Appeal No. 06-3108

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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

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

REPLY BRIEF OF APPELLANTS

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ARGUMENT

I.

The Department's policy does not impose an undue burden on prisoners' ability to choose abortion and the policy is reasonably related to the Department's legitimate penological interests.

Plaintiffs first argue that the right to elective abortion is a substantive due process right, as well as a privacy right, that survives incarceration. They concede, however, that "liberty of movement" and the Fourteenth Amendment right to travel are fundamentally inconsistent with incarceration. (Appellee's Br. at p. 18). Likewise, the Fourteenth Amendment right to choose abortion is inherently inconsistent with incarceration, as discussed in Appellants' Brief at pp. 21-24.

Plaintiffs, citing *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S.Ct. 2791, 2807 (1992), contend that an abortion decision involves a "uniquely personal" right. (Appellee's Br. at 20). In *Casey*, the Supreme Court first recognized that decisions relating to marriage, procreation, contraception, family relationships, and child rearing involve "the most intimate and personal choices a person may make in a lifetime," but stated further that these considerations "cannot end" the legal analysis of abortion rights. 112 S.Ct. at 2807. The reason for this is that abortion has consequences not only for the woman electing to terminate her pregnancy, but for

society. *Id.* Although the wish to terminate a pregnancy "may originate within the zone of conscience and belief" (*see id.*), the impact of abortion on others should be considered in determining the scope of abortion rights. The impact on the safety and rights of corrections officers and other inmates should be considered in determining the scope of inmate abortion rights. *See also Thornburgh v. Abbott*, 109 S.Ct. 1874, 1884 (1989). There is also an impact on society because Plaintiffs' asserted right to elective abortion conflicts with important penological interests, as discussed in Appellant's Brief.

In footnote 10, Plaintiffs intimate that under the policy, Department officials decide whether an individual inmate may carry her pregnancy to term. (Appellee's Br. at 20, n. 10). This is inaccurate – a physician determines whether an abortion is medically indicated and the Department does not interfere with that professional medical judgment. The policy was applied consistently to inmates for whom abortion was not medically necessary. There is no evidence that any Department official coerced or pressured an inmate into carrying a pregnancy to term.

Plaintiffs then suggest that the policy should be analyzed under the undue burden standard articulated in *Casey*, 112 S.Ct. 2791, 2819 (1992), rather than *Turner v. Safley*, 107 S.Ct. 2254 (1987). The district court properly determined that *Casey* is not the appropriate test to apply to the policy. App. 623. The scope of

constitutional rights asserted by inmates necessarily reflects the unique circumstances and difficulties of the prison setting. *Turner*, 107 S.Ct. at 2259-60; *Victoria W. v. Larpenter*, 369 F.3d 475, 483 (5th Cir. 2004).

Even if the undue burden test established in *Casey* did apply here, Defendants would still be entitled to judgment as a matter of law. The policy does not impose an undue burden on the plaintiff class's ability to choose abortion. Under *Casey*, though the government may not impose an undue burden on a woman's ability to decide whether to have an abortion, the state "need not [remove] obstacles not of its own creation." 112 S.Ct. at 2819. Indigency is one example of an obstacle not created by the state, although individuals may be poor through no fault of their own. *See Casey*, 112 S.Ct. at 2819, *citing Harris v. McRae*, 100 S.Ct. 2671, 2686 (1980); *see also Harris*, 100 S.Ct. at 2688 (1980). The obstacles to Plaintiffs in obtaining abortions – their choices to commit felonies, and, in some cases, further choices to violate the terms of probation or parole – are of Plaintiffs' own creation, and were not imposed by the Department.

Plaintiffs argue that, if this Court agrees with the district court that it is the *Turner* standard that applies, the policy is an unconstitutional regulation of the asserted right to choose elective abortion. Under *Turner*, the first consideration is whether the asserted constitutional right survives incarceration. *Turner*, S.Ct. at 2261,

2264; *Overton*, 123 S.Ct. at 2168. If the right does not survive incarceration, the analysis ends here. *Gerber v. Hickman*, 291 F.3d 617, 620, 621 (9th Cir. 2002).

