No. 06-3108

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JANE ROE, individually and on behalf of all others similarly situated,
Plaintiffs-Appellees,

v.

LARRY CRAWFORD, Director of the Missouri Department of Corrections, and
CYNTHIA PRUDDEN, Acting Superintendent, Women's Eastern Reception,
Diagnostic and Correctional Center, in their Official Capacities,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

BRIEF OF PLAINTIFFS-APPELLEES

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

This case arises from the official policy of the Missouri Department of Corrections (DOC or the Department) prohibiting pregnant inmates from obtaining medical care for abortion (the Policy). Abortion services are not available within any of DOC's on-site medical facilities, and DOC will not provide pregnant inmates with off-site transportation for abortion. Thus, the Policy forces inmates to continue unwanted pregnancies against their will. As the district court held, this Policy constitutes both a violation of the Fourteenth Amendment right of incarcerated women to choose abortion, and deliberate indifference to their serious medical needs in violation of the Eighth Amendment. Accordingly, the court below granted Plaintiffs – a certified class of current and future pregnant inmates who seek access to abortion services – declaratory and injunctive relief to prevent the ongoing and irreparable deprivation of their constitutional rights. This Court should affirm.

Plaintiffs request twenty minutes for oral argument.

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JURISDICTIONAL STATEMENT

Plaintiffs agree with the Department's jurisdictional statement.

STATEMENT OF THE ISSUES

I.

Whether the Policy, which bans abortion for inmates, violates Plaintiffs' Fourteenth Amendment rights.

Planned Parenthood v. Casey, 505 U.S. 833 (1992)
Turner v. Safley, 482 U.S. 78 (1987)
Salaam v. Lockhart, 905 F.2d 1168 (8th Cir. 1990)
Monmouth County Correctional Institutional Inmates v. Lanzaro, 834 F.2d 326 (3d Cir. 1987)

U.S. Const. amend. XIV.

II.

Whether the Policy, which bans abortion for inmates, violates the Eighth Amendment by denying medical care for Plaintiffs' serious medical needs.

Estelle v. Gamble, 429 U.S. 97 (1976)
Johnson v. Bowers, 884 F.2d 1053 (8th Cir. 1989)
Monmouth, 834 F.2d 326

U.S. Const. amend. VIII.

STATEMENT OF THE CASE

Plaintiffs supplement the Department's statement of the case only to include case history omitted therein. Prior to granting Plaintiffs summary judgment, *Roe v. Crawford,* 439 F. Supp. 2d 942 (W.D. Mo. 2006), the district court issued a preliminary injunction enjoining the Policy. The Department's multiple attempts

to stay that injunction – and to deny Plaintiff Jane Roe access to abortion services notwithstanding that injunction – were rejected by the district court, this Court, and the Supreme Court. *Roe v. Crawford*, 396 F. Supp. 2d 1041 (W.D. Mo. 2005) (denying stay of Oct. 13, 2005 preliminary injunction), *stay denied,* No. 05-3790 (8th Cir. Oct. 14, 2005), 126 S. Ct. 477 (2005).

STATEMENT OF FACTS

The challenged Policy prohibits pregnant inmates from obtaining medical care for abortion, thus forcing them to continue pregnancies against their will. The undisputed material facts establish that this Policy leaves Plaintiffs with no alternative means to exercise their right to abortion; is not related to a legitimate penological interest in security; does not conserve resources; and deprives Plaintiffs of care for a serious medical need.

Practices and Policies for Providing Transports for Medical Care

DOC regularly transports inmates off institutional grounds for a variety of purposes, including, "among other things, court appointments, medical appointments, work release, intra-institution transfers, and occasionally to take the State Board of Cosmetology examination." Such transports are called "outcounts." J.A. 615-16 (Dist. Ct. Order Granting Pls' Mot. for SJ) (Order). At the Women's Eastern Reception Diagnostic and Correctional Center (WERDCC), where all pregnant inmates are housed, the Department "handles approximately eight

outcounts per day, seven days a week, averaging 197 outcounts per month in 2005." J.A. 616 (Order).

Of those almost 200 monthly outcounts, over 75% are "medical outcounts": transports off-site for a wide variety of medical services for inmates, including preventive care and specialty referrals. J.A. 63, 147 (SOF ¶¶ 51-53, Cornell Dep. 19:22-20:6).[1] At WERDCC, Correctional Medical Services and the Office of the Chief of Custody regularly coordinate arrangements for these numerous medical outcounts:

> DOC contracts with Correctional Medical Services ("CMS") for the provision of medical care to inmates in the Department's custody. CMS provides a range of health services on-site at WERDCC . . . . When an inmate requires specialized medical, mental health, or dental services beyond the capability of the on-site health care system, CMS personnel refer her to an off-site specialist or facility. For all off-site medical appointments, CMS personnel schedule the appointment and notify the office of the Chief of Custody of the date and time. The office of the Chief of Custody is responsible for making the necessary security and transport arrangements. Of the roughly 200 outcounts that the Chief of Custody handles per month, about 155 are for medical care. Given the volume of medical outcounts, it is not uncommon for the office [of] the Chief

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[1] All cites to the Joint Appendix (J.A. __) are to the findings of the district court and/or directly to undisputed material facts that were relied upon, and included with, the cross-motions for summary judgment. Cites to "SOF" refer to the Plaintiffs' Statement of Uncontroverted Material Facts, which in turn contain cites to underlying record support. Because each one of Plaintiffs' SOF often cites to numerous sources of supporting record evidence, for the Court's convenience, Plaintiffs have generally included only one or two examples of the primary cites that support each SOF. Plaintiffs cite no deposition testimony or other documents that were not specifically referenced and cited in the summary judgment motions and the parties' statements of uncontroverted material facts.

> of Custody to reschedule or rearrange appointments depending on staff and vehicle availability.

J.A. 616, 64-65, 284-85, 177 (Order, SOF ¶¶ 59-60, 63, 65, Cornell Memo, July 7, 2005, Prudden Dep. 67:1-14).

Except for the challenged Policy, there is no other policy that identifies particular medical procedures as "elective," or that prohibits off-site transports for particular types of medical care. J.A. 64, 207-08 (SOF ¶58, Conley Dep. 32:25-33:8). CMS physicians have final authority to refer an inmate for any type of off-site medical care, even if CMS characterizes it as "elective," and the Department provides any transport necessary for the inmate to obtain that care. J.A. 64, 214 (SOF ¶¶ 54, 56, 60, Conley Dep. 57:5-22).

Transports for Pregnancy-Related Care

These numerous medical referrals and outcounts regularly include those for pregnancy-related care. "In any given month, there are anywhere from 35 to 50 pregnant inmates at WERDCC." J.A. 616, 65, 225-48 (Order, SOF ¶ 69, OB List 2005). CMS provides basic prenatal care to these inmates on-site, but the Department provides off-site transport for specialized prenatal care, care for high-risk pregnancies, and treatment for pregnancy-related complications. J.A. 616, 275 (Order, Defs.' Ans. To Pls.'

Interrog. 15). In addition, all inmates who carry to term are transported off-site for labor and delivery:

> In 2005, Defendants transported approximately 91 inmates off-site for labor and delivery. An inmate in labor is transported to the hospital without any restraints, regardless of her custody level. Two officers typically provide the transport and one officer will remain with the inmate at the hospital throughout the duration of her stay, anywhere from one to three days, on average. Defendants pay for all the costs associated with prenatal care and childbirth, including transportation and security.

J.A. 616-17, 67-68, 311, 322-24, 150 (Order, SOF ¶¶ 80-84, 90-93, Policy IS20-4.2, Cornell Dep. 29:2-21, 31:19-32:10).[2] Thus, CMS physicians regularly make off-site referrals for inmates with ongoing pregnancies, for which DOC provides all transports. However, if a woman decides she wishes to end her pregnancy, as a rule, CMS will not refer her for abortion care. J.A. 73, 215-16 (SOF ¶¶ 120-123, Conley Dep 63:21-64:2, 64:23-65:10). Accordingly, CMS will not coordinate with the Chief of Custody to arrange an abortion transport.

Although CMS was not involved in arranging abortions, from 1998 until the Policy went into effect in 2005, "Defendants transported seven inmates for abortion services, each of which was considered elective by Defendants." J.A. 617

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[2] DOC asserts that inmates "are taken to a hospital in the same county" to give birth. Brief of Appellants 34 (DOC Br.). While this is true for most births, it is undisputed that inmates are sometimes transported outside Audrain County, where WERDCC is located, to Columbia, Missouri, for pregnancy care, including childbirth, and are regularly transported as far as Jefferson City for other medical services. J.A. 65, 67, 148, 219 (SOF ¶¶ 64, 79, Cornell Dep. 21:1-12, Conley Dep. 78:9-79:9).

(Order). These transports were typically to Reproductive Health Services (RHS) in St. Louis, Missouri. *Id.* No abortion outcount took more than one day – each transport required only a single eight-hour shift. J.A. 617, 284 (Order, Cornell Memo July 7, 2005). Typically two female officers accompanied the inmate to RHS. Inmates arrived with wrist restraints, but were not restrained during the procedure. J.A. 617 (Order). Further, inmates were closely monitored by DOC guards during their entire stay at RHS, completely separated from other clients, and at the option of the Department could enter through a separate entrance not available to the public. J.A. 76, 40-41, 849, 740 (SOF ¶¶ 142-46, Defs.' Ans. ¶27, Defs.' Resp. SOF ¶ 142, Gianino Dep. 45:5-18). The Department provided the necessary security, transportation resources, and arrangements, but the inmate paid all medical costs. J.A. 617 (Order).

For each abortion outcount, WERDCC staff followed the same procedures. Although DOC never sought to implement a written protocol or contract, it consistently followed the standard arrangements in place with RHS regarding the receipt of inmates and the posting of officers at the clinic. J.A. 76-77, 153 (SOF ¶¶ 140, 149, Cornell Dep. 41:21-42:4; 44:7-9). This is not uncommon. Arranging the logistics, resources, and security for medical outcounts is a standard component of daily prison management at WERDCC. J.A. 64-65, 146, 148 (SOF ¶¶ 60-64, Cornell Dep. 16:13-18, 23:7-21). And the Department similarly relies on informal

arrangements for medical outcounts to other off-site facilities. J.A. 65, 76, 172-73 (SOF ¶¶ 66, 141, Prudden Dep. 39:22-41:5). The infrequent abortion outcounts were arranged within the parameters of this system. J.A. 77, 283, 284-85 (SOF ¶ 149, Prudden Memo July 6, 2005, Cornell Memo July 7, 2006).

