No. 06-3108

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JANE ROE,
Appellee,
v.
LARRY CRAWFORD, et al.,
Appellants.

Appeal from the United States District Court,
Western District of Missouri, Central Division
The Honorable Dean Whipple, Chief Judge

BRIEF OF APPELLANTS

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SUMMARY AND REQUEST FOR ORAL ARGUMENT

In 2005, the Department of Corrections revised its policy on inmate abortions. Under this policy, the Department will only transport an inmate to obtain an abortion outside prison walls if the abortion is medically necessary. Plaintiffs, a class of current and future pregnant inmates who might seek elective abortions while in the Department's custody, sought: (1) a declaration that the policy unconstitutionally prevents inmates from exercising their right to decide to have abortions and showed deliberate indifference to their serious medical needs and (2) injunctive relief to prohibit enforcement of the policy. Following cross-motions for summary judgment, the district court granted the declaratory relief sought by the plaintiff class.

The policy, however, does not infringe on abortion rights because the right to elective abortion does not survive incarceration. Even if the policy did impinge on abortion rights, the policy is consistent with the Fourteenth Amendment because there is a direct, reasonable relationship between the policy and the Department's legitimate penological interest in security. The policy does not violate the Eighth Amendment because elective abortions are not serious medical needs.

Defendants seek reversal of the district court's award of declaratory and injunctive relief and entry of summary judgment in their favor. In order to adequately address the points on appeal, Defendants request twenty minutes for oral argument.

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JURISDICTIONAL STATEMENT

This appeal is from a district court decision granting a plaintiff class declaratory relief and an injunction prohibiting enforcement of the Missouri Department of Corrections' policy not to transport inmates for the purpose of obtaining elective abortions. The judgment was issued on July 18, 2006, by the Honorable Dean Whipple, Chief United States District Judge for the Western District of Missouri. The plaintiff class asserted jurisdiction under 28 U.S.C. §§ 1331, 1343, 2201and 2202. This Court has jurisdiction over this appeal under 28 U.S.C. § 1291 because the order appealed from is now final. The notice of appeal, filed on August 16, 2006, was timely under Fed. R. App. P. 4(a)(1).

STATEMENT OF THE ISSUES

I.

Whether the policy of the Missouri Department of Corrections not to transport prisoners for non-therapeutic abortions (an application of its general policy not to transport inmates for non-medically necessary treatment) is consistent with the plaintiff class's Fourteenth Amendment right to an abortion because the policy does not impose an undue burden on prisoners' ability to obtain an abortion and the policy is reasonably related to the Department's legitimate penological interests.

Overton v. Bazzetta, 123 S. Ct. 2162, 2166-67 (2003)

Turner v. Safley, 107 S. Ct. 2254, 2262 (1987)

Victoria W. v. Larpenter, 369 F.3d 475, 486-87 (5th Cir. 2004)

II.

Whether the policy of the Missouri Department of Corrections not to transport prisoners for non-therapeutic abortions is consistent with the plaintiff class's Eighth Amendment right to be free from cruel and unusual punishment because no serious medical need is involved.

Camberos v. Branstad, 73 F.3d 174, 176 (8th Cir. 1995)

Estelle v. Gamble, 97 S. Ct. 285, 290 (1976)

Victoria W. v. Larpenter, 205 F. Supp. 2d 580, 595 (E.D. La. 2002)

Victoria W. v. Larpenter, 369 F.3d 475, 486-87 (5th Cir. 2004)

STATEMENT OF THE CASE

Jane Roe filed this action on her own behalf on October 12, 2005, and on October 19, 2005, amended her Complaint on behalf of herself and others similarly situated, against Larry Crawford, Director of the Missouri Department of Corrections, and Cynthia Prudden, Acting Superintendent of the Women's Eastern Reception, Diagnostic, and Correctional Center, in their official capacities. Roe alleged that a Department policy, IS 11-58, was unconstitutional because it prevented pregnant inmates from exercising their right to have abortions and because the policy showed deliberate indifference to inmates' serious medical needs by compelling them to carry their pregnancies to term. Roe sought: (1) a declaration that the policy is unconstitutional and (2) an injunction against enforcement of the policy.

Plaintiff filed her motion for class certification on October 19, 2005. Following Defendants' opposition to the motion and Plaintiff's reply, the district court, on November 28, 2005, certified as the plaintiff class: "All pregnant women who are seeking or may in the future seek non-therapeutic abortions and who are in the custody of Defendants at the time Plaintiff Roe filed her Verified Complaint in this case or who will be placed in the custody of Defendants in the future and may while in the custody of Defendants seek a non-therapeutic abortion."

On July 18, 2006, following cross motions for summary judgment, the district court denied Defendants' motion and granted the plaintiff class's motion, concluding

that the Department's policy violated the Eighth and Fourteenth Amendments of the United States Constitution. Defendants filed their notice of appeal on August 16, 2006.

