No.

IN THE

SUPREME COURT OF THE UNITED STATES

JOSEPH ARPAIO,
MARICOPA COUNTY SHERIFF
IN HIS OFFICIAL CAPACITY,
MARICOPA COUNTY,

Petitioners,

v.

JANE DOE,
INDIVIDUALLY AND ON BEHALF
OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE ARIZONA COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Maricopa County Jail maintains a policy prohibiting all off-site transportation for prisoners seeking to obtain non-therapeutic medical procedures including non-therapeutic abortions. Prisoners seeking transport can bypass the policy by obtaining a court order compelling transport. This case presents the following questions:

(1) Whether, under *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the subject prison policy imposes an "undue burden" on a female inmate's right to choose to terminate her pregnancy where not medically necessary, and, if so, then

(2) Did the court below err in holding, in harmony with the Fifth Circuit, but in conflict with the Third Circuit, that a policy prohibiting off-site transport of prisoners for non-therapeutic abortions is unconstitutional under the standard of scrutiny set forth in *Turner v. Safely*, 482 U.S. 78 (1987)?

ALL PARTIES TO THE PROCEEDINGS

Joseph Arpaio, Maricopa County Sheriff in his official capacity

Maricopa County, Arizona

Jane Doe, individually and on behalf of all others similarly situated

DISCLOSURE STATEMENT PER RULE 29.6

There is no parent corporation or public company related to the parties in this case.

Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases, continued: Page

Statutes:

PETITION FOR A WRIT OF CERTIORARI

Sheriff Joseph Arpaio and Maricopa County (collectively the "County defendants") respectfully petition for a writ of certiorari to review the judgment of the Arizona Court of Appeals.

OPINIONS BELOW

The trial court decision (App. D) granting summary judgment to Respondent Doe is unpublished, but can be accessed electronically at *Doe v. Arpaio (Arpaio I)*, No. CV 2004-009286, 2005 WL 2173988 at *3 (Ariz. Super. Ct. Aug. 25, 2005). The injunction entered to prevent enforcement of the subject policy is also included in the separate appendix. App. C. The Arizona Court of Appeals opinion affirming the decision (App. B) is published in the Arizona and Pacific reporters at *Doe v. Arpaio (Arpaio II)*, 214 Ariz. 237, 150 P.3d 1258 (Ct. App. 2007). The Arizona Supreme Court entered an order denying review of the Arizona Court of Appeals' decision on September 25, 2007. App. A.

JURISDICTION

The judgment the County defendants seek to have reviewed was entered in the Arizona Court of Appeals on January 23, 2007. App. B. The Arizona Supreme Court denied a timely petition for review on September 25, 2007. App. A. The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves application of the Fourteenth Amendment Due Process Clause:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

This case concerns whether a prison's unwritten policy (the "Policy") denying inmate requests for transport outside the jail facility to obtain non-therpeutic medical procedures, including non-therapeutic abortions, violates the Fourteenth Amendment. Two federal circuits have divided on this issue. *Compare Monmouth County Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir. 1987) (invalidating similar policy) *with Victoria W. v. Larpenter*, 369 F.3d 475 (5th Cir. 2004) (upholding similar policy). To date, the split remains unresolved. The Arizona Superior Court (the trial court) enjoined the County defendants from enforcing the subject Policy holding, ipso facto, that "any delay" in obtaining a requested abortion constitutes an unconstitutional "undue burden." App. D. The Arizona Court of Appeals then ruled that the *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) "undue burden" analysis was inapplicable, holding instead that the validity of prison regulations is determined solely by application of the "legitimate penological interests" analysis set forth in *Turner v. Safely*, 482 U.S. 78 (1987). App. B. Substituting its own "easy alter-

native" for that of the prison officials here, the Arizona Court of Appeals then held that the Policy represented an "exaggerated response" to the stated penological objectives advanced to support it. *Id.* The Arizona Supreme Court declined to grant review. App. A. This Court's review is needed to resolve the issues presented.