Moreover, "no security problems were reported during any abortion-related outcount." J.A. 617 (Order). Likewise, these outcounts had no meaningful, let alone significant, impact on other inmates or administrative resources. Transports for abortion never interfered with another inmate's ability to timely receive medical care. *Id.*; J.A. 77, 134-35, 277-78 (SOF ¶ 151, Long Dep. 109:13-19; 119:2-10, Defs.' Ans. To Pls.' Interrog. 20). The administrative and financial costs to the Department were equivalent to those associated with medical transports generally. J.A. 78, 173 (SOF ¶ 157, Prudden Dep. 41:6-14). And because abortion outcounts are so infrequent, the total associated costs constitute only a "minimal" component of the Department's budget. J.A. 617, 78, 284-85 (Order, SOF ¶¶ 154-156, Cornell Memo, July 7, 2005).

The Origins and Substance of the Policy

In early 2005, Missouri legislators complained about DOC's provision of transports for abortion, and pressured the Department to cut costs. "Hearings were held on the Department's budget and Defendants were questioned by the Missouri House and Senate about the practice of transporting inmates for abortion services.

Defendants were contacted by the legislative branch, both via letter and in person, regarding concerns over transports for elective abortions." J.A. 617-18 (Order); *see also* J.A. 79, 295 (SOF ¶¶ 163-66, Sen. Gross Letter Jan. 18, 2005). Although the issue thus first arose early in the year, no policy changes occurred until July 2005. J.A. 617-18 (Order).

On or about July 6, 2005, inmate JT requested an abortion. Consistent with past practice, Defendant Cynthia Prudden, then Acting Superintendent of WERDCC, approved the request and an abortion appointment was scheduled for July 8, at RHS. However, this time the procedure was postponed pending approval at the "executive level." J.A. 618 (Order):

> At the request of Steve Long, Acting Director of the Division of Adult Institution, Patricia Cornell, Assistant Director of the Division of Adult Institution, prepared a memorandum reviewing the impact abortion transports had on DOC's costs and resources. Comparative costs to DOC in providing inmates with pregnancy related care, including transporting pregnant inmates for prenatal care and labor and delivery were not considered at this time, or thereafter. On July 19, 2005, Long informed Prudden, via memorandum, that JT's request was denied because the procedure was elective.

Id. The new Policy that "[n]o further outcounts for elective abortions will be authorized," was announced in the July 19 memorandum and reiterated in a July 20 memorandum issued to the "Compliance Unit." J.A. 288-89 (Long Memos, July 19 and 20, 2005). In August 2005, DOC's Institutional Services Pregnancy

Counseling Policy was revised to reflect the new Policy. J.A. 249-50, 290 (IS Policy 11-58, Scott Memo, August 4, 2005).

The new Policy was approved by Defendant Larry Crawford, Director of DOC, in consultation with Steven Long and DOC General Counsel Daniel Gibson. J.A. 81, 112 (SOF ¶ 179, Crawford Dep. 60:2-6). According to Defendant Crawford, the Policy was implemented because of concerns over "security, staff, money and a statute that clearly was not encouraging and may actually be saying that it was unlawful for a nonmedical [sic] purpose." J.A. 619, 81, 109 (Order, SOF ¶ 180, Crawford Dep. 41:20-22). The July 19 memorandum references this same combination of factors. J.A. 288 (Long Memo, July 19, 2005). However, other than listing "security," as one of several reasons for the Policy, DOC officials admit that they did not look into any specific security risks related to abortion outcounts, and there is no documentation that any specific security concerns were raised during the policymaking process. J.A. 82, 155, 110, 284-85 (SOF ¶¶ 183-85, Crawford Dep. 47:4-8, Cornell Memo July 7, 2005).

There are no exceptions to the Policy. Every abortion is considered "elective" unless a CMS physician determines it is "indicated due to threat to the mother's life or health" *and* that decision is "approved by the Medical Director in consultation with the Regional Medical Director." J.A. 619, 249 (Order, IS Policy

11-58, 2005). CMS has never granted such approval upon an inmate's request for an abortion. J.A. 216 (Conley Dep. 66:9-22).

The Policy's Impact on the Medical Needs of Pregnant Inmates

As a result of the Policy, pregnant inmates who do not want to carry to term have no way to obtain medical care necessary to terminate their pregnancies. The uncontested expert opinion of Robert Sokol, M.D., a board-certified obstetrician-gynecologist, establishes that as a result, the Department prevents a pregnant inmate "from obtaining a type of pregnancy-related medical care that can safely reduce, by a substantial degree, the risks to her health and life entailed in continuing the pregnancy and in childbirth." J.A. 425 (Expert Report of Robert Sokol, M.D. ¶ 6) (Sokol Rep.).[3]

The health implications of forcing a woman to continue an unwanted pregnancy are serious, and often permanent. "Pregnancy is a time during which a woman faces increased risks for both morbidity (serious medical complications) and mortality (death)." J.A. 423 (Sokol Rep. ¶ 1). In addition, because "[p]rior to incarceration, many female inmates have unhealthy lifestyles including a history of

[3] Plaintiffs' expert Dr. Sokol also has a subspecialty certification in maternal-fetal medicine. He is currently Distinguished Professor of Obstetrics and Gynecology at Wayne State University School of Medicine in Michigan and Director of the C.S. Mott Center for Human Growth and Development. He has over thirty years experience in the field, and has published extensively. J.A. 423-573 (Sokol Rep. & CV). The Department neither contested the medical facts in Dr. Sokol's Report, nor offered its own expert.

[using] tobacco, alcohol, and other drugs extensively, and lack of prenatal care," many can be classified as having high-risk pregnancies. This is true of inmates at WERDCC. J.A. 71, 223, 259-60 (SOF ¶ 107, Conley Dep. 59:10-60:4; 102:14-103:17, National Commission on Correctional Health Care (NCCHC) Guideline P-G-07). Also, women who experience complications during pregnancy are high-risk and will need additional medical treatment. J.A. 424 (Sokol Rep. ¶ 3). These complications include, for example, miscarriage, preterm labor, and certain pregnancy-induced diseases, such as gestational diabetes, hypertension, and pre-eclampsia. *Id.*

For women who decide to continue their pregnancies, the type and frequency of needed medical care will vary with each individual. At a minimum, however, pregnant women will need prenatal care throughout pregnancy, more care "later in the pregnancy and for high-risk pregnancies," and medical care during labor and delivery as well as post-delivery. *Id.* "A woman who wants to terminate her pregnancy will need to see a physician for a medical or surgical procedure to induce abortion." *Id.* For her, the "risks of death and serious medical complications from induced abortion are substantially less than are the risks of death and serious medical complications from carrying a pregnancy through childbirth." J.A. 424 (Sokol Rep. ¶ 4). For example, "a woman is at least ten times more likely to die from continuing a pregnancy through childbirth than

from induced abortion." *Id.* This means that induced abortion is "far safer [not only] because the risk of death or complications from the abortion procedure is extremely low, but also because once the pregnancy ends the complications and risks related to ongoing pregnancy and childbirth are necessarily eliminated." *Id.*[4]

Thus, a pregnant woman "will need to see a medical provider for a range of medical care, whether she plans to continue her pregnancy through childbirth or to end her pregnancy through induced abortion." J.A. 423 (Sokol Rep. ¶ 1). Accordingly, the NCCHC Guideline on Pregnancy Counseling recommends that "[p]regnant inmates [be] given comprehensive counseling and assistance in accordance with their expressed desires regarding their pregnancy, whether they elect to keep the child, use adoption services, or have an abortion," and that "pregnant inmates receive services as they would in the community." J.A. 261-62, 250 (NCCHC Guideline P-G-10, IS Policy 11-58 (referencing P-G-10)). As part of its contract with DOC, CMS is NCCHC-certified and expected to adhere to NCCHC guidelines. J.A. 62-63, 211-12 (SOF ¶¶ 43-46, Conley Dep. 48:10-12, 50:7-10).

[4] The risks associated with abortion, however, increase as gestation advances. While "abortion is significantly safer than continuing pregnancy through childbirth . . . [i]t is safest to perform an abortion as early in the pregnancy as possible." Delaying the procedure, particularly into the second trimester, "substantially increases the risks . . . to the woman's health and life." J.A. 424 (Sokol Rep. ¶ 5).

The Policy's Impact on Plaintiff Jane Roe

Jane Roe was initially admitted to WERDCC on January 24, 2005, on a drug charge. She was paroled on May 24, 2005, but was re-arrested in California, in July, for a probation violation. She first learned of her pregnancy while in custody in California, where she requested access to abortion services, but before she could obtain them, she was returned to DOC's custody on August 22, 2005. At WERDCC, Plaintiff Roe immediately and repeatedly informed medical and non-medical staff that she wanted an abortion. Her request was finally denied on August 30, after being reviewed by both Defendant Superintendent Prudden and Assistant Division Director Cornell. Her further efforts, through counsel, to resolve her request administratively as expeditiously as possible were similarly unsuccessful. J.A. 619, 84-86 (Order, SOF ¶¶ 197-216). By October 12, 2005, her pregnancy had advanced to the second trimester. J.A. 87, 374-75 (SOF ¶¶ 224-25, Oct. 6, 2005 Memo). Fearing she would run out of time to safely and legally obtain an abortion, Plaintiff Roe sought emergency relief and initiated this class action. But for the preliminary injunction, Plaintiff Roe, and other class members,[5] would have been compelled to continue their pregnancies against their will and in the custody of the State.

[5] Between entry of the preliminary injunction and entry of final relief, Plaintiffs learned of three additional class members. J.A. 88, 309, 376-77, 831-33 (SOF ¶ 231, Oct 18 Memo, Oct. 21 Memo, T.K. Aff. attached to Pls.' Supp. SOF).

SUMMARY OF THE ARGUMENT

The challenged Policy – which prohibits inmates from obtaining abortion care – is unconstitutional on two independent grounds: It violates a woman's Fourteenth Amendment right to choose to terminate her pregnancy, *Planned Parenthood v. Casey,* 505 U.S. 833 (1992), and, in violation of the Eighth Amendment, constitutes deliberate indifference to pregnant inmates' serious medical needs, *Estelle v. Gamble*, 429 U.S. 97 (1976).