STATEMENT OF THE FACTS[1]

In 2005, the Department of Corrections revised its pregnancy counseling policy, IS 11-58, which addresses the prenatal care and support services available to pregnant inmates. App. 249. Before the amendment, IS 11-58 provided that if an inmate expressed her wish to have an abortion, the Department's classification staff would contact Reproductive Health Services of Planned Parenthood of the St. Louis Region, Inc., (RHS) to schedule the abortion and to discuss security arrangements for the time the inmate would be at the RHS facility. App. 251. Inmates were required to pay for the abortion procedure themselves. App. 376-77, 720 (Dep. p. 35).

The 2005 revision to IS 11-58 reflected this change in the Department's policy on inmate abortion: it would no longer transport inmates for elective abortions. App. 249, 289-90, 682 (Dep. p. 44). Where an abortion was medically indicated due to a threat to the mother's health or life, the Department would provide transportation and security for the procedure. App. 249. The Department does not provide transportation to inmates for any elective medical procedures. App. 682 (Dep. p. 44). Prior to the change in IS 11-58, elective abortions were the only instance in which the Department would approve transport of prisoners outside of correctional centers to obtain health care services that were not medically necessary. App. 789.

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[1]References to the Joint Appendix are denoted "App. __."

A wide range of medical and dental care is available to inmates inside the Women's Eastern Reception Diagnostic and Correctional Center (WERDCC) in Vandalia, Missouri. App. 646 (Dep. pp. 18-20). Physicians review requests for off-site medical care on a individual basis. App. 649 (Dep. p. 32). Where there is a threat to an inmate's health or life, care is considered medically necessary. App. 655 (Dep. p. 56). The existence of a threat to health is determined by the treating physician. App. 655 (Dep. p. 56).

Where the patient's health will not be endangered by delaying a procedure, the procedure may be considered elective. App. 649 (Dep. pp. 31-32), 655 (Dep. p. 56). For example, anterior cruciate ligament repair may be an elective procedure, depending on the medical findings for an individual patient. App. 650 (Dep. pp. 33-34). In some cases, off-site specialty care to repair a reducible hernia may be elective, but whether the repair is medically necessary is determined on an individual basis. App. 651 (Dep. pp. 37-38). The Department does not have any policy that categorizes specific medical procedures or health care services as elective, rather than medically necessary; medical necessity is determined by physicians exercising their professional judgment. App. 655-56 (Dep. pp. 53, 56, 57), 707 (Dep. p. 143). Physicians determine whether a procedure or treatment is medically necessary or elective on a case-by-case basis. App. 649 (Dep. p. 32), 655-56 (Dep. pp. 53, 56, 57). Thus even if administrators or other persons decide that a procedure is elective or not

medically necessary, the treating physician has the authority to override that decision and order that an inmate be sent outside the prison for the procedure. App. 656 (Dep. p. 57). The Department simply does not interfere with a physician's professional judgment that a procedure is medically necessary. App. 656 (Dep. p. 57), 695 (Dep. p. 95).

All pregnant inmates are incarcerated at WERDCC. App. 647(Dep. p. 22), 679 (Dep. p. 32). The Department provides pre-natal care to all pregnant inmates. App. 253-54, 647 (Dep. pp. 23-24), 658 (Dep. pp. 66-68), 796-97. An obstetrician is available to inmates at WERDCC two days per week; two physicians and a nurse practitioner are at the facility five days per week. App. 647 (Dep. pp. 23-24). Pregnant inmates are transported to nearby medical facilities for care needed during the pregnancy that cannot be provided at the prison. App. 658-59 (Dep. pp. 68-69, 71). Inmates at WERDCC usually travel to a hospital in the same county to give birth (App. 225-46, 661 (Dep. pp. 78, 80)), though it is not uncommon for an inmate to be released from prison before childbirth (App. 226-46). After a vaginal birth, the inmate stays in the hospital for only twenty-four hours. App. 661 (Dep. p. 77). Second trimester abortions require a two-day procedure and two separate trips to the RHS clinic. App. 18a-18b, 741-42 (Dep. pp. 52-53). The closest facility that provides abortions to inmates is in St. Louis. App. 284.

Any instance where an inmate leaves the grounds of a correctional facility is defined as an "outcount." App. 355. Most outcounts from WERDCC in 2005 were for court appearances or medical care. App. 296-307. Other reasons for outcounts include work release, transfers to another corrections facility, and transport to the bus station upon an inmate's release. App. 319-24, 749 (Dep. p. 19).

WERDCC's transportation operating procedure listed mandatory minimum requirements for security in a variety of situations where inmates were transported outside the prison. App. 354, 370. For example, unless an inmate was a custody level five offender (the highest security rating), a single inmate on an outcount would generally be accompanied by one corrections officer. App. 368. Two officers will accompany a level five offender or a group of inmates on an outcount. App. 367-68.