Plaintiffs cite *Washington v. Harper*, 110 S.Ct. 1028 (1990), in support of their argument that inmates' abortion rights survive incarceration. Even if this is so, a prison regulation or policy that might otherwise impinge on an inmate's constitutional right will survive a challenge if the regulation is reasonably related to legitimate penological interests. *Turner v. Safley*, 107 S.Ct. 2254, 2261; *Goodwin v. Turner*, 908 F.2d 1395, 1398-1400 (8th Cir. 1990). Prisoners retain constitutional rights that are not inconsistent with the legitimate penological objectives of the correctional system. *Hudson v. Palmer*, 104 S.Ct. 517, 523 (1984). The Court in *Harper* recognized the prison system's important interests in combating the danger inmates pose to others and in ensuring the safety of prison staff. 110 S.Ct. at 1039. Just as the challenged policy in *Harper* was rationally related to these legitimate penological objectives, the Department's policy is rationally designed to further its compelling interest in security. *See* 110 S.Ct. at 1038.

The evidence in the record was more than sufficient to demonstrate that the Department's policy is rationally related to its legitimate interest in security. In *Beard v. Banks*, 126 S.Ct. 2572 (2006), the Supreme Court held that a prison superintendent's deposition testimony and affidavit provided adequate justification

for the challenged policy in that the testimony set forth a valid, rational connection between denying photographs and periodicals to a class of inmates and the penological goal of behavior modification. 126 S.Ct. at 2578-79. This testimony warranted granting summary judgment in favor of the Pennsylvania Department of Corrections at the first stage of the *Turner* analysis; the additional justifications of security and fire prevention were not needed to uphold the policy. *Beard*, 126 S.Ct. at 2578-79. In the instant case, like the deposition testimony of the official in *Beard*, the deposition testimony of Steve Long, Acting Director of the Division of Adult Institutions at the time the policy change was contemplated and adopted, demonstrated that the policy was adopted because of security and safety concerns and explained how the policy rationally furthers the legitimate penological functions articulated. App. at 681, 690 (Dep. of Long at 39, 73-75). Mr. Long's deposition testimony was supported by a Department memorandum contemporaneous with the policy change. (App. 288, 853, 891). Although Plaintiffs contend that security was "at best one of several considerations" in the policy's adoption (see Appellee's Br. at 26, n. 13), as in *Beard v. Banks*, Defendants are entitled to summary judgment whether or not additional penological goals and interests used as a basis for summary judgment argument are ultimately held sufficient to validate the challenged policy. 126 S.Ct. at 2578-79. Mr. Long's testimony, memorandum, and other evidence

demonstrate a valid, rational connection between the policy and the Department's compelling penological interest in security.

Plaintiffs' reliance on *Quinn v. Nix*, 983 F.2d 115 (8th Cir. 1993), which reviewed a district court's factual determination after a trial, is misplaced. 983 F.2d at 117, 119. In contrast with *Quinn*, in the instant case, contemporaneous, written evidence shows that inmates were denied elective abortions due to security and safety concerns and, as distinguished from *Quinn* and *Williams v. Brimeyer*, 116 F.3d 351, 353-54 (8th Cir. 1997), the Department's policy has been applied consistently.

Plaintiffs' assertion that Defendants' position is tantamount to demanding "blind" acceptance of its security concerns (Appellee's Br. at 26) is incorrect. Defendants simply argue that there was more than adequate evidence to support prison officials' judgment that outcounts for elective abortions should be discontinued for security reasons, and that Plaintiffs failed to meet their burden of disproving the validity of the policy. *See Overton v. Bazzetta*, 123 S.Ct. 126, 132 (2003). Plaintiffs do not challenge the Department's general policy against providing transportation and security for elective procedures, implemented for security reasons, of which the policy not to transport inmates for elective abortions is a logical extension. The policy is neither arbitrary nor irrational. *See Victoria W. v. Larpenter*, 369 F.3d 475, 486-87 (5th Cir. 2004).