Prison walls draw no iron curtain between inmates and the Constitution: Prison administrators are constitutionally obligated to accommodate inmates' rights where doing so will not undermine legitimate penological goals. *See Turner v. Safley,* 482 U.S. 78 (1987). Disregarding this principle, the Department argues that women absolutely lose their right to decide whether or not to continue a pregnancy upon imprisonment. To the contrary, this completely personal and private decision is not inconsistent with the purposes of incarceration, and is thus *not* a right necessarily lost to inmates. *Id.* Nor, as the Department alternatively argues, is the Policy reasonably related to security. The Policy stands in stark contrast to the Department's practice of providing medical care and transports for all other pregnancy-related needs (and for a wide variety of other medical needs). Off-site transports for abortion have no greater impact on prison security, administration, or costs, than these other transports. And the security and

administrative burdens identified by the Department range from *de minimis* to purely conjectural. Thus, as a matter of law, prohibiting the infrequent transports for abortion is not reasonably related to legitimate penological goals. *Id.*; *Monmouth County Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir. 1987).

Additionally, withholding abortion care forces on pregnant inmates the permanent and irreversible consequences – medical, physical, and emotional – of the increased risks to their health and lives inherent in continuing a pregnancy and in childbirth. The Department's characterization of the decision to terminate a pregnancy (as opposed to the decision to continue a pregnancy) as "elective" is irrelevant as a matter of law, *Johnson v. Bowers,* 884 F.2d 1053 (8th Cir. 1989), and cannot overcome the undisputed medical evidence that access to abortion is necessary to address a serious medical need. Indeed, the Department does not even offer a medically-based reason for denying this component of pregnancy-related care. Thus, the Policy constitutes deliberate indifference to Plaintiffs' serious medical needs. *Estelle*, 429 U.S. 97; *Monmouth* 834 F.2d 326.

For these reasons, the district court correctly held that as a matter of law and undisputed fact, Plaintiffs are entitled to summary judgment on both their constitutional claims. This Court should affirm.

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment *de novo*. *Forest Prods. Indus., Inc. v. ConAgra Foods, Inc.*, 460 F.3d 1000, 1002 (8th Cir. 2006). Summary judgment is proper "when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law." *Continental Cas. Co. v. Advance Terrazzo & Tile Co.,* 462 F.3d 1002, 1007 (8th Cir. 2006) (citation and internal quotation marks omitted). Once the moving party has carried its initial burden of demonstrating the absence of material facts, the opposing party may not "rest on mere allegations or denials but must demonstrate on the record the existence of specific facts which create a genuine issue for trial." *Krenik v. County of Le Sueur*, 47 F.3d 953, 957 (8th Cir. 1995) (internal quotation marks omitted).[6]

[6] In seeking reversal, the Department does not suggest there exist "specific facts which create a genuine issue for trial." As evidenced by the cross-motions, all parties agree this case is properly resolved as a matter of law on the undisputed material facts developed below. Based on that record, there is no basis for reversing the judgment below and granting summary judgment in the Department's favor – the only relief it seeks on appeal.

ARGUMENT

I. The Court Should Affirm the District Court's Holding That the Policy Violates Plaintiffs' Fourteenth Amendment Right to Choose Abortion.

A. Pregnant Inmates' Right to Choose Abortion Is Constitutionally Protected.

There is no question that certain individual freedoms and rights are properly limited as a result of incarceration. Yet it is likewise beyond question that inmates retain many constitutional protections, including protection of due process and privacy rights.

As the Supreme Court emphasized in *Turner*:

> [F]ederal courts must take cognizance of the valid constitutional claims of prison inmates. Prison walls do not form a barrier separating prison inmates from the protections of the Constitution. . . . Because prisoners retain these rights, "[w]hen a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights."

Turner, 482 U.S. at 84 (quoting *Procunier v. Martinez*, 416 U.S. 396, 405-06 (1974)) (internal citations omitted); *see also Johnson v. California,* 543 U.S. 499, 509-10 (2005) (citing Court decisions considering various constitutional rights in prison context); *O'Lone v. Estate of Shabazz,* 482 U.S. 342, 348 (1987) ("[C]onvicted prisoners do not forfeit all constitutional protections by reason of their conviction." (internal quotation marks omitted)). Accordingly, the Court has recognized that inmates retain substantive due process rights such as the right to marry, *Turner*, 482 U.S. at 96, and the right to refuse unwanted medical treatment,

Washington v. Harper, 494 U.S. 210, 221-22 (1990). Likewise, and consistent with Supreme Court holdings, this Court has held unconstitutional security protocols that are unreasonably invasive of inmates' personal privacy and bodily integrity. *Hill v. McKinley*, 311 F.3d 899, 903 (8th Cir. 2002) ("[W]e hold that [plaintiff's] Fourth Amendment rights were violated when the defendants allowed her to remain completely [naked and] exposed . . . after the threat to security and safety had passed."); *see also Bell v. Wolfish*, 441 U.S. 520, 558-60 (1979) (subjecting body cavity searches to constitutional review); *Timm v. Gunter*, 917 F.2d 1093, 1099-1102 (8th Cir. 1990) (subjecting bodily surveillance and pat-down searches to constitutional review).[7]

In contrast, there are very few instances where a right, or particular aspects of a right, are so fundamentally inconsistent with incarceration that they are automatically and completely lost upon imprisonment. One such example is the liberty of movement and travel that is virtually unfettered in the free world, but that would be wholly at odds with confinement. But there are few other rights that are

[7] The Department fails to recognize that this aspect of bodily privacy is qualitatively different from the right against unreasonable searches of one's home or property. In *Hudson v. Palmer*, 486 U.S. 517 (1984), the Court held that the normally reasonable expectation of living in a home free of observation and search is necessarily lost in the context of a prison cell. But as *Bell* and *Hill*, *see supra*, recognize, inmates may still reasonably expect privacy from searches that unduly invade bodily autonomy and integrity. For this reason, the Department's reliance on *Hudson* fails, as does its mischaracterization of *Bell* and *Timm* as demonstrating that prisoners lose *all* privacy rights. DOC Br. 23.

completely extinguished. Indeed, even with respect to freedom of association – which "is among the rights least compatible with incarceration['s]" goals of confinement and isolation – the Court has refused to hold that "any right to intimate association is altogether terminated by incarceration." *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003).

Despite this clear precedent, the Department asserts that the Policy is subject to no constitutional scrutiny whatsoever because "[p]rivacy rights are fundamentally inconsistent with incarceration" and thus "the right to elective abortion does not survive incarceration." Brief of Appellants 23 (DOC Br.).[8] The Department's belief that the right is necessarily lost as a condition of punishment and incarceration conflicts directly with *Turner* and its progeny. For many of the same reasons that the right to marry, the right to refuse medical treatment, and the right to be free from unreasonable invasions of bodily privacy – all rights grounded in substantive due process and privacy – survive incarceration, so does a woman's right to decide to terminate her pregnancy. It is not a right grounded in the liberty

[8] Though less than clear, the Department seems to fold this proposition into its argument that its proffered security concerns justify the Policy under *Turner*. DOC Br. 22-24. Application of *Turner*, however, *presumes* that a claimed right survives incarceration. Regardless of whether a policy is ultimately upheld, the fact that policies restricting constitutional rights have been reviewed under *Turner* refutes the Department's claim that those rights simply do not survive incarceration. DOC Br. 21-24 (citing numerous cases that applied *Turner*, or pre-*Turner* cases embodying equivalent reasonableness standards).

to freely associate, to have intimate contact, or other aspects of constitutional rights that frequently conflict with penological objectives. *See, e.g., Overton*, 539 U.S. at 131.[9] Rather, the right to terminate a pregnancy is a uniquely personal, moral, and medical decision regarding bodily autonomy and health. *Casey*, 505 U.S. at 852. As such, it does not conflict with the inherent purposes of punishment and incarceration. *See e.g., Turner,* 482 U.S. at 96 (identifying aspects of right to marriage that involve decisions about, and expressions of, personal commitment and faith as "unaffected by the fact of confinement"); *Estelle*, 429 U.S. at 103 (holding denial of medical care serves no "penological purpose").[10]

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[9] For this reason, the Department's reliance on cases like *Gerber v. Hamilton,* 291 F.3d 617 (9th Cir. 2002), and *Southerland v. Thigpen*, 784 F.2d 713 (5th Cir. 1986), DOC Br. 22-24, is wholly misplaced. The rights at issue there – the right to procreate and the right to breastfeed – were grounded in the right of intimate association. *Gerber*, 219 F.3d at 621; *Southerland*, 784 F.2d at 715-16. The right to end a pregnancy and prevent unwanted childbirth raises no such concerns.

[10] Indeed, allowing prison officials to decide for a pregnant woman whether or not she can terminate her pregnancy is never consistent with the legitimate purposes of incarceration: safety, punishment, and rehabilitation. Thus, the Policy is most properly subject to the same test applicable outside prison – the undue burden test – which it does not pass. *See Johnson*, 543 U.S. at 510 ("[W]e have applied *Turner*'s reasonable-relationship test *only* to rights that are inconsistent with proper incarceration." (citations and internal quotation marks omitted)). Though the district court declined to apply the undue burden test, the appropriate application of that standard is addressed in Plaintiffs' Memorandum of Law in Support of Motion for Summary Judgment. *See* J.A 574-99, at 582-85. However, to affirm the district court's holding that the Policy fails the more deferential *Turner* standard, this Court need not reach the question of whether, or when, the undue burden standard applies in the prison context.