WERDCC's transportation policy allowed for additional security measures where greater precautions were warranted. App. 355, 702 (Dep. p. 122). Prior to July 2005, the Department transported inmates for non-therapeutic abortions. App. 251, 289-90. Corrections officials deemed additional security advisable for abortion outcounts. App. 702 (Dep. p. 121-22), 754 (Dep. p. 40). Usually a Corrections Officer II, or sergeant, and a Corrections Officer III, or lieutenant, accompanied the inmate, regardless of her security level. App. 754 (Dep. p. 40). Regular procedures for the arrival of inmates at RHS have not been implemented; hospitals that provide

care to WERDCC inmates, in contrast, do have protocol for handling inmates. App. 339-41, 788.

Security and safety were the primary reason for the Department's policy change. App. 681 (Dep. p. 39). Whenever inmates are taken outside the prison, there is a risk of escape. App. 690 (Dep. p. 75), 788. The risk that an inmate's friends or associates will help her attempt to escape is one of the greatest dangers to corrections officers in public settings. App. 690 (Dep. p. 75). If an inmate successfully escapes, the fugitive poses a threat to public safety as well as law enforcement. App. 690 (Dep. p. 75), 788. Escapes can give rise to hostage situations, vehicle thefts, and additional crimes. App. 690 (Dep. p. 75). The pursuit of an escaped inmate and her eventual apprehension can jeopardize the lives of innocent bystanders. App. 690 (Dep. p. 75), 788.

According to the testimony of Paula Gianino, CEO of Planned Parenthood of the St. Louis Region, Inc., in the year the Department revised the policy, approximately one hundred picketers demonstrated outside the RHS clinic every Saturday. App. 775, 777. One Saturday each month that grew to "several hundred picketers." App. 777.

Plaintiffs asserted that by April 2006, the number of picketers on Saturdays had decreased. App. 815, 825. At her April 21, 2006, deposition, Ms. Gianino testified that on three Saturdays per month, thirty picketers position themselves outside the

clinic; one Saturday per month these picketers are joined by the archbishop and fifty additional protestors. App. 736 (Dep. p. 29). Every Saturday and most Tuesdays two "verbally abusive" individuals are present. App. 736 (Dep. p. 29). Protestors have verbally confronted pregnant inmates and accompanying correctional officers at the RHS facility. App. 177 (Dep. p. 65).

Once a pregnancy has reached fourteen and one half weeks, RHS will only perform the abortion on a Friday. App. 18a-18b. At eighteen weeks gestation, the procedure must be performed over two separate days. App. 18a-18b. At RHS, two-day procedures are performed on Fridays and Saturdays only. App. 18a-18b. Inmates cannot stay at RHS overnight if a two-day procedure is required. App. 741-42 (Dep. pp. 52-53). Thus, if the abortion cannot be completed in one day, an additional trip must be made the following day. App. 741-42 (Dep. pp. 52-53).

On several occasions, RHS employees have found it necessary to call the police because of protestor activity outside the building. App. 735-36 (Dep. pp. 26-27, 30-31). Picketers have a history of blocking the driveway when cars attempt to enter the RHS parking lot. App. 735 (Dep. p. 26). Protestors also write down vehicle license plate numbers and photograph or videotape persons entering and exiting the RHS building. App. 177 (Dep. p. 65-66), 735, 777. Picketers prop their signs so that they invade the lanes of Forest Park Avenue, posing traffic hazards. App. 736 (Dep. p.

31). Picketers have also used megaphones and amplified Bible reading outside the RHS clinic. App. 736 (Dep. p. 31).

The parking lot gate is open throughout RHS' hours of operation. App. 734 (Dep. pp. 21-22), 742 (Dep. p. 55). No appointment is needed to enter the RHS building. App. 734 (Dep. pp. 23-24). RHS staff have had to call the police to remove relatives from the building, as well as other individuals opposed to the abortion decisions of pregnant women. App. 735 (Dep. pp. 26-27). On at least one occasion, there was a physical altercation inside the clinic between a pregnant woman and family member. App. 735 (Dep. p. 27).

Contemporaneously with the policy change, WERDCC lost corrections officers due to state budget cuts, despite its growing inmate population. App. 677 (Dep. pp. 21, 24), 679 (Dep. p. 31), 721 (Dep. p. 39). Many corrections officers now work ten or twelve hour shifts. App. 686 (Dep. p. 57). The Department eliminated outcounts for funerals and bedside visits, which averaged three per month at WERDCC during the first half of 2005. App. 296-301, 311, 362, 721 (Dep. p. 39). Even though the Department discontinued outcounts for elective abortions, for funerals, and for bedside visits by July 2005, outcounts for medically necessary care that could not be provided at WERDCC still had to be rescheduled at times due to insufficient security and transport personnel. App. 800-801. Nine medical outcounts were rescheduled in

September 2005, nine in January 2006, eight in July 2005, and five during August 2005. App. 800-801.

Three WERDCC inmates requested elective abortions in October 2005. App. 310, 374-77. There was also a request for an elective abortion in July 2005, as well as one other request earlier in 2005, before the change in policy. App. 285. Four inmates had abortions in 2004 and three in 2003. App. 282. Since 1998, no inmate in the Department's custody has had a medically necessary abortion. App. 658 (Dep. p. 66). There is no evidence in the record that an abortion was ever medically necessary for any pregnancy of any inmate in the Department's custody. App. 658 (Dep. p. 66), 754 (Dep. p. 37).