Plaintiffs repeatedly emphasize their view that elective abortions are medically necessary (see, e.g., Appellee's Br. at 32) and do not pose greater security risks than other medical outcounts. Only elective, non-medically necessary abortions are at issue in this case. The law simply does not accord an inmate's desire for particular medical treatment equal status with medically necessary care. *See Dulany v. Carnahan*, 132 F.3d 1234, 1239 (8th Cir. 1997).

Plaintiffs argue that the policy prohibiting outcounts for non-therapeutic abortions for security reasons is not justifiable because that policy will not reduce the overall number of trips outside the prison. Pregnant inmates will still be transported to give birth and also when other medical needs arise that cannot be addressed inside the prison walls. But the plaintiffs' argument is logically flawed. When physicians have determined a double mastectomy is not medically necessary or appropriate, the desire of an inmate with breast cancer to undergo that procedure need not be acceded to, even where the elective procedure would eliminate the need for outcounts for chemotherapy or radiation treatment. Eliminating outcounts for elective abortions reduces security risks. The need to transport inmates for necessary medical care does not detract from the policy's rational relationship to legitimate security concerns, even if a series of medical outcounts may be necessary to address certain medical needs.

Moreover, the evidence in the record shows the existence of additional security risks associated with abortion outcounts qualitatively different from those associated with medical outcounts. See Appellant's Br. at 14-17. A further illustration of the different nature of the security risks involved in abortion outcounts is that, if there were substantial security problems associated with a particular health care provider or facility, the Department would have the option to transport inmates needing outside medical care to a different location and would have many available options. In contrast, it is undisputed that there is no facility closer than St. Louis that provides abortions to inmates. Seeking an alternate abortion provider is not a reasonably available option.

Plaintiffs discount the Department's security concerns and the evidence supporting them, contending that there is little risk of escape or interference by third parties because WERDCC's patient transport procedure provides that inmates should not be told of the date, time, or location of an off-site medical appointment. Appellee's Br. at 33; App. 373. However, surgical procedures or administration of anesthetics often require a prior period of abstention from food or water; a prisoner might conclude that her abortion outcount was imminent if access to food or water was withdrawn or ask for an explanation of this withdrawal. It is also a matter of public record that inmates are taken to RHS' clinic in St. Louis for abortion

outcounts. Family members and others in communication with an inmate seeking abortion, particularly those who are paying for her abortion, would be aware the procedure would occur within a relatively short period of time. Because the abortion outcount is tentative until RHS has received payment, there might well be communication between an inmate and persons outside the prison that an outcount was scheduled to occur in the near future.

Plaintiffs contend that because no escape or violence occurred during past abortion outcounts, prison officials' professional judgments about security risks should not be considered. However, in *Turner*, the Supreme Court recognized that prison officials must retain the "ability to *anticipate* security problems." 107 S.Ct. at 2262 (emphasis added). Prison officials need not refrain from adopting security-based regulations until a tragedy has occurred; the Department has a duty to protect inmates and staff, and a compelling interest in safety and security.

Plaintiffs suggest that the evidence of protestor activity at the RHS clinic should not be considered because to do so would grant demonstrators a "heckler's veto," citing *Lewis v. Wilson*, 253 F.3d 1077, 1082 (8th Cir. 2001)(Appellee's Br. at 34). However, *Lewis* stood for the proposition that the "mere possiblity" of a violent reaction to speech, as opposed to conduct, was not a constitutional basis for restricting plaintiff's speech, absent evidence of intent to provoke a violent reaction

or "personally abusive epithets" (fighting words) directed at a particular individual. 253 F.3d at 1081-82. The Department's policy here is not based on concerns about the content of protestors' speech; rather, there was evidence of specific protestor actions that raised security concerns. In addition, prison officials were justifiably concerned about risks inherent in escorting an inmate through or near a crowded public setting. (See Appellant's Br. at 27-28).