The subject "Policy" is that Maricopa County Jail inmates seeking any non-therapeutic medical procedure, including but not limited to non-therapeutic abortions, are required to get a court order directing the Sheriff's office to provide transport off-site from the jail for them to obtain the procedure.[1] App. B. The reasons for the Policy include safety, liability, and budget concerns. *Id.* According to the affidavit testimony of Captain Kelch, one of the "authors" of the Policy, the Policy was developed during the administration of a prior Sheriff:

> to promote the safety of the office and to prevent the sheriff's office from having any exposure to liability that may arise from such a transport. . . . If we do not have to or need to transport an inmate outside of the jail facility then we will not do so as it significantly decreases the risks associated with outside transports.

Former Maricopa County Counsel MacIntyre, the other "author" of the Policy, also testified by deposition that,

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[1] Medical personnel with Correctional Health Services ("CHS") determine whether a jail inmate, including a pregnant inmate, needs any particular medical services. App. B. In that context, nonparty CHS determines whether an inmate needs to be transported for medical care. *Id.* CHS only seeks transport for medically necessary procedures. The Policy does not apply "where a pregnant inmate needs to have an abortion because her life or health is at risk." *Id.* That would be regarded as a medically necessary procedure.

at the time of adoption of the Policy, government resources could not be expended for elective medical procedures. *See* Ariz. Rev. Stat. Ann. §35-196.02, *held unconstitutional on state law grounds, Simat Corp. v. Ariz. Health Care Cost Containment Sys.*, 203 Ariz. 454, 56 P.3d 28 (2004) (Arizona statute prohibiting use of public resources for abortion procedure unless necessary to save the life of the pregnant woman).

Shortly before her incarceration, plaintiff Doe learned that she was pregnant. App. B. She advised jail personnel of her desire to terminate her pregnancy. *Id.* Pursuant to the Policy, plaintiff Doe was advised that she would need to obtain a court order for transport for an elective medical procedure. *Id.* Plaintiff's attorney filed an unopposed motion which was unsuccessful, then declined further representation.[2] *Id.* Ms. Doe obtained other counsel and filed this action challenging the Policy. *Id.*[3] Following cross motions for summary judgment, the trial court granted judgment in favor of plaintiff Doe and against defendants Maricopa County and Sheriff Arpaio. *Id.* The Arizona Court of Appeals affirmed the decision (App. B) and the Arizona Supreme Court denied discretionary review. App. A.

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[2]The court commissioner who denied the unopposed motion believed she did not have authority to order transport for an elective medical procedure. *Id.*

[3]Ms. Doe sought a temporary restraining order so that she would be provided transport to and from the jail to obtain a scheduled abortion. App. B. That same day, with counsel present and no opposition, the court ordered Doe's transport to obtain the procedure. Plaintiff Doe obtained the abortion. *Id.* The lower court decided not to treat the issue as moot.

REASONS FOR GRANTING THE PETITION

I.
WHETHER AND TO WHAT EXTENT THE RIGHT TO CHOOSE SURVIVES INCARCERATION RAISES IMPORTANT CONSTITUTIONAL QUESTIONS NEEDING SUPREME COURT RESOLUTION

Review is necessary to resolve the "important question[s] of federal law" that have not yet been "but should be settled by this Court." Sup. Ct. R. 10(b). This case involves the scope of abortion rights, and the application of those rights, whatever their scope, in the unique prison context. As is evident from the split in the federal circuits described in detail below, the issues presented here cannot be resolved without Supreme Court intervention.

A. Undue Burden Analysis as Applied in Prison Context

The cases addressing similar prison policies affecting an inmate's decision to terminate her pregnancy,[4] all have essentially overlooked the importance of the *Casey* constitutional "undue burden" analysis required before reaching the *Turner* test. Despite this oversight, *Casey*'s constitutional analysis is essential to a complete evaluation of the validity of the policy at issue.