SUMMARY OF THE ARGUMENT

The Department's policy to provide transportation and security only for medically necessary abortions is consistent with the Fourteenth Amendment because transporting inmates to distant facilities for elective abortions is fundamentally inconsistent with incarceration. The policy is also consistent with the Fourteenth Amendment because there is a direct, reasonable relationship between the policy and the Department's legitimate penological interests in security and cost containment.

The policy not to transport prisoners for elective abortions is also consistent with the right to be free from cruel and unusual punishment because elective abortions do not involve serious medical needs. It is simply contradictory to conclude that an abortion that is not medically necessary can be a serious medical need. If an abortion is medically necessary to protect the life or health of the prisoner, the Department will transport the prisoner for the procedure.

STANDARD OF REVIEW

The district court in this case granted the plaintiffs' motion for summary judgment. The grant of summary judgment is reviewed de novo. *LeGrand v. Area Resources for Community & Human Servs.,* 394 F.3d 1098, 1101 (8th Cir. 2005), *cert. denied*, 126 S. Ct. 335 (2005). Questions of constitutional law are also reviewed de novo. *South Dakota v. United States Dept. of Interior,* 423 F.3d 790, 797 (8th Cir. 2005), *cert. denied*, 2006 WL 1520764 (2006). A grant of summary judgment is proper only if there is no genuine issue of fact and the movant is entitled to judgment as a matter of law. *LeGrand,* 394 F.3d at 1101; *see also* Fed.R.Civ.P. 56(c).

ARGUMENT

I.

The policy of the Missouri Department of Corrections not to transport prisoners for non-therapeutic abortions (an application of its general policy not to transport inmates for non-medically necessary treatment) is consistent with the plaintiff class's Fourteenth Amendment right to an abortion because the policy does not impose an undue burden on prisoners' ability to obtain an abortion and the policy is reasonably related to the Department's legitimate penological interests.

Many liberty interests and due process rights of prisoners may be significantly limited because they are not physically at liberty to make arrangements that would be possible for those able to travel in the community. *Gibson v. Matthews,* 926 F.2d 532, 535-36 (6th Cir. 1991), *citing Bell v. Wolfish*, 99 S. Ct. 1861 (1979). Although the right to vote is a fundamental right, *Tashjian v. Republican Party of Conn.,* 107 S. Ct. 544, 550 (1986), a state may nevertheless bar convicted felons from voting. *Richardson v. Ramirez,* 94 S. Ct. 2655, 2671 (1974). The right to procreate is a fundamental right, but corrections officials may restrict that right. *Goodwin v. Turner,* 908 F. 2d 1395, 1398-1400 (8th Cir. 1990). Abridgment of fundamental rights due to incarceration alone is constitutionally permissible when those rights are inconsistent with the confinement.

Neither this Court nor the United States Supreme Court has specifically addressed abortions in the prison context. The Fourteenth Amendment right to choose abortion is subject to greater limitation than fundamental rights such as voting and procreation. *See Gibson*, 926 F.2d at 535-36; *Maher v. Roe,* 97 S. Ct. 2376, 2382-83 (1977). The limited right at issue here is subject to restrictions based on the nature of imprisonment and prison officials' important responsibilities and interests, including security, public safety, efficient operations, and containing costs. *See Timm v. Gunter*, 917 F.2d 1093, 1100-1101 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 2807 (1991). It is not excluded from the general rule that prison administrators are entitled to adopt legitimate regulations and restrictions, even regulations that might impinge on constitutional rights, in order to accomplish the penal system's legitimate goals and in furtherance of recognized penological interests. *Overton v. Bazzetta,* 123 S. Ct. 2162, 2166-67 (2003); *Turner v. Safley,* 107 S. Ct. 2254, 2262 (1987).

Prison regulations that might impinge on the constitutional rights of inmates are evaluated under *Turner v. Safley,* 107 S. Ct. 2254 (1987). Under *Turner,* the first consideration is whether the asserted constitutional right is fundamentally inconsistent with incarceration. *Turner,* 107 S. Ct. at 2261, 2264; *Overton,* 123 S. Ct. at 2168. If the right does not survive incarceration, the analysis ends there. *Gerber v. Hickman,* 291 F.3d 617, 620 (9th Cir. 2002). A prison regulation or policy that might otherwise impinge on an inmate's constitutional right will survive a challenge

if the regulation is reasonably related to legitimate penological interests. *Turner v. Safley,* 107 S. Ct. 2254, 2261 (1987); *Goodwin,* 908 F.2d 1395, 1398. The burden "is not on the State to prove the validity of prison regulations but on the prisoner to disprove it." *Overton v. Bazzetta,* 123 S. Ct. 2162, 2168 (2003). The right to elective abortion does not survive incarceration.