Thus, not surprisingly, every court to address the issue has, explicitly or implicitly, reached the conclusion that the right to abortion survives incarceration. *See, e.g.*, *Bryant v. Maffucci*, 923 F.2d 979, 982-85 (2d Cir. 1991); *Monmouth*, 834 F.2d 326; *Roe v. Leis,* No. C-1-00-651, 2001 WL 1842459 (S.D. Ohio Jan. 10, 2001); *Doe v. Barron*, 92 F. Supp. 2d 694 (S.D. Ohio 1999); *Doe v. Arpaio*, No. 2004-009286, 2005 WL 2173988 (Ariz. Super. Ct. Aug. 25, 2005); *cf. Reprod. Health Serv. v. Webster*, 851 F.2d 1071, 1083-84 (8th Cir. 1988) (interpreting state statute to avoid constitutional question of whether prohibiting transports for abortion would violate plaintiffs' Eighth Amendment rights by denying care for serious medical need), *rev'd on other grounds*, 492 U.S. 490 (1989); *Victoria W. v. Larpenter*, 369 F.3d 475 (5th Cir. 2004) (assuming without deciding that the abortion right survives incarceration). The district court reached the same conclusion, and properly rejected the Department's opposite claim as "unfounded." J.A. at 620 (Order).[11]

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[11] Equally unfounded is the argument of *Amici Curiae Senators Gross and Scott in Support of Appellants* (*Amici* Senators) based on the State's interest in distinguishing between elective abortions and those necessary to protect a woman's health or life. *Amici* Senators argue that Supreme Court precedent recognizing that distinction justifies banning inmates from obtaining elective abortions. Brief of *Amici* Senators at 21-23 (Senators Br.). First, whatever authority the State normally has to treat therapeutic and non-therapeutic abortions differently, it does not have the authority to ban non-therapeutic abortions pre-viability, as the Policy does. Second, Plaintiffs' claim is that the prison must accommodate their Fourteenth Amendment right to choose *non-therapeutic*

B. **The Policy Cannot Withstand Constitutional Scrutiny Under *Turner*.**

The district court correctly held that the Policy cannot withstand constitutional scrutiny under the deferential *Turner* standard. Thoroughly and thoughtfully applying *Turner* to the undisputed facts of this case, the district court found that the Policy was not reasonably related to legitimate penological interests. J.A. 624-31 (Order). This decision finds support in virtually every other case to consider a blanket prison policy obstructing inmates' access to abortion. *See Monmouth*, 834 F.2d at 351 (applying *Turner* and holding jail policy obstructing access to abortions unconstitutional); *Arpaio*, 2005 WL 2173988, at *1 (same); *Leis,* 2001 WL 1842459, at *2-*4 (same); *Barron*, 92 F. Supp. 2d at 696 (same). *But see Victoria W.*, 369 F.3d 475 (applying *Turner* and upholding policy that permitted abortion transports only if inmate obtained court authorization).[12] Thus, for the reasons set forth in the district court's opinion, and as discussed below, this Court should affirm.

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abortion, not because it is the equivalent of a *therapeutic* abortion, but because that choice is constitutionally protected.

[12] For reasons discussed *infra*, pp. 44-46, *Victoria W.* is unpersuasive on several fronts.

1. The *Turner* Standard.

Under *Turner*, prison regulations alleged to infringe inmates' constitutional rights are valid only if they are "reasonably related to legitimate penological interests." 482 U.S. at 89. Valid penological interests include "deterrence of crime, rehabilitation of prisoners, and institutional security." *O'Lone*, 482 U.S. at 348. To determine whether a restriction on inmates' constitutional rights is reasonably related to such penological interests, this Court considers four factors or "prongs": (1) whether the policy "rationally and actually advances a neutral and legitimate government interest; (2) whether the prisoner has alternative means of exercising the same right; (3) the effect proposed accommodations will have on prison resources; and (4) whether the existence of 'obvious, easy alternatives' that impose a *de minimis* cost" reflects the unreasonableness of the regulation. *Salaam v. Lockhart,* 905 F.2d 1168, 1171 (8th Cir. 1990) (quoting *Turner*, 482 U.S. at 89-91); J.A. 624 (Order) (applying same).

In applying *Turner*, this Court has directed:

> A reasonableness standard is not toothless. We must make sure after an independent review of the evidence that the regulation is not an exaggerated response to prison concerns. While we may not invalidate a regulation because we can imagine a more refined one, constitutional rights should be accommodated. We cannot validate prison regulations that are clearly broader in their scope or significantly more burdensome in effect than reasonable alternatives.

Salaam, 905 F.2d at 1171 (citations and internal quotation marks omitted). Moreover, "[p]rison officials are not entitled to the deference described in *Turner* . . . if their actions are not actually motivated by legitimate penological interests *at the time they act*." *Quinn v. Nix*, 983 F.2d 115, 118 (8th Cir. 1993) (emphasis added). Applying these standards, the district court correctly held that the Policy "is not reasonable but is an exaggerated response to prison concerns." J.A. 631 (Order) (quoting *Turner* (internal quotation marks omitted)).

2. <u>The District Court Correctly Held the Policy Fails the First *Turner* Prong.</u>

Courts, including the Supreme Court and this Court, do not hesitate to reject as unreasonable policies that do not in fact relate to the asserted penal interest – even when, as here, the proferred interest is security. For example, in rejecting the marriage ban challenged in *Turner*, the Court concluded that despite DOC's proffered security concern – that permitting female inmates to marry would lead to dangerous "love triangles" – it had "pointed to nothing in the record suggesting that the marriage regulation was viewed as preventing such entanglements." *Turner*, 482 U.S. at 98. Similarly, this Court rejected as unreasonable a ban on racist publications that prison administrators asserted would incite violence among inmates. It found that the ban was an exaggerated response because "the publications did not counsel violence, and there is no evidence that they have ever caused disruption." *Williams v. Brimeyer*, 116 F.3d 351, 354 (8th Cir. 1997); *see*

also Monmouth, 834 F.2d at 338 (holding jail abortion restriction "centers around the nature of the treatment" and "it in no way relates to the gravity of any perceived security risks"). As in *Turner, Williams,* and *Monmouth*, the evidence here shows "that Defendants' Policy is not related to any perceived security risks," J.A. 627 (Order), and that "the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational." *Turner*, 482 U.S. at 89-90.

The Department argues, however, that the district court did not give enough deference to its security concerns, DOC Br. 27, and improperly declined to consider cost containment as an independent legitimate penological interest under the first *Turner* prong. DOC Br. 27-29. The Department is wrong on both counts. First, the *Turner* test *is* the judicial standard by which courts afford deference to the professional judgments of prison administrators. *Turner*, 482 U.S. at 89-90 (explaining how "reasonableness standard" ensures prison administrators, not courts, will be "primary arbiters" of prison administration). As part of that deference, institutional security is recognized as a legitimate penological concern. But whereas the Department argues that the mere *identification* of security considerations ends the inquiry in its favor, it is only the beginning. *See Salaam*, 905 F.2d at 1171 (reasoning *Turner* would be "toothless" if courts "deferred not only to the choices between reasonable policies made by prison officials but to

their justifications for the policies as well"). Meaningful *Turner* analysis cannot be avoided, as the Department suggests, by simply invoking a litany of potential security concerns and then demanding blind deference by the courts.[13]

Second, the district court was correct to analyze the Department's interest in avoiding *any* costs or resource expenditures on abortion outcounts under the third *Turner* prong – the impact of accommodation on prison administration. The Supreme Court and this Court have identified institutional security and inmate rehabilitation, but never cost, as legitimate penological goals. *Turner,* 482 U.S. at 91-93, 97-100; *O'Lone*, 482 U.S. at 350-51 (holding that "institutional order and security" and "[r]ehabilitative concerns" are legitimate penological interests); *Timm*, 917 F.2d at 1099-1100, 1102 (recognizing only internal security and equal employment opportunities as legitimate penological concerns and considering

[13] Nor is the Department somehow entitled to greater deference because it now, for the first time, insists that "safety and security concerns were the *primary* reason for the policy revision." DOC Br. 24 (emphasis added). This characterization misconstrues the record. The district court found, and the evidence overwhelmingly demonstrates, that security was at best one of several considerations underlying the Policy. J.A. 625, 887 (Order, Defs.' Reply ¶13 ("security was a factor" among "additional motivating factor[s]")). Defendant Crawford testified that these additional concerns included costs, staffing, and the potential impact of the law banning state funding for abortion. *Supra* p. 9. Moreover, security was given little, if any, direct consideration at the time the Policy was implemented, or thereafter. While these undisputed facts "certainly impl[y] that Defendants did not consider security implications in implementing the Policy," the district court nonetheless drew all inferences in the Department's favor and fully considered each of its alleged security concerns. J.A. 626 (Order).

financial burdens under *Turner's* third prong); *see also Hamilton v. Schriro,* 74 F.3d 1545, 1548-49, 1557 (8th Cir. 1996).[14] This is because *Turner* incorporates cost containment in the third step, which weighs the fiscal impact as part of the burden that accommodating the right imposes on prison resources. 482 U.S. at 90. In contrast, consideration of costs under *Turner*'s first step would render the third step irrelevant and subvert the *Turner* test: If cost containment were a legitimate penological interest, the State could deprive inmates of constitutional rights whenever doing so conserved some prison resources. *Turner* does not allow such a result.

a) The Policy "Is Not Related to Any Perceived Security Risk" That the Department Proffered in the Summary Judgment Proceedings Below.

After carefully considering the particular security concerns proffered by the Department – both risks that are inherent to all outcounts and risks allegedly specific to abortion outcounts – the district court concluded that in light of the undisputed material facts, the Policy fails the first *Turner* prong because it is not

[14] Thus, the Department's reliance on *Timm* and *Hamilton*, *see* DOC Br. 22, 29, is misplaced. Both cases demonstrate that cost containment is not considered under the legitimate penological interest prong. The language the Department quotes from *Hamilton* discussing cost concerns as a possible justification for the challenged policy was itself a quotation from the decision below; addressed application of the Religious Freedom Restoration Act; and formed no part of this Court's *Turner* analysis.

related to security. J.A. 627 (Order).[15] For the reasons discussed below, that conclusion is correct as a matter of both law and undisputed fact.

i. The fact that risks are inherent in all outcounts cannot justify the Policy.

"Every prisoner transport raises a variety of security concerns, for the prisoner, the guard(s), and third parties." J.A. 626 (Order). Accordingly, the Department has extensive policies and practices to minimize risks to inmates, officers, and the public. Using these safeguards, the Department's long-standing practice of transporting inmates for abortions has been followed consistently and safely for at least eight years. *Supra* pp. 5-7. Not once has any of those transports harmed staff or inmates, or undermined institutional security. *Supra* p. 7; J.A. 626-27 (Order). It is undisputed: the Department has always accommodated inmates'

[15] On appeal, security and cost containment are the only factors DOC advances as neutral and legitimate interests under the first *Turner* prong. As discussed *infra*, the district court properly analyzed cost containment under the third prong, regarding the impact of accommodation. DOC has abandoned the other two goals it advanced below as legitimate interests. First, it now proffers the alleged concern that abortion outcounts could hypothetically interfere with other medical outcounts as relevant to the third *Turner* prong (impact of accommodation), as did the district court. J.A. 625, 629 (Order). Second, DOC no longer argues that the Policy is justified by a penological interest based on Missouri's statute prohibiting the use of state funds to assist with any abortion not necessary to save a woman's life. Thus, DOC has waived this argument. *See Jasperson v. Purolator Courier Corp.*, 765 F.2d 736, 740-41 (8th Cir. 1985). As it should. In *Webster*, this Court held that Missouri's statutory ban on "assisting" in an abortion "does not prevent state employees from arranging for abortion procedures for inmates or from transporting and escorting inmates to abortion facilities." 851 F.2d at 1084; J.A. 628 (Order quoting same).

right to abortion without detriment to prison safety and security. Moreover, the Department does not, and cannot, point to any change in circumstances over the last eight years that would heighten security risks for future abortion outcounts.