The Court's *Turner* test is not derived from the line of abortion cases. It is a test of prison regulations and applies only after a constitutional infringement is first

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[4]*See Monmouth County Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir. 1987); *Victoria W v. Larpenter*, 369 F.3d 475 (5th Cir. 2004); *Roe v. Crawford*, 439 F. Supp. 2d 942 (W.D. Mo. 2006); *Doe v. Barron*, 92 F. Supp. 2d 694 (S.D. Ohio 1999); *Roe v. Leis*, No. C-1-00-651, 2001 WL 1842459 at *1 (S.D. Ohio Jan. 10, 2001).

found to exist. "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to a legitimate penological interest." *Turner v. Safely*, 482 U.S. 78, 89 (1987) (emphasis added). Stated simply, there is a clear sequence: (1) does the subject prison regulation impinge on an inmate's constitutional rights; if so, then (2) is it reasonably related to legitimate penological interests? If a prison regulation does not infringe a constitutional right, then the analysis ends there without reaching the *Turner* factors. Thus, before reaching *Turner* it is essential first to ask and answer the threshold constitutional question: does the policy impose an undue burden on an incarcerated inmate's right to choose to terminate her pregnancy?

In *Casey*, this Court made a point to recognize that "[a]ll abortion regulations interfere to some degree with a woman's ability to decide whether to terminate her pregnancy." *Casey*, 505 U.S. at 875. "Not all burdens on the right to decide whether to terminate a pregnancy will be undue," and "not every law which makes a right more difficult to exercise is, ipso facto, an infringement of that right." *Id.* at 873. "[A] pregnant woman does not have an absolute constitutional right to an abortion on her demand." *Doe v. Bolton*, 410 U.S. 179, 189 (1973).

With the recognition that some level of restriction on the abortion decision is permitted, this Court's line of abortion cases may be divided into two separate categories: (1) those cases involving laws that affirmatively restrict or prohibit abortions and (2) those cases involving laws that fail to facilitate or otherwise assist in implementing the decision to abort. While this Court has often held restrictions imposing a "substantial

obstacle" on the abortion right unconstitutional, it has, with complete consistency, held that a state's failure to facilitate implementation of the decision is not unconstitutional.

An example of a case falling in the latter category is *Maher v. Roe*, 432 U.S. 464 (1977). There the plaintiffs were indigent women challenging Connecticut's law prohibiting government funding (Medicaid) of non-therapeutic abortions. They argued that elimination of such funding was a state-created obstacle burdening indigent women and effectively making it impossible for them to carry out a decision to seek an abortion. The Supreme Court held that the state could lawfully withhold funding for elective abortions although that might "make it difficult and in some cases, perhaps, impossible for some women to have abortions." *Id.* at 474. The Court determined that the pregnant woman's indigency, not the state regulation, created the obstacle.

A similar analysis was applied in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989). "[O]ur cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *Id.* at 507 (citation omitted). "If the State may 'make a value judgment favoring childbirth over abortion and . . . implement that judgment by the allocation of public funds,' . . . surely it may do so through the allocation of other public resources, hospitals and medical staff." *Id.* at 510 (citation omitted).

As the Court stated in *Casey*, "[t]he fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abor-

tion cannot be enough to invalidate it." 505 U.S. at 874. For instance, the Court in *Casey* acknowledged that its decision reaffirmed "that a State may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided that there is an adequate judicial bypass procedure." *Id.* at 899. Thus, obtaining a court order in connection with seeking an abortion is not, ipso facto, an undue burden. Moreover, the fact that obtaining a judicial bypass order necessarily involves some delay, does not make that procedure an undue burden.

In *Casey* the Court upheld a mandatory waiting period requiring that at least 24 hours before the abortion, the woman be advised of the gestational age of the fetus and of the health risks associated with both abortion and childbirth. Thus, both the delay required for testing the gestational age of the fetus and the minimum 24 hour delay for the mandatory waiting period were obvious delays which the *Casey* Court did not find to be undue burdens. "We do not doubt that, as the District Court held, the waiting period has the effect of 'increasing the cost and risk of delay of abortions.' " 505 U.S. at 885-87 (emphasis added). Thus, delay is not synonymous with undue burden.