The right to choose abortion has been characterized as a right of personal privacy. *Roe v. Wade,* 93 S. Ct. 705, 727 (1973); *Maher v. Roe,* 97 S. Ct. 2376, 2381 (1977). Privacy rights are fundamentally inconsistent with incarceration. "Loss of freedom of choice and privacy are inherent incidents of confinement" in the penal system. *Bell v. Wolfish,* 99 S. Ct. at 1873. Prison inmates have no privacy rights in their cells. *Hudson v. Palmer,* 104 S. Ct. 3194, 3200 (1984). Inmates may constitutionally be subjected to visual body cavity searches. *Wolfish,* 93 S. Ct. at 1884-84. Male inmates may be surveilled by female prison guards while showering or using the toilet. *Timm,* 917 F.2d at 1101-1102.

Constitutionally protected personal privacy rights include the interest in making certain personal decisions independently, including decisions about marriage and family relationships, procreation, contraception, and child rearing. *Carey v. Population Servs.,* 97 S. Ct. 2010, 2016 (1977). The deterrence and punishment goals of the prison system and institutional security needs nevertheless justify separating prisoners from spouses and children "and necessitate the curtailment of many parental

rights that otherwise would be protected." *Southerland v. Thigpen,* 784 F.2d 713, 716 (5th Cir. 1986). Although the Fifth Circuit had decided that the choice whether to breast-feed was constitutionally protected as an important aspect of child rearing (*see Dike v. School Bd.*, 650 F.2d 783, 787 (5th Cir. 1981)), in *Southerland* the court determined that allowing an inmate to breast-feed her infant was incompatible with penal objectives. 784 F.2d at 716-17. Allowing inmates to choose to nurse their babies would undermine the state's interest in deterring criminal behavior, interfere with maintaining institutional security, and create an additional financial burden that "would further undercut important goals of the already heavily burdened prison system." 784 F.2d at 717.

The constitutional protection that applies to a woman's choice whether to terminate a pregnancy is also a right that can be legitimately foreclosed completely by prison confinement. Transporting inmates outside of prison for abortions interferes with the Department's compelling interest in security, and imposes additional costs on the Department when its resources could be used for necessary trips rather than elective procedures. App. 681 (Dep. p. 39), 689 (Dep. p. 69), 284. Safety and security concerns were the primary reason for the policy revision. App. 681 (Dep. p. 39). Protecting members of the public from harm is a related legitimate penological goal and is one of the main reasons (if not the primary reason) why

Plaintiffs are incarcerated. *See Overton,* 123 S. Ct. at 133 (legitimate penological interest in protecting child visitors).

The Department's policy promotes safety and security because it directly prevents inmates and officers from being placed in an uncontrolled, emotionally volatile situation. The RHS parking lot is readily accessible to the public, including protestors; its gates are open throughout the clinic's hours of operation. App. 734-35 (Dep. pp. 21-24, 27), 742 (Dep. p. 55). No appointment is required to enter the RHS building. Individuals who would be barred from visiting or communicating with inmates inside prison (e.g., due to recent criminal history), could approach the inmate directly and converse with her. This, in turn, could facilitate an escape attempt or result in interference with the inmate's custody. In a public area, as opposed to prison, corrections officers are unable to prevent those possessing contraband and concealed weapons from entering the inmate's environment. The Department's policy promotes safety by avoiding placing inmates in a situation where significant threats to security cannot be identified and eliminated in advance.

In significant part, the trial court based its rejection of the Department of Corrections' new policy not to transport for non-therapeutic abortions on a Third Circuit decision involving the abortion rights of pre-trial detainees, *Monmouth County Correctional Institutional Inmates v. Lanzaro,* 834 F.2d 326 (3d Cir. 1987). The district court's reliance on Lanzaro was misplaced because the defendant officials

in *Lanzaro* did not adopt the challenged policies for security reasons. *See* 834 F.2d at 335 n. 12. Moreover, in *Lanzaro* the policy required a pregnant inmate to obtain a court order prior to any abortion unless she was in imminent danger of death. 834 F.2d at 328, 340. The policy did not contain a health exception. *Id.* In *Lanzaro*, the jail officials were unable to demonstrate a valid, rational connection between the jail's abortion policies and any legitimate penological interest asserted as the reason for the policies. *See* 834 F.2d at 335, n. 12, n. 15. Thus the first step of the *Turner* analysis was not satisfied. *See Turner,* 107 S. Ct. at 2261-62. In contrast, Missouri Department of Corrections officials have shown that here there is a strong and direct connection between their policy and the Department's interest in providing confinement that is safe to those both inside and outside prison walls.