In the face of this record, the Department argues that eliminating transports *for abortion* is a reasonable means of minimizing general security risks – by reducing the total number of outcounts. DOC Br. 26-27. This proposition is wrong as a matter of law and fact. As a matter of law, the Department recognizes that when accommodation of a right requires outcounts, it must manage security concerns. And they regularly do so to transport prisoners to court or for medical care. J.A 861 (Defs.' Resp. Br.). The goal of avoiding the risks inherent in outcounts generally cannot, without more, justify the Policy any more than it could justify prohibiting the transports necessary to effectuate these other constitutional rights. *See Salaam*, 905 F.2d at 1171 (recognizing "constitutional rights should be accommodated"); *Monmouth*, 834 F.2d at 341-43.

As a matter of undisputed fact (and objective logic), and even giving weight to the Department's desire to avoid risks inherent in any outcount, the Policy does not relate to that goal. First, transports for abortions represent only a miniscule fraction of the hundreds of outcounts DOC provides each month from

WERDCC.[16] Second, refusing to transport inmates who have chosen abortion will not eliminate or reduce the outcounts required for those same inmates to receive other pregnancy-related medical care – whether prenatal care, treatment of pregnancy-related complications (including miscarriage and preterm labor), childbirth, or some combination of these. And these other pregnancy-related outcounts are likely to be more numerous and/or of longer duration. *Supra* pp. 4-5; J.A. 616 (Order). Further, the Department admits that the primary security concerns when transporting prisoners are related *not* to the purpose of the transport, but to the individual prisoner's risk factors, such as a history of violence. J.A. 61, 136 (SOF ¶ 37, Long Dep. 122:3-14). The Policy, however, applies irrespective of a particular inmate's security risks, or lack thereof. J.A. 81, 127 (SOF ¶ 174, Long Dep. 61:17-20). Thus, the Policy would reduce neither the number of transports, nor transports among high-risk inmates.

ii. <u>Neither the presence of picketers, nor any other circumstance allegedly particular to abortion outcounts, justify the Policy.</u>

Implicitly recognizing that nothing about its actual experience with abortion outcounts justifies the Policy, the Department has invented a story of apparently insurmountable security obstacles – primarily related to the presence of nonviolent

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[16] For roughly *eight years* up to the time the Department implemented the Policy, there were only seven abortion outcounts. During that same period, at WERDCC, medical outcounts alone averaged between 100 and 200 *per month*. J.A. at 616-617 (Order); *supra* pp. 3, 5.

picketers on public grounds near RHS. Although this was not one of the considerations at the time the Policy was formulated and implemented, *see supra* p. 9, it has now become the Department's primary justification for the Policy. DOC Br. 27-30. That justification fails. As the district court concluded: "Defendants fail to present any material fact showing that the presence of picketers in fact increases security concerns. Rather, it is undisputed that in the past eight years, picketers have never interfered with the safety or security of DOC inmates or staff." J.A. 626 (Order); *see also supra* p. 7.

What the evidence *does* show is that RHS has been able to serve its clients, including DOC inmates, in a consistent, orderly, and safe manner, despite the regular presence of picketers. Since RHS opened its facility approximately eight years ago, they have received no threats, there have been no instances of vandalism, and the picketers have caused no disruptions of business or physical altercations. J.A. 734-37, 824 (Gianino Dep. 24:23-25:16, 32:21-33:11, Pls.' Supp. SOF ¶ 7). Indeed, the picketers that the Department is ostensibly concerned about are typically present only two days a week. J.A. 735, 825 (Gianino Dep. 28:12-19, Pls.' Supp. SOF ¶ 8). This schedule is generally as consistent as clockwork, and both RHS and local law enforcement are well informed of any planned picketing activity. *Id*. Hence, the presence and movement of non-patients near RHS is subject to far more monitoring and control than at other off-site medical

facilities.[17] Thus, the Departments' rhetorical and inflammatory characterization of abortion outcounts as placing staff and inmates in "an uncontrolled, emotionally volatile situation," DOC Br. 25, is completely contrary to the record evidence.

Likewise without support is DOC's insistence that there is a "real risk" that an upset family member or partner might confront an inmate while at RHS, *id.* at 28-29, and that inmates on an abortion outcount will be more likely than pregnant inmates on other medical outcounts to attempt an escape. *Id*. at 30. During no abortion outcount has there ever been a confrontation between a DOC inmate and another person (family or otherwise), or an attempted escape. And, as the district court concluded, there is not even "evidence substantiating" the Department's speculation about an increased *risk* of escape during an abortion outcount. J.A. 627 (Order).[18] To the contrary, the Department substantially exaggerates these

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[17] For example, DOC focuses on the attempts of picketers to obstruct the RHS driveway as a special security concern. But the evidence regarding the presence of picketers – obtained from DOC's deposition of RHS's CEO – establishes that such attempts are infrequent, easily managed, and have never resulted in dangerous or physical altercations with RHS staff or clients. In any event, there is simply *no* evidence that picketers ever attempted to block the driveway during any abortion outcount. J.A. 824-25, 734-37 (Pls.' Supp. SOF ¶¶ 6-7, Gianino Dep. 24:23-25:16, 26:6-15, 32:21-33:11).

[18] Nonetheless, the Department continues to argue that pregnant inmates seeking an abortion pose a greater escape risk because they presumably have fewer physical limitations than women in advanced stages of pregnancy or persons with serious health problems. DOC Br. 29. The Department's argument is, again, utterly counter-factual: DOC regularly transports inmates with medical needs – such as preventive dental care – that pose no physical limitations whatsoever.

risks. As the uncontroverted evidence establishes, WERDCC staff completely control the scheduling and timing of medical transports and do not give inmates advance notice of when the transport will occur, J.A. 64, 372-73 (SOF ¶ 60, Procedure SOP11-42, 2004 Procedures 1 & 6); "inmates on abortion outcounts are restrained both during transport and upon arrival at the facility," J.A. 627 (Order); and inmates on abortion outcounts may enter RHS through a separate entrance not available to the public, do not have visitors, and are separated from other patients the entire time they are at RHS. *Supra* p. 6.[19] In this way DOC greatly reduces, if not eliminates, both an inmate's ability to alert others of her upcoming abortion outcount, and the possibility of any contact with unapproved third parties during the outcount. The record simply does not substantiate the Department's picture of inmates and members of the public freely commingling at RHS.

Moreover, DOC's own witness explained that DOC officials do not evaluate security risks by reference to the degree of disability inherent in an inmate's medical condition. Assistant Division Director Long testified that other than an extreme emergency – such as an incapacitating heart attack – the nature of the medical transport is not relevant to the security assessment and the "elective" nature of a medical transport is not viewed as a risk factor. J.A. 82, 136 (SOF ¶ 183, Long Dep. 122:3-122:25).

[19] Indeed, the risk of someone knowing of, or gaining access to, an inmate on an outcount appears to be greater when inmates give birth at the local community hospital, where they are transported without restraints, stay one or more nights, and are permitted visitors. J.A. 616-17 (Order); *see also* J.A. 69, 151 (SOF ¶ 94, Cornell Dep. 33:7-12).

Finally, it would raise serious constitutional questions if the Department could justify its refusal to transport inmates to medical facilities, or for that matter the courthouse, because people in the community registered their objections by engaging in First Amendment activity near those locations. Those picketers' right to assemble and express their views – even if others find them inflammatory – is constitutionally protected. That is because the state may not suppress speech that, while controversial, does not incite violence or imminent lawless action. *See Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969). But just as the Constitution protects their speech against a "heckler's veto," *Lewis v. Wilson*, 253 F.3d 1077, 1082 (8th Cir. 2001), the Constitution likewise forbids the State from effectively granting the picketers a "heckler's veto" over inmates' right to abortion, which would be precisely the result if the Department could use the picketers to justify the Policy.[20]

b) <u>The Department's Newly Proffered Hypotheticals Have No Record Support and Are Irrelevant.</u>

On appeal, the Department relies on yet new examples of purely hypothetical security breaches that it considered neither when implementing the

[20] This Court has specifically rejected the notion that the prison context legitimizes a third-party veto. *See Salaam*, 905 F.2d at 1175 (where accommodating inmates' religious exercise requests might lead to confrontation with uncooperative inmates, court concluded, "if the rights of those who would cooperate could be sacrificed in fear of those who would cause trouble . . . , officials could ignore any individual right").

Policy, nor at any time thereafter. The Department now speculates, for instance, that at RHS: "individuals . . . could approach the inmate directly and converse with her"; that the use of megaphones by protestors might "impair corrections officers' ability to hear verbal exchanges between the inmate and an interlocutor with violent intentions"; or that someone could slip the inmate drugs or other contraband "under the guise of a sidewalk counseling effort." DOC Br. 25, 28-29. These scenarios are wholly unrealistic. There is virtually no opportunity for interaction between inmates and the public, or even other clients, while at RHS. *See supra* pp. 5-6. Moreover, it is inappropriate for the Department to present these hypotheticals as "undisputed facts" that were ignored by the district court, DOC Br. 29, when no such facts exist in the summary judgment record.