In a footnote, Plaintiffs assert that the Department did not discuss the "particular days" on which RHS performs abortion procedures that require two days, and argue that Defendants cannot rely on this fact on appeal, citing *Canada v. Union Elec. Co*, 135 F.3d 1211 (8th Cir. 1997). (Appellee's Br. at 35, n. 21). *Canada* is distinguishable because appellant had failed to respond to the summary judgment motion. 135 F.3d at 1213. In contrast, the Department raised the problematic nature of two-day abortions in summary judgment proceedings below. (App. 849, 889). This Court may properly consider Plaintiffs' affidavit filed with the district court and included in the joint appendix with Plaintiffs' consent. Fed. R. App. P. 10(a); *cf. Huelsman v. Civic Center Corp.*, 873 F.2d 1171, 1175 (8th Cir. 1989) (affidavit not part of the original district court record would not be considered).

In the prison context, the elective termination of inmate pregnancies is fraught with consequences for prison staff, other inmates, for the penal system, and for

society. The evidence in this case demonstrated that transporting inmates outside the prison walls for elective abortions posed significant safety and security risks. The policy not to transport inmates for non-therapeutic abortions is rationally related to legitimate penological interests.

Plaintiffs disagree that means of exercising abortion rights remain available to inmates. Under the second *Turner* factor, prison officials should be accorded latitude where a regulation substantially restricts one particular manner of exercising a constitutional right, but alternative means of exercising the right remain open to inmates. *Turner*, 107 S.Ct. at 2262; *Pell v. Procunier*, 107 S.Ct. 2800, 2806 (1974). The Department's policy allows inmates to be transported for abortions that are medically necessary due to a threat to the mother's health or life.

In addressing the third *Turner* factor, the impact accommodating elective abortions will have on guards and other inmates, as well as resource allocation, Plaintiffs focus mainly on the financial cost of the journey to St. Louis. But, in addition to mere financial costs, transporting inmates for elective abortions exposes corrections officers and pregnant inmates to safety and security risks absent or more readily preventable inside prison and such transports impose additional burdens on accompanying corrections officers. Transporting inmates for elective abortions would have a significant ripple effect on use of WERDCC's limited resources to

preserve security. The evidence showed an adverse impact on corrections officers from increased stress as a result of travel to St. Louis and from working longer shifts or overtime to accommodate medically unnecessary outcounts. App. 126, 150, 859, 864. The necessity of devoting substantial corrections staff time to accommodate an individual prisoner's asserted right is evidence that accommodation of that right may have a significant ripple effect on corrections officers, inmates, and the allocation of prison resources. *See Herlein v. Higgins*, 172 F.3d 1089, 1091 (8th Cir. 1999).

Prison officials are also concerned about the potential adverse impact on the rights of other inmates. *See Turner*, 107 S.Ct. at 2262-63. Accommodating elective abortions consumes prison resources that could otherwise be used for medically necessary outcounts. App. 284, 288. Transporting inmates for non-medically necessary abortions could potentially require an outcount for needed medical care to be rescheduled. Where the asserted right is exercised at a significant cost to the liberty and safety of corrections officers and inmates, the third *Turner* factor weighs in favor of upholding the prison regulation. *See Thornburgh v. Abbott*, 109 S.Ct. 1874, 1884 (1989). In response to this evidence, Plaintiffs referenced some of the Department's security procedures, but did not point to facts that would undermine prison officials' expert opinion that outcounts for elective abortions pose unacceptable risks to safety and security, impose increased stress on officers, and can

potentially interfere with other inmates' receipt of necessary medical care. On this record, the district court should not have entered summary judgment against Defendants.