As discussed above, any time an inmate is transported outside the secure, controlled prison environment, there is a risk of escape or interference by third parties, posing a risk to the safety of the transporting corrections officers, the inmate herself, and innocent bystanders. The Department's policy of not transporting inmates for elective abortions, an extension of its policy barring outcounts for elective medical procedures, reduces these risks. Although inmate abortions were relatively infrequent, any reduction in the possibility of physical harm or inmate escape is important. In *Victoria W. v. Larpenter,* despite the fact that plaintiff was the first inmate in the jail who had ever requested an abortion, the court recognized that

reducing the total number of outcounts, no matter how small the reduction, promotes security. 369 F.3d 475, 486-87 (5th Cir. 2004). Reducing security risks by reducing the number of outcounts is a rational means of furthering the legitimate penological interest in prison security. *See Victoria W. v. Larpenter*, 205 F. Supp. 2d 580, 595 (E.D. La. 2002), *aff'd*, 369 F.3d 475, 486-87 (5th Cir. 2004).

While the district court stated that it would accept the Department's security concerns as "credible" for purposes of summary judgment, the court went on to reject the evidence supporting these concerns and the professional judgment of prison officials. Thus the district court inappropriately failed to give proper deference to the professional expertise and judgment of the prison officials. The district court failed to give adequate weight to the risks of harm or violence that arise when inmates are transported outside prison to obtain abortions – risks that are significantly different from those present during routine medical care. Evidence of these risks included the testimony of the CEO of Planned Parenthood for the St. Louis Region herself. App. 734-42 (Dep. pp. 21-56), 775, 777.

Protestors not only routinely picket the RHS facility, but have a history of obstructing the clinic's driveway, photographing or videotaping those entering and exiting the building, and writing down license plate numbers of vehicles entering RHS' parking lot. RHS employees have had to call the police because of protestor activity outside the clinic and, on at least one occasion, a physical altercation between

a pregnant woman and relative inside the clinic. There is a real risk that an inmate's relatives, husband, boyfriend, or sexual partner could show up at the RHS clinic to confront her about a planned abortion.

Security problems are magnified on Saturdays, when large groups of picketers are regularly present. There was uncontroverted evidence that when the Department revised its abortion policy, crowds of at least one hundred people protested outside the RHS clinic every Saturday. App. 775, 777. "Several hundred" picketers positioned themselves outside the RHS building one Saturday each month. App. 777. While Plaintiffs asserted that the number of picketers has decreased somewhat, the security issue remains.

At eighteen weeks gestation, and in situations where two consecutive days are required for the abortion procedure, RHS will only perform the procedure on Friday and Saturday. Because inmates cannot stay at the RHS facility overnight, this requires the Department to transport the inmate to the same uncontrolled location two days in a row – the second time on a day of heightened protestor activity, increasing the burden on the corrections officers charged with providing security for the outcount.

The documented activity of protestors at the RHS clinic alone poses security risks. In addition, demonstrations could facilitate an actual escape by allowing an accomplice to blend in with protestors and approach an inmate without that proximity

drawing particular attention or suspicion. A loud demonstration where protestors use megaphones or amplify speech could impair corrections officers' ability to hear verbal exchanges between the inmate and an interlocutor with violent intentions. *See* App. 736 (Dep. p. 31). Drugs or other contraband could be given to an inmate under the guise of a sidewalk counseling effort or concealed in leaflets and educational materials.

Despite these undisputed facts, the district court erroneously found that inmates transported to facilities performing abortions "pose no greater risk than any other inmate that requires outside medical attention." App. 626. Moreover inmates in advanced stages of pregnancy or in labor, as well as inmates with serious health problems, have greater physical limitations and pose less of an escape risk than inmates in early stages of pregnancy. *See, e.g.*, App. 702 (Dep. p. 121). Prison officials exercising their professional judgment should be free to determine that the security risks that accompany abortion outcounts mitigate against allowing outcounts for non-medically necessary abortions. The fact that inmates are transported for necessary medical care does not detract from the Department's legitimate security concerns.

Cost concerns, as well as safety and security, may be shown to be a compelling governmental interest in the prison setting. *Hamilton v. Schriro,* 74 F.3d 1545, 1552 (8th Cir. 1996), *cert denied*, 117 S. Ct. 193 (1996). The importance of the

Department's cost containment objective is illustrated by its policy against providing transportation for elective medical procedures generally. The Department also found it necessary to discontinue outcounts for funerals. The Department's interest in avoiding expenses for non-medically necessary abortions is particularly compelling where a two-day procedure is required. Because inmates cannot stay at the RHS facility overnight (unlike hospitals near WERDCC at which births occur), when an abortion cannot be completed in a single day, this necessitates an extra trip to and from WERDCC, involving additional expense for the accompanying corrections officers' time and the cost of calling in other corrections officers to replace them at the prison.

The Department's policy was changed due to safety and security concerns, in addition to the Department's legitimate cost containment interest. Disallowing outcounts for elective abortions eliminates occasions where an inmate is taken outside the controlled, secure prison environment, thereby reducing the risk of escape or interference by third parties and the attendant risk of injury to the inmate, corrections officers, and members of the public. There are safety risks associated with transporting inmates for abortions, and to the RHS clinic in particular, that are distinct and more problematic than the risks inherent in inmate outcounts generally. Thus, the first *Turner* factor, a valid, rational connection between the policy and the penological interest, is satisfied.