Similarly, the Department takes notable liberties with the record in its arguments that rely on increased protestor presence on Saturdays and on the possibility of an inmate needing a two-day abortion procedure that starts on Friday and is completed on Saturday. First, it is clear that these issues played no role in the decision to implement the Policy. *Supra* pp. 7-9 (identifying facts considered in implementing Policy). It is simply disingenuous to suggest that the record establishes otherwise.[21] Nonetheless, the Department implies that they have had

[21] Further, in the summary judgment proceedings, the Department never cited, let alone relied on, the particular days on which RHS provides two-day procedures. *See* DOC Br. 16, 28 (citing affidavit submitted with Plaintiffs' original complaint

to, or will have to, confront hundreds of protestors during an abortion outcount. DOC Br. 28, 30.[22] But in nearly ten years, no inmate has required two transports to obtain an abortion (which would be required only for relatively late, and therefore infrequent, abortions). And there is no evidence that abortion outcounts were ever on a Saturday or when hundreds of picketers were present. J.A. 825, 886-87 (Pls.' Supp. SOF ¶¶ 8-9 (citing evidence regarding days abortion outcounts occurred and declining presence of picketers in past year), Defs.' Reply SOF ¶¶ 10-11 (admitting same)).

Ultimately, however, the presence of protestors on particular days or the potential need for two transports is irrelevant. *The Policy is absolute – it applies to transports for all "elective" abortion procedures, all the time*. It does not restrict

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but never relied on by either party in cross-motions for summary judgment). Accordingly, the Department cannot belatedly rely on this fact on appeal. *See Canada v. Electric Co.*, 135 F.3d 1211, 1213 (8th Cir. 1997) ("On appeal, we limit our examination to those same portions of the record [presented below], not taking into account other parts of the record that [appellant] now, belatedly, calls to our attention."). In any event, for reasons discussed *infra*, it is irrelevant.

[22] DOC claims there is "uncontroverted evidence that when the Department revised its abortion policy, crowds of at least one hundred people protested outside the RHS clinic every Saturday." DOC Br. 28. But nothing in the record establishes the number of protestors present on the Saturdays "when the Department revised its abortion policy," between January and July 2005. All the record shows is that as of September 2005, picketer presence on Saturdays typically reached 100, but that number fell to thirty by April 2006. J.A. 775-84, 735 (Gianino Aff. submitted Sept 5, 2005 in unrelated case; Gianino Dep. 28:23-29:6). And DOC has never asserted that it knew of, or considered, this evidence at the time it implemented the Policy.

transports to particular days, or prohibit them on days when increased protestor presence is expected. The Policy bears no relationship to the alleged risks – even those the Department has crafted from wholly speculative scenarios.

3. The Remaining *Turner* Factors Weigh in Plaintiffs' Favor.

The district court rightly concluded that consideration of each of the three remaining *Turner* factors – inmates' ability to otherwise exercise their right, the effect of accommodation on prison resources, and the existence of a ready alternative at *de minimis* cost – also weighs strongly in favor of Plaintiffs. J.A. 628-31 (Order).

a) Plaintiffs Have No Alternative Means to Exercise Their Right.

The second *Turner* factor inquires whether there are alternative means available to inmates to exercise the affected right. *Turner*, 482 U.S. at 90. Because the right at issue here is "both time-bound and procedure-specific," *Monmouth*, 834 F.2d at 339, it will be completely lost if not exercised within a relatively short period of time. The Policy completely disregards this reality and leaves pregnant inmates with no alternative means to exercise their right to choose abortion. In such circumstances, the second *Turner* factor weighs heavily in favor of accommodating inmates' rights. *See Love v. Reed*, 216 F.3d 682, 689-90 (8th Cir. 2000) (invalidating regulation after concluding that inmate "has no consistent and dependable way of exercising his right to observe his Sabbath without the

requested accommodation"); *Monmouth*, 834 F.2d at 339 (striking down abortion restriction where "no other avenues remain available for the exercise of the asserted right" (internal quotation marks omitted)).

Nonetheless, the Department inexplicably argues that an inmate can obtain an abortion if a CMS doctor determines it is necessary to protect her health. DOC Br. 31. This is no alternative at all. Plaintiffs do not claim that the Policy prohibits access to therapeutic abortions, but that it extinguishes a pregnant inmate's constitutional right to terminate her pregnancy under *any other* circumstances. Equally irrelevant is the Department's argument that other avenues of exercising the right remain available because "an *inmate* may obtain an elective abortion *before* her term of incarceration begins." *Id.* (emphases added). The district court rightly rejected this self-contradicting proposition, explaining that "*Turner* analyzes the prison regulation, as applied to inmates, not as applied to individuals before incarceration." J.A. 629 (Order) (citing *Turner*, 482 U.S. at 90). Moreover, the Department's proposed pre-incarceration "alternative" callously ignores the reality of those inmates who – like Plaintiff Roe – discover they are pregnant only after incarceration. There is simply no dispute on this point: unless the Department provides transport, there is no alternative for *inmates* to obtain non-therapeutic abortions. *Id.*

b) Accommodating the Right Has No Ripple Effect on Others or on Prison Resources.

The third *Turner* factor considers the impact accommodation of the right has on guards, other inmates, and the allocation of prison resources. *Turner*, 482 U.S. at 90. As the district court found, "it is undisputed that the impact of accommodating a woman's right to terminate a pregnancy does not increase the burden on prison resources, including guards and other inmates." J.A. 629 (Order).

In reaching this finding, the district court appropriately considered undisputed material evidence regarding the known and estimated financial and administrative resources entailed in arranging abortion outcounts and other comparable medical care. The lower court found: 1) "abortion outcounts have no distinct or measurable impact on the ongoing prison need to schedule and reschedule many medical appointments," some 155 per month; 2) DOC "fail[s] to present any evidence where the transport of an inmate for an abortion has hindered the medical care of another inmate"; 3) the costs associated with an abortion outcount were "infrequent" and "minimal"; 4) DOC regularly bore the costs of medical care and transport for other pregnancy related care, including some 90 childbirths per year; and 5) when "reviewing the impact abortion transports had on DOC's costs and resources," the Department failed to consider the "comparative costs" of providing other pregnancy-related medical care and transports – costs that DOC does not have to bear if the inmate terminates her pregnancy. J.A. 616-18;

629-30 (Order).[23] Looking at similar facts, the *Monmouth* Court concluded: "Accommodation of the inmate's choice to terminate her pregnancy under the same terms currently available to pregnant inmates opting for childbirth will impose no more, and indeed probably less, administrative and financial burdens on [prison] officials." *Monmouth*, 834 F.2d at 341-42. The same is true here.

Trying to escape the import of these undisputed facts, the Department complains that the district court placed an "excessively high summary judgment evidentiary burden on Defendants." DOC Br. 33. But it does not explain how this is so. Rather, it merely reiterates the speculation that accommodation will pose an increased drain on prison resources, and will therefore presumably interfere with transports for other medical care. But, consistent with the above findings, the Department only identifies typical overhead costs inherent to all medical transports and admits that "the cost of [abortion] transport was small in comparison with the Department's total budget." *Id.* Such minimal costs are acceptable under *Turner*. *Turner* does not contemplate that "alternatives have to be entirely cost-free; costs that are insubstantial in light of the overall maintenance of the prison are acceptable." *Salaam,* 905 F.2d at 1171; *Monmouth*, 834 F.2d at 337 (holding "the cost of protecting a constitutional right cannot justify its total denial" (internal

[23] The summary judgment record overwhelming supports each of these findings. *See supra* pp. 2-7 (citing record evidence establishing same).

quotation marks omitted)). The Department's complaint that the court below gave inadequate consideration to these burdens thus rings hollow and falls far short of overcoming Plaintiffs' showing that accommodation will not "have a significant 'ripple effect' on fellow inmates or on prison staff." *Turner,* 482 U.S. at 90.

c) A Ready and Workable Alternative to the Policy Is Available.

The final *Turner* factor – whether there are ready alternatives that would accommodate Plaintiffs' constitutional rights at *de minimis* cost to valid penological interests – likewise weighs in Plaintiffs' favor. DOC can accommodate Plaintiffs' right to choose abortion, as they have in the past, by simply providing abortion outcounts. This has been a workable accommodation for at least the past eight years, and the Department cannot reasonably explain why it is no longer a ready alternative to the Policy.

Instead, the Department mistakenly argues that it is "legally insufficient" for Plaintiffs to seek elimination of the Policy, rather than imposition of some new form of accommodation. DOC Br. 34-35. As the district court recognized, the Department "fails to consider the full extent of the Supreme Court's guidance in *Turner*." J.A. 630 (Order). Where inmates point to an accommodation that poses only "*de minimis* costs to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard." *Id.* (quoting *Turner*, 482 U.S. at 91) (internal quotation marks omitted). There is

no additional requirement that the proposed accommodation be something wholly new. Indeed, this Court has not hesitated simply to eliminate prison policies that posed unreasonable barriers to constitutional rights. For instance, in *Williams*, this Court struck down a policy prohibiting inmates from receiving certain racist publications, which prison administrators claimed was necessary to prevent violence among inmates. 116 F.3d at 354. In so doing, this Court did not require the plaintiff to identify a *new* alternative by which officials could accommodate his First Amendment right to these materials. Rather, it invalidated the ban because the record demonstrated no connection between receipt of the magazines in the past and the proffered security concerns. *Id.* at 354; *see also Love*, 216 F.3d at 691 (eliminating policy where doing so accommodated prisoner's religious rights with *de minimis* burden to prison).

As in *Williams,* the practices in place prior to the challenged Policy remain a ready alternative. For reasons discussed thoroughly with respect to the first *Turner* prong, the record establishes that providing abortion outcounts has *not* compromised prison security. *See supra* Part I.B.2. Plainly, then, continuing these same practices cannot possibly pose *more* than a "*de minimis* cost to valid penological interests." *Turner*, 482 U.S. at 90-91. Moreover, not only has transport for off-site abortion care proven a workable accommodation within DOC for many years, the federal and several state prison systems provide similar

accommodations to their inmates.[24] In other words, providing abortion outcounts is not only ready and workable, it is a *proven* alternative to an absolute ban. As the district court properly concluded, the record below flatly contradicts the Department's insistence that there is no way to accommodate both the constitutional rights of Plaintiffs and its proffered security concerns. J.A. 631 (Order).