Plaintiffs suggest that the final *Turner* factor need not be considered in this case because the proposed accommodation need not be wholly new and the Department could simply return to providing outcounts for elective abortions as it had in the past. (Appellee's Br. at 42-43). Plaintiffs appear to argue that they need not demonstrate alternative means of accommodating elective abortion – other than eliminating the policy – or that returning to the former policy of providing transportation and security for elective abortion would come at a de minimus cost to penological interests, because this Court has invalidated certain prison policies that presented unreasonable barriers to constitutional rights, citing *Williams v. Brimeyer*, 116 F.3d 351 (8th Cir. 1997). (Appellee's Br. at 42). But if a prison regulation is not reasonably related to a legitimate penological interest, that regulation will be invalidated under the first *Turner* factor. *Turner*, 107 S.Ct. at 2262. Where the relationship to the penological interest is so attenuated the policy is irrational, a prison regulation cannot be upheld. *Id.*

Brimeyer is factually inapposite to this case. In *Brimeyer*, there was binding precedent that the challenged policy banning all materials from a particular religious

group was unconstitutional, prison officials were unable to point to any evidence that the materials caused racial tension or security problems, and prison officials considering the materials unanimously determined inmates should be able to receive them. 116 F.3d at 353-54. Thus, the judgment of prison officials did not weigh in favor of the challenged policy. This Court, reviewing a district court's factual determinations following a trial, nevertheless stated in *Brimeyer* that whether the challenged rejection of the materials was an exaggerated response was a question "not free from doubt." *Id.* at 352, 354. In contrast, the Department consistently applied its policy, which was based on the professional judgment of prison officials and supported by evidence of security concerns associated with abortion outcounts.

The Department's policy does not violate the plaintiff class's Fourteenth Amendment rights. Even if the right to elective abortion survives incarceration, there was more than sufficient evidence in the record to show that the policy was rationally related to the Department's penological interest in security and reducing security risks to corrections officers, inmates, and members of the public. Accommodating elective abortions would have a significant ripple effect on the safety and liberty of corrections officers and inmates. Finally, Plaintiff have been unable to meet their burden of proposing an alternative means of accommodating elective abortion and cannot demonstrate that providing transportation and security for elective abortion

outcounts would have a de minimus impact based on the evidence in the record.

Accordingly, Defendants are entitled to judgment as a matter of law.

II.

The Department's policy not to transport prisoners for abortions that are not medically necessary is consistent with the plaintiff class's Eighth Amendment right to be free from cruel and unusual punishment because no serious medical need is involved.

Plaintiffs contend that abortion "is a serious medical need" even in the absence of a treating physician's judgment that termination of a particular pregnancy was medically indicated due to a threat to the health or life of the mother. (Appellee's Br. at 48). Plaintiffs then assert that the Department's policy constitutes deliberate indifference to that serious medical need.

This Court has held that no "serious medical need" exists absent a physician's diagnosis that treatment is required or unless the need is "so obvious that even a layperson would easily recognize the necessity for a doctor's attention." *Camberos v. Branstad*, 73 F.3d 174, 176 (8th Cir. 1995). Although an inmate has an Eighth Amendment right to receive medically necessary care, the Eighth Amendment does not bestow on her any right to receive a particular or requested course of treatment. *Dulany v. Carnahan*, 132 F.3d 1234, 1239 (8th Cir. 1997). Physicians remain free to exercise their medical judgment in determining an appropriate course of treatment for a prisoner. *Id*. Holding abortion to be a serious medical need where no treating

physician has determined that an abortion is medically necessary would be inconsistent with Eighth Circuit precedent, as well as logically inconsistent.

As discussed in Appellant's Brief, prenatal care is provided to all pregnant inmates. (Appellant's Br. at 12-13, 37). Plaintiffs contend that some pregnancies may pose health risks for an individual. (Appellee's Br. at 54). This is where the treating physician's professional judgment comes into play. Continuing a pregnancy to term has proven health benefits. According to the National Cancer Institute, pregnancy and childbirth significantly reduce the risk of breast cancer and ovarian cancer. *Pregnancy and Breast Cancer Risk* (visited Dec. 6, 2006) *available at:* www.cancer.gov/cancertopics/factsheet/Risk/pregnancy; *see also* http://ctep.info.nih.gov/resources/gcig/news072004.html (visited Dec. 6, 2006)(large study published in medical journal found reduced ovarian cancer risk for women who had given birth versus women who had never born a child, showing increased protection with additional births and with incidence of childbirth past age 35). Pregnancy has been positively correlated with marked reductions in the relapse rate of women with multiple sclerosis, especially during the second and third trimesters. Sandra Vukusic et al., *Pregnancy and Multiple Sclerosis (the PRIMS study): clinical predictors of post-partum relapse*, 127 BRAIN 1353-60 (2004), *available at:* http://brain.oxfordjournals.org/cgi/content/abstract/awh152v1 (visited Dec. 6, 2006).