Similarly, having a court authorize a transport order for an inmate to be able to leave the jail and receive an elective medical procedure is not an undue burden. As this Court has long recognized, while a woman has a "fundamental" right to make the decision, "it does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices." *Harris v. McRae*, 448 U.S. 297, 316 (1980). Following *Harris*, it would seem that public prison officials are

similarly under no obligation to assist a female inmate in implementing her decision by providing her with the financial and other resources necessary to "avail herself of the full range of protected choices" notwithstanding her confinement. This is because it is the condition of confinement brought on by the inmate's criminal conduct that self-imposes a burden on her ability to exercise the right, not the actions of the prison officials in carrying out their duty to prevent her from leaving the jail once she is incarcerated. As explained in *Casey*, the fact that the transport Policy incidentally may make it more difficult to obtain an abortion does not invalidate the Policy. The evidence suggests that, in the past, despite application of the Policy, every inmate who has requested transport for such a procedure has been accommodated once a court order is obtained. The Policy, therefore, imposes no "undue" burden and is a constitutionally permissible regulation. The Arizona courts should have upheld the constitutionality of the Policy without even reaching a *Turner* analysis.

B. *Turner* As Applied to Abortion

Even assuming *Turner* must be considered, a hallmark of *Turner* has always been deference to the decisions of prison officials. This Court has long recognized that the judiciary is ill-equipped to handle the problems posed by prison administration. "Suffice it to say that the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree." *Bell v. Wolfish*, 441 U.S. 520, 548 n.30 (1979) (citation omitted). "Judicial scrutiny of prison regulations is an endeavor fraught with peril." *Beard v. Banks*, 126 S. Ct. 2572, 2582 (2006)

(Thomas, J., concurring in judgment). Flowing from this recognition is the generally accepted principle that imprisonment is fundamentally at odds with the free exercise of many constitutional protections and that, when inconsistent with penological objectives, some of those protections simply do not survive incarceration at all.[5] "Whether it be called a jail, a prison, or a custodial center, the purpose of the facility is to detain. Loss of freedom of choice and privacy are inherent incidents of confinement in such a facility." *Bell*, 441 U.S. at 537. "The very object of imprisonment is confinement. Many of the liberties and privileges enjoyed by other citizens must be surrendered by the prisoner. An inmate does not retain rights inconsistent with proper incarceration." *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003). "[I]mprisonment carries with it the circumscription or loss of many significant rights." *Hudson v. Palmer*, 468 U.S. 517, 524 (1984). Accordingly, the question under *Turner* is necessarily bifurcated: (1) do prisoners possess a right to a purely non-therapeutic abortion and (2) if so, to what extent does that right trump a prison's otherwise legitimate policies?

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[5] Indeed, Justices Thomas and Scalia have long recognized that, apart from the Eighth Amendment prohibition on cruel and unusual punishment, the Constitution does not otherwise contemplate the free exercise or retention of "fundamental" rights by incarcerated individuals. In recognizing the Eighth Amendment limits of prisoners' rights, Justices Thomas and Scalia have also identified the severe consequences of the judiciary's attempts to intervene and reinstate such rights nevertheless. *See Beard*, 126 S. Ct. at 2582 (2006) (Thomas, J., concurring in judgment) (discussing violent backlash after court invalidated racial segregation policy in California prison). *See also Johnson v. California*, 543 U.S. 499 (2005).

The Maricopa County Jail does not perform abortions within its facility. Consequently, a final determination in favor of plaintiff Doe is necessarily a final determination that the County defendants are constitutionally required to transport prisoners to an off-site facility to obtain the desired procedure or, in the alternative, to equip themselves to begin performing abortions inside the jail upon request by a pregnant inmate. Forcing a state prison to perform the abortion procedure inside its facility is obviously at odds with the long line of precedent expressly holding that the state has no such obligation.[6] The alternative — forced off-site transport to an unsecure abortion clinic of the inmate's choice — is also obviously at odds with the primary penological objective of this and indeed all prisons — confinement. In fact, no Supreme Court decision premised on *Turner* has ever required prison officials to go to such lengths to accommodate prisoners wishing to exercise their constitutional rights in the absence of a finding that the desired procedure is medically necessary, thus implicating the Eighth Amendment. Consequently, if this Court were to mandate that the abortion procedure be provided to incarcerated inmates either on-site or off-site, it would essentially have to designate all non-therapeutic abortions as "serious medical needs" subject to an Eighth Amendment analysis rather than scrutiny under *Turner*.

