvency of the disability insurance program and its current structure of employee contributions and benefits. California asserts that it would cost upwards of $120 million per year to cover pregnancy-related illnesses, and this cost would soon overwhelm the program, necessitating either sharp increases in premiums or drastic reductions in benefits.[28]

The voluntariness of many normal pregnancies does not withstand scrutiny as a real, rather than a litigation-inspired, rationale for excluding pregnancy-related conditions. Not all pregnancies are voluntary or desired. And no doubt the temporary physical disabilities that can accompany normal pregnancy are neither voluntary nor desired. Moreover, the comprehensive disability program covers other temporary disabilities, illnesses, and injuries that result from numerous voluntary activities or medical procedures. Workers temporarily unable to work because they choose to have voluntary, non-medically-necessary cosmetic surgery or sterilization procedures are fully covered. Workers temporarily disabled due to injuries incurred as a result of voluntary and normal activities, such as playing sports and driving cars, are fully covered. To single out pregnancy from all the other voluntary activities covered by the program is arbitrary, and thus an illegitimate reason under any standard of review.

Turning to the rationale that it would be too costly to cover temporary disabilities related to normal pregnancy, California asserts that based on experience in other states, well over half of the payments from the fund would have to go to cover these disabilities. While the precise amount of increased cost cannot be verified, and Appellees contend that the cost would be far less than California estimates,[29] it is undisputed that benefit

[28] This is substantially the same argument that the State advanced and the court accepted in *Clark v. California Employment Stabilization Comm'n*, 332 P. 2d 716 (Cal. App. 4th Dist. 1958), that is, that the exclusion of pregnancy-related disabilities is necessary to protect the solvency of the disability insurance program.

[29] Appellant estimates the increased cost of including normal pregnancy at $120.2 million to $131 million annually, a 33 percent and 36 percent increase. Appellees estimate the increased

costs will increase with an expansion of coverage. It is also undisputed that California would likely have to increase the required level of employee contributions above the current 1 percent, or would have to slightly raise the current $85 cap on annual contributions, thus making the program somewhat more costly for workers.

California also contends that because women workers generate a greater rate of claims, women already receive a greater share of benefits from the fund than men. Appellant submitted to the district court data indicating that both the annual claim rate and the annual claim cost are greater for women than for men. As the district court acknowledged, "women contribute about 28 percent of the total disability insurance fund and receive back about 38 percent of the fund in benefits." 359 F. Supp. at 800.

This latter contention about women generating more claims and receiving a greater share of benefits cannot be California's actual reason, or a legitimate reason, for excluding pregnancy-related disabilities.[30] It is an argument based on actuarial principles, and California deliberately and carefully structured its fund so as not to rest on actuarial calculations. For example, workers' contributions are not set according to their level of individual risk of incurring conditions that will generate claims, or the likely cost and duration of those claims. Contributions do not rise for any group of workers when their group generates a large percentage of claims. All workers pay 1 percent of their income up to $85 per year, regardless of individual or group actuarial risk. Indeed, the program has a scale of benefits designed so that its likely effect will be that those earning small incomes (a group disproportionately composed of women workers, *see* Tr. of Oral Arg.) will receive more in benefits than they contribute. *See* Cal. Unemp. Ins. Code § 2655. California conceded in the lower court that under its system, "the right to benefits should not have any relationship to the amount contributed to the fund." 359 F. Supp. at 800. Because the purpose and structure of the California disability compensation program do not limit benefits to various groups based upon actuarial considerations, the state certainly cannot justify limiting benefits for pregnant women on this basis.

cost at $48.9 million annually, a 12 percent increase. California assumes that most women will remain out of work for twelve weeks or longer after childbirth, while Appellees contend that most leaves will be six to eight weeks, the time that the American College of Obstetrics and Gynecologists estimates the average woman is physically disabled from working after childbirth. Br. for Appellees at 59–60.

[30] Similarly, under the EEOC's Guidelines on Discrimination Because of Sex, "[i]t shall not be a defense under title VIII 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 § 1604.9 (e).

The state's contention that including pregnancy will undermine the solvency of the program similarly does not withstand even a modest level of scrutiny. As the lower court noted:

> Even using defendant's estimate of the cost of expanding the program to include pregnancy-related disabilities, however, it is clear that including these disabilities would not destroy the program. The increased costs could be accommodated quite easily by making reasonable changes in the contribution rate, the maximum benefits allowable, and the other variables affecting the solvency of the program. For example, the entire cost increase estimated by defendant could be met by requiring workers to contribute an additional amount of approximately [0.364] percent of their salary and increasing the maximum annual contribution to about $119.
>
> 359 F. Supp. at 798.

Appellant contends, however, that California should be able to abide by its reasonable policy choice to limit contributions to their current threshold, and to pay the current level of maximum benefits. While this may well be the case under the *Dandridge v. Williams* rational basis standard of review, 397 U.S. at 483, it is not a sufficient justification for sex-based discrimination, especially one that also burdens women's exercise of their reproductive liberty. California's interest in preserving the fiscal integrity of its disability insurance program as currently constituted simply cannot render its use of a suspect classification constitutional. For while "a State has a valid interest in preserving the fiscal integrity of its programs[,] ... a State may not accomplish such a purpose by invidious distinctions between classes of its citizens ... The saving of welfare costs cannot justify an otherwise invidious classification." *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969). Thus, when a statutory classification is subject to strict judicial scrutiny, the state "must do more than show that denying [benefits to the excluded class] saves money." *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 263 (1974); *see also Graham v. Richardson*, 403 U.S. 365, 374–375 (1971).