Pregnancy also appears to have a positive impact on rheumatoid arthritis due to pregnancy related changes in the body's immune response. *See* C Lopez et al., *Variations in chemokine receptor and cytokine expression during pregnancy in multiple sclerosis patients*, 12 MULTIPLE SCLEROSIS 421-27 (2006) (positive impact of pregnancy on T cell-mediated autoimmune diseases including multiple sclerosis and rheumatoid arthritis), *see supra* BRAIN website for article link.

Plaintiffs also assert that elective abortions are the only elective medical treatment that the Department of Corrections completely prohibits. They contend that for all elective procedures except abortion, "[e]ven if CMS characterizes particular medical care as 'elective,' the physicians providing care to DOC inmates retain the discretion to authorize treatment." Appellees' Brief at 55, n. 32. However, the deposition testimony that seems to form the basis for Plaintiffs' contention ultimately does not support this assertion, because Dr. Conley testified that where CMS administration and treating physicians disagree on whether a procedure is medically needed or simply elective, the medical judgment of the treating physician controls. App. 650 (Dep. of Conley at 33), 655 (Dep. of Conley at 53), 656 (Dep. of Conley at 57). Similarly, if the attending physician determined an inmate had a medical need for an abortion, the Department would transport her whether or not anyone else

believed the procedure was “elective.” App. 695 (Dep. of Long at 95); App. 670-71 (Procedure IS 11-58, III.C, attached as Dr. Conley Dep. Ex. 3).

This deference to the judgment of the attending physician also fully addresses the concerns of the *amici* medical organizations. These *amici* characterize the Department’s position to be that a non-therapeutic abortion cannot constitute a serious medical need because such abortions are "elective." They then cite several cases in support of their argument that an "elective" medical treatment can still be a serious medical need. The *amici*, however, misread the Department ’s argument. The conclusion that non-therapeutic abortions are not serious medical needs is not based on any designation of the procedure as an "elective" one[1] but on the medical determination of the treating physician that the procedure is not medically necessary. A procedure that is not medically necessary cannot be a serious medical need. If, on the other hand, the treating physician determines that a prisoner does have a medical

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[1]The defendant Corrections officials also note that they are using the term “elective” in a different sense than are the plaintiffs, the *amici*, and the courts whose decisions they cite. The Corrections officials are using “elective” as a synonym for “non-therapeutic,” which means “[h]aving healing or curative powers,” American Heritage Dictionary 1260 (2d College Ed.) (conversing definition of “therapeutic” due to the prefix “non”), or, in other words, to mean not medically necessary. Plaintiffs, *amici*, and the decision they cite use “elective” in the sense of a procedure that, while healing or curative, is not necessary at this moment (i.e., is not an emergency).

need for an abortion and directs that an abortion be performed, the abortion will be provided, with the Department providing transportation.

The Department does not interfere with physicians' medical judgment. If there were a medical reason for a prisoner to have an abortion, the policy would permit it. The policy does not deny Plaintiffs necessary medical care and does not display deliberate indifference to the serious medical needs of pregnant inmates. For these reasons, the policy does not violate the Eighth Amendment and the district court should have entered summary judgment in Defendants' favor.

CONCLUSION

For the reasons discussed above and in the Main Brief, Appellants urge this Court to reverse the district court's entry of summary judgment against them and to remand this case to the district court with instructions to enter judgment in their favor.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the text of the foregoing document, excluding the Table of Contents, Table of Authorities, and this Certificate of Compliance, contains 4298 words of proportional spacing as determined by the automated word count of the WordPerfect 9 word processing system used and has 14-point size, and that the diskette submitted with the instant brief has scanned for viruses and is virus-free.

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