4. Similar Decisions From Other Courts Support Affirmance.

As discussed *supra* p. 22, court after court has struck down prison or jail policies obstructing inmates' access to medical care for abortion. Particularly instructive is the Third Circuit's analysis of a policy that prohibited inmates from obtaining off-site abortion care unless they were able to first obtain an authorizing court order. *Monmouth*, 834 F.2d at 331-44. Like the Policy at issue here, that restriction applied to abortions categorized as elective, but not to the many off-site transports for health care that jail officials categorized as medically necessary. As in this case, the jail regularly transported inmates off-site for all other pregnancy-related care, including childbirth. *Id.* at 341-42. And, as here, the prohibition was

[24] Federal prisons are required to offer counseling to pregnant inmates on all options, including abortion, and arrange for abortion upon an inmate's request. 28 C.F.R. § 551.23; Bureau of Prisons Policy 6070.5. Various state prisons, including California, Illinois, Minnesota, and New Jersey, have similar policies. *See* Cal. Penal Code § 3405; 20 Ill. Admin. Code § 415.30(j); Minn. Dep't of Corrections Division Directives 500.010, 500.108 (Nov. 7, 2006), *available at* http://info.doc.state.mn.us/DocPolicy2/html/DPW_toc.asp#HEALTH; 10A N.J. Admin. Code, § 31-13.10(a)(3), (5).

a blanket policy that did not take into account an inmate's security history or other individualized considerations. *Id.* at 338. In light of these facts, the Third Circuit found the differential treatment of inmates seeking abortions and inmates seeking all other types of medical care "simply inexplicable in terms of legitimate security concerns," and concluded that the policy unconstitutionally "center[ed] around the nature of the treatment" and "in no way relate[d] to the gravity of any perceived security risks." *Id*. at 336-38. For all the reasons discussed above, the district court's similar analysis and conclusion based on the specific, yet analogous, facts of this case are correct.[25]

In contrast, the Department's singular reliance on *Victoria W.* – for the proposition that its Policy is a rational means to promote security because it seeks to reduce "the total number of outcounts, no matter how small the reduction" – is unavailing. DOC Br. 26-27. *Victoria W.*, the only case to uphold a policy

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[25] The Department briefly argues *Monmouth* is unpersuasive because it did not consider security concerns and because the policy at issue lacked a health exception. DOC Br. 25-26. Both points misunderstand the *Monmouth* analysis and relevance. The *Monmouth* court, like the district court here, assumed that the state had a legitimate penological interest related to the security of off-site transports and considered – as required by the first *Turner* prong – whether the policy was rationally related to that interest. *See* 834 F.2d at 336-38. The Department's assertion that the *Monmouth* policy did not contain a health exception is similarly mistaken. On appeal, the jail took the position that its policy did not apply to "medically necessary abortions," and the Third Circuit reviewed the constitutionality of the policy as it applied to non-therapeutic abortions. 834 F.2d at 328 n.4.

obstructing inmates' access to abortion,[26] is unpersuasive both because of serious errors in the court's legal analysis, and because the policy and facts in that case are distinguishable from those here.

The *Victoria W.* court implicitly acknowledged that a prison policy aimed at preventing abortions, or having that effect, would be unconstitutional, and found that such was not the purpose of the challenged policy, which required inmates to obtain court orders for abortions. 369 F.3d at 488-89. Further, the court found that any inmate asking a court to authorize an off-site abortion would obtain the necessary order. *Id.* at 488. Nonetheless, the court went on to validate, as presumptively legitimate, the policy's goal of prohibiting as many abortion transports as possible. The error in this reasoning is two-fold. First, it assumes that inmates have the constitutional right to access abortion services, but fails to recognize any corresponding obligation of prison officials to accommodate that right. Second, if the court order requirement served a legitimate purpose only

[26] *Amici* Senators rely to no avail on two cases in which individual prisoners were unable to obtain abortions because of excessive delays in arranging the procedures. Senators Br. 16-17. In *Bryant v. Maffucci*, 923 F.2d 979 (2d Cir. 1991), although the Second Circuit held that negligence by prison officials in one isolated case did not amount to a constitutional violation, it did so because the prison's "normal procedure guarantees female inmates . . . their right to choose to terminate their pregnancies." *Id.* at 986. Far from validating a blanket prohibition on abortion such as the Policy, *Malffucci*'s analysis strongly indicates that such a ban could not withstand constitutional scrutiny. *Id.* Similarly, the decision in *Gibson v. Matthews*, 926 F.2d 532 (6th Cir. 1991), is based on a singular incident in which the negligence of various prison employees delayed an inmate's access to abortion until it was too late. *Id.* at 535-36.

when it in fact prevented a transport, but the record demonstrated that authorization for abortion transports was always forthcoming, then the policy served no purpose at all when applied to inmate requests for abortion.

The factual dissimilarities between *Victoria W.* and this case further undermine the Department's reliance on that decision. In *Victoria W.*, the policy applied equally to all requests for "non-emergency" off-site medical care. In contrast, here, DOC has not determined that security concerns necessitate a restriction, let alone ban, on the wide array of non-emergency medical care for which inmates are daily transported. Further, the facts here establish that prohibiting abortion outcounts does not in fact eliminate the need to transport pregnant inmates for future pregnancy-related medical care. *See supra* pp. 4-5 (regarding frequency of such transports). Whether no such facts were developed in *Victoria W.*, or that court failed to consider them, in this case their relevance to the *Turner* reasonableness analysis is clear: Prohibiting abortion outcounts will do nothing to reduce the impact of outcounts on overall prison security and resources.

* * *

In sum, the Department admittedly did not promulgate the Policy in response to any identified or known repercussions from providing abortion outcounts, and for the many years during which it has transported inmates for abortions, none of its alleged concerns has ever materialized. Indeed, despite the

Department's strained attempts to virtually reinvent the summary judgment record, they point to no record facts, and no error in the district court's legal analysis, that require reversal, much less entitle the Department to judgment in its favor. Ultimately, the Department's justifications for the Policy amount to nothing more than "'piling of conjecture upon conjecture'" – a wholly insufficient basis for depriving Plaintiffs of their constitutional rights. *Salaam*, 905 F.2d at 1174 (quoting *Reed v. Faulkner*, 842 F.2d 960, 963 (7th Cir. 1988)); *see also Quinn*, 983 F.2d at 119 (affirming finding below that "proffered justification for [prison officials'] actions was pretextual" where basis of alleged penological concerns was not identified at time officials acted). Because the Department's refusal to accommodate the rights of inmates who choose to terminate their pregnancies does not "rationally" or "actually" advance a "neutral and legitimate government interest," *Salaam*, 905 F.2d at 1171, it cannot stand.

II. The District Court Correctly Held That the Policy Constitutes Deliberate Indifference to Pregnant Inmates' Serious Medical Needs.

Just as the Policy is not reasonably related to legitimate *penological* concerns, *supra* Point I, the Policy – of forcing inmates to continue their pregnancies and give birth against their will – is wholly unrelated to *medical* needs. The Department does not even pretend that it considered the medical impact on inmates in formulating the Policy, the underlying motivations for which were transparently *political*. *Supra* pp. 7-8 (regarding origins of Policy). Indeed,

the Policy violates the Eighth Amendment because it constitutes deliberate indifference to pregnant inmates' serious medical needs. The State is obligated "to provide medical care for those whom it . . . incarcerat[es]." *Estelle*, 429 U.S. at 103. Exhibiting "deliberate indifference" to "serious medical needs" by "[i]ntentionally denying or delaying access to medical care" violates inmates' right to be free from cruel and unusual punishment. *Id*. at 104-05; *see also Robinson v. Hager*, 292 F.3d 560, 563-64 (8th Cir. 2002) (quoting same); *Warren v. Fanning*, 950 F.2d 1370, 1373 (8th Cir. 1991). Pregnancy termination fits well within the bounds of those medical needs that courts routinely safeguard under the Eighth Amendment. And, as established by undisputed medical evidence in this case, pregnancy termination constitutes a vital component of medical care for pregnant women. For these reasons, the district court correctly held that the Policy violates the Eighth Amendment. J.A. 631-32 (Order).

A. Under Relevant Eighth Amendment Jurisprudence, an Inmate Who Decides to Terminate Her Pregnancy Has a Serious Medical Need.

Access to abortion care is a "serious medical need" because an incarcerated woman denied the procedure inevitably faces irreparable consequences: continuation of the pregnancy and either miscarriage or childbirth – all against her will. Plainly, unlike many other potentially "elective" medical treatments, the decision to terminate a pregnancy "cannot be postponed, or it will be made by

default with far-reaching consequences." *Bellotti v. Baird*, 443 U.S. 622, 643 (1979); *see also* J.A. 64, 207 (SOF ¶ 55, Conley Dep. 31:14-19) (agreeing that impact of delaying treatment is relevant in decision to provide medical care to prisoners). Indeed, the irreparable consequences of denying women the right to access abortion are well established. *See Roe v. Wade*, 410 U.S. 113, 153 (1973) ("Specific and direct harm medically diagnosable even in early pregnancy may be involved. . . . Psychological harm may be imminent."). Assessing this irreparable harm in the prison context, the Third Circuit rejected the notion that the classification of abortion as "elective" disqualifies it as a "serious medical need":

> [A] woman exercising her fundamental right to choose to terminate her pregnancy requires medical care to effectuate that choice. Denial of the required care will likely result in tangible harm to the inmate who wishes to terminate her pregnancy. Characterization of the treatment necessary for the safe termination of an inmate's pregnancy as "elective" is of little or no consequence in the context of the *Estelle* "serious medical needs" formulation. An elective, nontherapeutic abortion may nonetheless constitute a "serious medical need" where denial or undue delay in provision of the procedure will render the inmate's condition "irreparable."