The second factor in determining the reasonableness of a prison regulation is "whether there are alternative means of exercising the right that remain open to prison inmates." *Turner,* 107 S. Ct. at 2262. The district court found that unless the Department provides transportation, inmates are unable to exercise "their right to choose to terminate their pregnancy." App. 629. But even under the Department's current policy, transportation is provided and inmates may exercise their right to choose an abortion when a doctor has determined that an abortion is medically necessary due to a threat to the mother's life or health.

Even when an abortion is not medically necessary, other avenues of exercising the right to choose an abortion remain available to inmates. The pregnant inmates incarcerated at WERDCC all became pregnant prior to their imprisonment. An inmate may obtain an elective abortion before her term of incarceration begins. A pregnant woman awaiting trial or sentencing can post bail; even during sentencing she can request temporary release or a slight delay in her surrender date in order to avail herself of access to abortion services. In cases like this, where "other avenues remain available" to exercise an asserted right, the court should ordinarily defer to the expert judgment of corrections officials. *Pell v. Procunier,* 94 S. Ct. 2800, 2806 (1974); *Turner,* 107 S. Ct. at 2262.

A third consideration is "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of

prison resources generally." *Turner,* 107 S. Ct. at 2262. Under *Turner,* where an inmate's exercise of a constitutional right adversely affects the rights and safety of correctional officers and other inmates, corrections officials' decision to limit that right "should not be lightly set aside by the courts." 107 S. Ct. at 2263. Prison officials have a legitimate penological interest in treating all inmates equally to the extent possible. *Goodwin v. Turner,* 908 F. 2d at 1400.

In ruling on the parties' respective motions for summary judgment, the district court was required to draw all reasonable inferences in favor of the non-movant. In doing so, however, the district court was required to distinguish between evidence of disputed facts and "disputed matters of professional judgment." *Beard v. Banks,* 126 S. Ct. 2572, 2578 (2006). With respect to disputed matters of professional judgment, the court's inferences "must accord deference to the views of prison authorities." *Id.*

Here, the district court gave too little deference to the professional judgment of Department officials that transporting inmates for elective abortions adversely impacted the Department's security interests and could delay necessary medical care for other inmates. One example of this is the district court's conclusion that providing transportation and security for elective abortions had a de minimus impact because the Department of Corrections had on occasion transported inmates for such abortions in the past. App. 631.

The district court's statements about the cost of transporting inmates for elective abortions illustrate that the court placed an excessively high summary judgment evidentiary burden on Defendants. App. 630. While the cost of the transport was small in comparison with the Department's total budget, the cost and impact on prison resources were more than de minimus, especially given the lack of medical necessity of non-therapeutic abortion. Apart from the expense for the transfer itself, there was evidence of staff time expended to make security and other arrangements for the procedure. The cost of calling officers in to work to replace the corrections officers providing security for abortion outcounts, including the cost of overtime if needed to adequately staff the prison, is not insignificant.

Transporting and providing security to inmates for the purpose of obtaining non-medically necessary abortions poses additional risks to the life and safety of the inmates and accompanying corrections officers that they would not face inside prison. Providing transportation for elective abortions also can hinder the transport of inmates for medically necessary care. There is a finite amount of staff and transport resources and expending these resources on non-medically necessary abortions can cause delays in appointments of other inmates that are medically required. App. 789. Delaying necessary medical care that cannot be provided at WERDCC will adversely impact the health interests of other inmates.

The district court concluded that accommodating an inmate's desire to terminate her pregnancy was less administratively burdensome than transporting inmates to a hospital to give birth. But those inmates who remain at WERDCC until they give birth are taken to a hospital in the same county. In contrast, the nearest facility providing abortions is in St. Louis. Further, in cases where birth is to be by Caesarean section or where labor is to be induced, the surgery may be scheduled well in advance of delivery. Thus, there can often be greater opportunity for long-term planning, including for staffing needs and allocation of other resources, when pregnancies are carried to term in comparison with abortions, which must take place within a limited time frame.

Finally, the plaintiff class had the burden of showing an alternative existed that fully accommodated their rights at a de minimus cost to valid penological interests. *Turner*, 107 S. Ct. at 2262. This is intended to be a "high standard" that is not easily met. *See Overton*, 123 S. Ct. at 2169. Plaintiffs failed to meet their burden.

Plaintiffs' suggestion that eliminating the regulation barring the transport of inmates for elective abortions would be an obvious alternative does not meet the burden of demonstrating alternative means under *Turner*. Similarly to the plaintiffs in *Overton,* plaintiffs here have not suggested an actual alternative to the Department's policy. App. 629-30. Instead, they suggested the Department's policy

be set aside. Arguing that a prison regulation should be eliminated is legally insufficient. *See* 123 S. Ct. at 2169-70.