When California's particular explanations for why it would be too costly to cover disabilities related to normal pregnancy are more closely examined, it becomes evident that the program's disadvantageous treatment of women due to their reproductive capacity rests on the same illegitimate stereotypes about women's presumed physical limitations and their proper and natural role within the home that underlie other forms of employment discrimination against pregnant women.

Sex-role stereotypes can easily lead to an exaggeration of the feared costs of pregnancy disability benefits. California's anticipation that most women will require lengthy periods of post-childbirth leave longer than six to eight

weeks rests on the same stereotypes about the physical frailty and incapacity of all pregnant women that we recently rejected in *LaFleur*, 414 U.S. at 644. Like the forced maternity leave at issue in *LaFleur*, the denial of benefits for pregnancy-related disabilities seems to have its roots in the belief that all pregnant women are incapable of work for long periods of time, and therefore, they will generate large disability claims.[31] The truth of this belief is certainly suspect. As we noted in *LaFleur*, while striking down mandatory maternity leave for pregnant schoolteachers commencing well before and extending for three months after delivery, not all women are physically affected by pregnancy in the same way and for the same duration. Many women will be fully physically capable of returning to work within a few weeks after childbirth; others will require longer leaves.

As the district court pointed out:

> the treatment of pregnancy in other cultures shows that much of our society's views concerning the debilitating effects of pregnancy are more a response to cultural sex-role conditioning than a response to medical fact and necessity ... Indeed, a realistic look at what women actually do even in our society belies the belief that they cannot generally work throughout pregnancy ... Nevertheless, the belief that pregnant women are disabled for substantial periods results in their being denied the opportunity to work, unemployment compensation benefits designed to aid those able to work, and – because of the belief that they will submit large claims – disability insurance benefits.
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> 359 F. Supp. at 799 (citations omitted).

The sex-role stereotypes in operation are even more starkly revealed by an additional argument advanced to substantiate California's fear that it will cost too much to remove the pregnancy exclusion. The state argues that the pregnancy exclusion is necessary to prevent abuse of the program by women who have no desire to return to work because they prefer to remain home with their children. 359 F. Supp. at 800. The state's argument depends on several unsubstantiated assumptions: These women – presumably many or most – will be able to find sympathetic physicians who support women staying home with their babies, and who will certify them as disabled for as many weeks as possible, so that the women can reap maximum benefits. Many of these women will then never return to work. In other words, California argues that

[31] Indeed, as noted above, the starkly differing cost estimates of Appellants and Appellees stem from differing assumptions about the length of leaves that women will take. California assumes leaves will average longer than eight weeks, while Appellees take individual's varying physical and economic situations into account and estimate that most women will require shorter leaves.

the pregnancy exclusion is necessary to prevent women from using the disability program as a maternity leave program. Indeed, the state explicitly defended the pregnancy exclusion on this basis when it was initially challenged on equal protection grounds in state court. *Clark v. California Employment Stabilization Com.*, 332 P.2d 716 (Cal. App. 4th Dist. 1958). The state court uncritically accepted this rationale: "[T]o award disability compensation to women employees on account of illness caused by pregnancy, [would] in effect, constitute[] a maternity benefit plan for a limited group, i.e., women employees. The purpose of the unemployment disability program is to afford relief to employees sustaining loss of wages on account of illness, and not to confer maternity benefits." *Id.* at 719.

This rationale for the pregnancy exclusion is inextricably rooted in the archaic sex-role stereotypes that underlie the separate spheres ideology. The exclusion reflects the idea that women are mothers first, and workers second. This ideological belief assumes that most women will, and should, leave the workforce when they have children. *See* Br. for ACLU as Amicus Curiae. These are precisely the type of sex-role stereotypes that led us recently to reject sex-based laws in *Reed* and *Frontiero*. Moreover, this archaic stereotype ignores the greatly increased workforce participation of women (currently almost 39 percent of women with children under six are in the workforce), and the fact that nearly two-thirds of all women who work do so of necessity: either they are unmarried or their husbands earn less than $7,000 per year. *See* United States Department of Labor, Women's Bureau, *Why Women Work* (rev. ed. 1972); United States Department of Labor, Employment Standards Administration, *The Myth and the Reality* (May 1974 rev.). Appellee Jaramillo, for example, is the sole economic support for her family, and she juggles work outside the home and family responsibilities while her husband pursues his education. The other Appellees are also the sole economic support for their households. They are far more typical of working women than Appellant's stereotyped assumptions acknowledge.

To the extent that some women do in fact leave the workforce when they bear children, California's exclusion of pregnancy has all the earmarks of a self-fulfilling prophecy. If women are treated by the state and their employers as detached from the workforce when pregnancy disables them, it is not surprising that some respond to the disincentives barring their way to return and thus fulfill Appellant's stereotyped vision of women's place post-childbirth. Br. for ACLU as Amicus Curiae.

Concerns about the cost of providing equal disability coverage to women are not a sufficient rationale for the sex-based exclusion of pregnancy-related disability, especially where, as here, these cost concerns evince stereotypes

about women's role in reproduction as incompatible with workforce participation. This case highlights that barriers to women's full workforce participation are caused not by women's biological differences from men, but by the way our laws, governments, and employers choose to treat those differences.

The stay previously issued by this Court is vacated, and the judgment of the District Court striking down the pregnancy exclusion in California Unemployment Insurance Code § 2626 is *affirmed*.