Monmouth, 834 F.2d at 349.[27] Because the decision to terminate a pregnancy – no less than the decision to carry to term – requires timely medical care to avoid

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[27] *Amici* Senators accuse the *Monmouth* Court of inappropriately confusing Fourteenth Amendment abortion jurisprudence with Eighth Amendment jurisprudence. Senators Br. 19 & n.19. However, that part of the *Monmouth* decision did not consider abortion jurisprudence for the purpose of interpreting Eighth Amendment standards, but to illustrate the serious and permanent medical consequences – long recognized by the Court – of pregnancy and childbirth.

serious and permanent health consequences, "the categorical denial of elective, nontherapeutic abortions constitutes deliberate indifference to serious medical needs." *Monmouth,* 834 F.2d at 349. *See also Barron*, 92 F. Supp. 2d at 696 (citing *Monmouth* with approval).[28]

This Court has relied on *Monmouth* in likewise rejecting the notion that Eighth Amendment serious medical needs analysis can be reduced to distinguishing "elective" and "medically necessary" care. In *Johnson v. Bowers*, this Court cited *Monmouth* in support of the proposition that the mere

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[28] The State does not refute *Monmouth*'s analysis. And *Amici* Senators' various arguments to discredit *Monmouth* fail. First, their view that *Victoria W.* is more persuasive, Senators' Br. 11-18, 20, 22-26, ignores the plain error in *Victoria W.*: the Fifth Circuit's assumption that *Turner* applied to Eighth Amendment claims. *See Victoria W.*, 369 F.3d at 485 & n.45. *Turner* is unquestionably *not* the standard for Eighth Amendment claims. *See Johnson*, 543 U.S. at 511 ("[W]e have not used *Turner* to evaluate Eighth Amendment claims of cruel and unusual punishment in prison. We judge violations of that Amendment under the 'deliberate indifference' standard."). *Amici* Senators' nearly exclusive reliance on the *district court*'s Eighth Amendment analysis in *Victoria W.* is equally unavailing since the Fifth Circuit did not adopt that reasoning and, in affirming, applied the wrong standard (i.e., applied *Turner* to Eighth Amendment claims). Second, that *Monmouth* preceded the Supreme Court's decision in *Casey*, 505 U.S. 833, is irrelevant. *See* Senators' Br. 18. *Casey*, which addressed the standard for Fourteenth Amendment reproductive rights claims, neither touched on Eighth Amendment analysis nor questioned the serious medical and health implications of forcing women to carry to term. 505 U.S. at 846-54. Finally, their reliance on *Gibson*, Senators Br. 16-17, is also misplaced. The plaintiff's claim in that case was rejected *not* for failure to show a serious medical need, but because the negligent actions of individual prison officials did not amount to "deliberate indifference." 926 F.2d at 536-37. *See also supra* note 26.

"classification" of medical care "as 'elective' . . . does not abrogate the prison's duty" to provide that care where denying it would have irreparable consequences. 884 F.2d at 1056; *see also id.* at 1054, 1056 (holding that indefinitely delaying "elective" surgery to correct left-hand nerve injury constituted denial of care for serious medical need even though inmate was "right-handed and experience[d] no pain from the injury," because without surgery, the injury would constitute a "permanent handicap" restricting his day-to-day activities); *Garrett v. Elko*, No. 95-7939, 1997 WL 457667, at *3 (4th Cir. Aug. 12, 1997) (unpublished) (relying on *Johnson* and *Monmouth* in recognizing that "proper eighth amendment inquiry should involve looking beyond labels and examining the substance of the claim"); *Garrett, supra,* at *2-*3 (holding that district court erred in holding "denial of 'elective' surgery cannot amount to a deprivation of necessary medical treatment," where surgery delayed so long that hernia became inoperable); *Delker v. Maass*, 843 F. Supp. 1390, 1400 (D. Or. 1994) ("[T]he words 'elective surgery' are not a talisman insulating prison officials from the reach of the Eighth Amendment.").[29]

Thus, as this Court and others have recognized, when the denial of treatment for a particular medical condition causes irreparable harm, it is a "serious medical

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[29] DOC thus rests to no avail on the conclusory statement that because "elective" abortions are not "medically necessary," they do not constitute a "serious medical need." DOC Br. 38.

need," regardless of whether prison officials characterize it as "elective."[30] Because an inmate denied an abortion will forever suffer the consequences – medical, physical, and emotional – of continued pregnancy and childbirth, she has a serious medical need. J.A. 632 (Order). The Department's rejoinder – that the Policy is constitutional because it does not contravene "concepts of 'dignity, civilized standards, humanity and decency," *Estelle*, 429 U.S. at 102 – is groundless. DOC Br. 38. Longstanding precedent, as well as the undisputed record evidence here, *see infra* Point II.B., establish that access to abortion care is "central to personal dignity and autonomy," in a way "unique to the human condition." *Casey*, 505 U.S. at 851-52. Though quoting *Estelle*, the Department ignores its core principle: that the Constitution forbids treatment of prisoners that

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[30] Nor, as *Amici* Senators suggest, Senators Br. 11-12, 19-20, do courts, including this Court, limit serious medical needs to emergency or extreme medical conditions. *See, e.g., Ellis v. Butler*, 890 F.2d 1001, 1003 n.1 (8th Cir. 1999) ("[A] medical condition need not be an emergency in order to be considered serious under *Estelle*."); *see also* Brief of American College of Obstetricians and Gynecologists *et al.* in Support of Appellees (ACOG Br.). Moreover, the vast body of Eighth Amendment jurisprudence illustrates that inmates are constitutionally entitled to receive treatment for a broad range of conditions where denial of care has consequences that are similar to, or less serious than, the consequences of denying women access to abortion. *See, e.g.*, *Hartsfield v. Colburn*, 371 F.3d 454, 456-58 (8th Cir. 2004) (dental care to treat tooth infection is serious medical need); *Board v. Farnham* 394 F.3d 469, 478-83 (7th Cir. 2005) (right to toothpaste to meet serious medical need and for regular dental hygiene); ACOG Br. (listing cases). These cases, as well as the undisputed evidence discussed *infra* Point II.B, likewise belie *Amici* Senator's similar argument that a pregnant woman in need of an abortion has a condition "lacking in similarity and intensity to the other medical conditions" found to be serious medical needs. Senators Br. 15-16 (citing *Victoria W.* district court opinion).

"result[s] in pain and suffering which no one suggests would serve any penological purpose." *Estelle*, 429 U.S. at 103. Yet the Policy, in compelling Plaintiffs to assume the risks and burdens of pregnancy and childbirth against their will, does just that. Given the unique challenges and vulnerabilities faced by incarcerated women, *see* Brief of CLAIM *et al.* in Support of Appellees, the Department's willful disregard of these consequences is particularly "repugnant to the Eighth Amendment." *Estelle*, 429 U.S. at 102.

B. Undisputed Evidence Demonstrates That Plaintiffs Have a Serious Medical Need.

Expert medical opinion and relevant medical standards establish that access to abortion care is necessary to meet the serious medical needs of a woman who does not want to continue her pregnancy. This is in no small part because, as explained in Dr. Sokol's uncontested expert report, women face increased risks of serious medical complications and death throughout pregnancy. J.A. 423-24 (Sokol Rep. ¶¶ 1, 3-4). Hence, essential medical care for pregnant women includes obstetrical care throughout pregnancy and delivery; treatment for complications of pregnancy; and "procedure[s] to induce abortion" for those women who want to end a pregnancy. J.A. 424 (Sokol Rep. ¶ 3).

Moreover, while both induced abortion and childbirth are safe when provided by skilled medical personnel, induced abortion carries substantially less risk of death and serious medical complications. "[A] woman is at least ten times

more likely to die from continuing a pregnancy through childbirth than from induced abortion." J.A. 424 (Sokol Rep. ¶ 4.) These increased risks of continuing a pregnancy are even greater where the pregnancy is "high-risk," such as when the woman lacks access to prenatal care, has a history of substance abuse, suffers hypertension, or develops complications of pregnancy, such as gestational diabetes. These increased risks are very real for incarcerated women. As the Department admits, many pregnant inmates at WERDCC have high-risk pregnancies. *Supra* pp. 10-11.

Further, as set forth by *Amici* American College of Obstetricians and Gynecologists *et al.* (ACOG), the standards of care established by the leading national medical groups recognize that abortion is an essential component of pregnancy care, and that there is no medical justification for denying an abortion to a woman who wants to end her pregnancy. *See* ACOG Br. [31] Likewise, under NCCHC guidelines – which DOC incorporates in its health policies – pregnant inmates' care must be "in accordance with their expressed desires regarding their pregnancy, whether they elect to keep the child, use adoption services, or have an abortion." *Supra* p. 12. The import of these ACOG and NCCHC standards is

[31] *Amici* ACOG obviously do not suggest that abortion is indicated as a treatment for every pregnancy. Rather, these groups recognize that the option of abortion must be available for all pregnant women, whereas denying women this component of standard care is medically inappropriate.

plain in the Department's own guidelines for meeting inmates' serious medical needs, which require it to provide "the level of care that is comparable to [the] community standard of practice." *Id.*; J.A. 63, 380 (SOF ¶¶ 47-48, Patient Guide to Med. Servs.)[32] Thus, the Policy prohibiting abortion is inconsistent with national, correctional, *and* DOC medical standards.

* * *

For a woman who does not want to continue her pregnancy, it is undisputed that induced abortion "can safely reduce, by a substantial degree, the risks" to her health and life. J.A. 425 (Sokol Rep. ¶ 6). Nonetheless, the Department deprives inmates of abortion care, thereby forcing them to take on the greater health risks, and the need for other medical care, inherent in continuing a pregnancy. In so doing, the Policy manifests deliberate indifference to Plaintiffs' serious medical needs. *Hartsfield v. Colburn*, 371 F.3d 454, 457 (8th Cir. 2004) (finding Eighth Amendment violation where defendants knew of "objectively serious medical need . . . yet deliberately disregarded it").

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[32] Indeed, besides abortion, the Department does not prohibit any other particular medical care. Even if CMS characterizes particular medical care as "elective," the physicians providing care to DOC inmates retain the discretion to authorize that treatment. *See supra* p. 4. Thus, the inability of pregnant inmates to ever obtain elective abortions – either on- or off-site – conflicts with the Department's own claim of meeting community standards of practice and allowing case-by-case consideration of all medical requests. DOC Br. 12-13.

CONCLUSION

For the foregoing reasons this Court should affirm the decision below.

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I hereby certify that the text, including footnotes, 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 13,980 words of proportional spacing as determined by the automated word count of the Microsoft Word 2002 processing system and has 14-point font size, and that the CD-ROM 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 labeled CD-ROM containing this brief were mailed, postage prepaid, this 30th day of November, 2006, via Federal Express next day delivery, to:

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ADDENDUM

Letter from Sen. Chuck Gross to Larry Crawford (Jan. 18, 2005) A1

Memo from Patricia Cornell to Steve Long (July 7, 2005) A2

Memo from Steve Long to Cyndi Prudden (July 19, 2005) A4

Memo from Sheila Scott to Institutional Services Policy and Procedure Manual Holders (Aug. 4, 2005) A5

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Expert Report of Robert James Sokol, M.D. A8

UNPUBLISHED OPINIONS

1. *Garrett v. Elko*, 120 F.3d 261, 1997 WL 457667 (4th Cir. Aug. 12, 1997)

2. *Doe v. Arpaio*, No. 2004-009286, 2005 WL 2173988 (Ariz. Super. Ct. Aug. 25, 2005)

3. *Roe v. Leis,* No. C-1-00-651, 2001 WL 1842459 (S.D. Ohio Jan. 10, 2001)