The absence of ready alternatives is evidence that a prison regulation is reasonable. *Turner,* 107 S. Ct. at 2262. Even where "obvious, easy alternatives" exist, these options may be "some evidence" a regulation is unreasonable, but their existence is not conclusive on this point. *Overton,* 123 S. Ct. at 2169; *Turner,* 107 S. Ct. at 2262. The district court misapplied the law in ruling that the Department's policy was not reasonable, but an exaggerated response. App. 631. The evidence in the record shows that requiring the Department to provide transportation and security for elective abortions would have more than a negligible effect on the goals served by its policy. *Overton*, 123 S. Ct. at 2170; *Turner*, 107 S. Ct. at 2262. The district court's decision to invalidate the Department's policy as to elective abortions was not legally justified.

In summary, loss of freedom of choice and personal privacy are inseparable from imprisonment and necessary to its legitimate purposes. Just as privacy in one's living space and many essential areas of marriage and family relationships, including procreation, may be completely foreclosed for inmates, due to legitimate penological concerns, so too may be the right to abortion. *See Champion v. Artuz*, 76 F.3d 483, 486 (2d Cir. 1996) (no due process right to conjugal visits); *Goodwin v. Turner,* 908 F.2d 1395, 1399-1400 (8th Cir. 1990); *Gerber v. Hickman,* 291 F.3d 617, 621-22 (9th

Cir. 2002) (prison may prevent inmates from artificially inseminating spouses), *cert. denied,* 123 S. Ct. 558 (2002). Extending the right to choose abortion to prison inmates poses unique security problems, undermines legitimate penological goals of punishment and deterrence, and places significant burdens on the prison system's strained finances and human resources.

Even if abortion rights survive incarceration, Defendants have shown that the Department's policy not to transport inmates for elective abortions is rationally related to its legitimate penological interests, particularly the Department's interest in security and protecting the public. The evidence shows that accommodating Plaintiffs' asserted right to elective abortion would adversely impact safety and security, other inmates' access to needed medical care, and resource allocation. Finally, the plaintiff class failed to propose any alternative that would fully accommodate elective abortion at a de minimus cost to the Department's valid penological interests.

Defendants were entitled to judgment as a matter of law. The decision of the district court should be reversed and remanded with directions to enter summary judgment in Defendants' favor.

II.

The policy of the Missouri Department of Corrections not to transport prisoners for non-therapeutic abortions is consistent with the plaintiff class's Eighth Amendment right to be free from cruel and unusual punishment because no serious medical need is involved.

Plaintiffs asserted that the Department's policy constituted deliberate indifference to inmates' serious medical needs. App. 631. But neither the United States Supreme Court nor this Court have found elective abortion to be a serious medical need. A serious medical need is "one that has been diagnosed by a physician as requiring treatment, or one that is so obvious that even a layperson would easily recognize the necessity for a doctor's attention." *Camberos v. Branstad,* 73 F.3d 174, 176 (8th Cir. 1995).

While pregnancy does result in the need for medical care, the Department provides such needed care to all pregnant inmates. An obstetrician is available at WERDCC two days per week; two physicians and a nurse practitioner are at the facility five days a week. App. 647 (Dep. pp. 23-24). Physicians determine whether any particular procedure or type of care is medically necessary or elective on a case-by-case basis. The Department does not interfere with a physician's professional judgment that a procedure is medically necessary.

Plaintiffs here challenge what they must concede are elective, medically unnecessary abortions. Such a concession is logically required. By definition, there is no medical need for a procedure that is not medically necessary. Thus, such abortions are not serious medical needs in the context of the Eighth Amendment. *See Camberos,* 73 F.3d at 176; *see also Victoria W. v. Larpenter,* 205 F. Supp. 2d 580, 600-01 (E.D. La. 2002), *aff'd*, 369 F.3d 475 (5th Cir. 2004). Where an abortion is medically indicated, the Department will provide transportation and security for the procedure.

The Department's policy denying transportation for elective medical procedures, including abortion, are not incompatible with the concepts of "dignity, civilized standards, humanity and decency" and, thus, do not impose cruel and unusual punishment on Plaintiffs. *Estelle v. Gamble,* 97 S. Ct. 285, 290 (1976); *Victoria W.,* 205 F. Supp. 2d at 601. The policy does not deny Plaintiffs necessary medical care and does not display deliberate indifference to the serious medical needs of pregnant inmates. Elective abortions are not serious medical needs and Department's policy does not constitute cruel and unusual punishment. For these reasons, the district court should have concluded that Defendants were entitled to judgment as a matter of law and granted summary judgment in their favor.

CONCLUSION

In light of the foregoing, Defendants Crawford and Prudden urge this Court to reverse the district court's entry of summary judgment against them and to remand this case to the district court with instructions to enter judgment in their favor.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that the text of the foregoing document, excluding the Summary and Request for Oral Argument, the Table of Contents, the Table of Authorities, this Certificate of Service and Compliance, and the Addendum, contains 6985 words of proportional spacing as determined by the automated word count of the WordPerfect 9 word processing system used and has 14-point print size, and that the diskette submitted with the instant brief has been scanned for viruses and is virus-free.

I further certify that two true and correct copies of this brief and a 3½ inch, labeled diskette containing this brief, were mailed, postage prepaid, this 13th day of October, 2006, to:

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ADDENDUM