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[6]The state may choose not to provide public funding for abortions. *Harris v. McRae*, 448 U.S. 297 (1980). The state may choose not to permit public funds, employees, or facilities to be used for, or to assist in performing, non-therapeutic abortions. *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989). In fact, the state may adopt a policy favoring childbirth over abortion and implement that policy. *Id.* at 508-10. "*Maher*, *Poelker*, and *McRae* all support the view that the State need not commit any resources to facilitating abortions." *Id.* at 511.

The constitutional questions presented by the abortion cases arising within the prison system are important ones. The *Turner* test has never before been analyzed by this Court in an abortion context. This Court should grant review to determine whether and to what extent the right to seek a non-therapeutic abortion survives incarceration and whether and to what extent prison officials must accommodate a prisoner's exercise of that right if it does.

II.
FEDERAL CIRCUITS ARE SPLIT ON THE QUESTIONS PRESENTED

The constitutional quandary presented in this case is a necessary consequence of attempting to accommodate constitutional rights without undermining prison administration. The Policy at issue calls for the Court to address the extent to which a state's discretion to implement regulations and policies necessary to assure the safe and efficient administration of its prison system must yield to a woman's decision to abort her pregnancy. The question has produced a split between the Third and the Fifth Circuits. *See Monmouth County Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir. 1987); *Victoria W v. Larpenter*, 369 F.3d 475 (5th Cir. 2004). Yet unresolved, the circuit split on these issues has forced lower federal and state courts now considering the issue to choose sides in the split and, more fundamentally, in the underlying juridical conflict: Which interest should prevail — a woman's right to choose or a prison's right to regulate? Accordingly, this Court's review is warranted. *See* Sup. Ct. R. 10(a) (review proper when "a

United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter.").

A. The *Monmouth* and *Victoria W* Cases

In *Monmouth*, the Third Circuit addressed a policy similar to that at issue here, which restricted inmate transport outside the Monmouth County jail for non-therapeutic abortions absent a court order. 834 F.2d at 334. Without conducting the "undue burden" analysis (as *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) had not yet been decided), the Third Circuit applied *Turner v. Safely*, 482 U.S. 78 (1987) (decided the same year as *Monmouth*) to determine whether the policy could pass constitutional scrutiny as "rationally related to legitimate penological interests." The *Monmouth* court ultimately concluded that the prison's policy must yield to the incarcerated woman's decision to terminate her pregnancy. *Monmouth*, 834 F.2d at 326. Fifteen years later, in *Victoria W*, the Fifth Circuit addressed a similar prison policy. 369 F.3d at 479. The Fifth Circuit took a fundamentally different approach to the *Turner* test and, consequently, reached the opposite result. A close comparison of their analyses demonstrates the fundamental divergence between these circuits over the application of *Turner* to abortion rights in the prison context.

Under *Turner*, a prison policy that infringes a constitutional right is nevertheless valid if the policy is "rationally related to legitimate penological interests." *Turner*, 482 U.S. at 89. *Turner* focused on four elements: (1) whether there is "a 'valid, rational connection' between the prison regulation and the legitimate govern-

mental interest put forward to justify it," (2) "whether there are alternative means of exercising the right that remain open to prison inmates;" (3) "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally;" and (4) "the absence of ready alternatives." *Id.* The divergence between *Monmouth*'s and *Victoria W*'s application of *Turner* is apparent from a step-by-step comparison of their analyses of these four elements.

On the first element — whether a policy prohibiting transport for non-therapeutic abortions had "a valid rational connection" to the interests advanced to support the policy — *Monmouth* and *Victoria W* reached opposite conclusions. The Third Circuit summarily dismissed the "financial and administrative burdens" advanced to support the Monmouth policy as presumptively illegitimate. "We agree with the district court that, at the threshold, the County's articulated objection to the costs of providing MCCI [the subject jail] inmates with abortion-related services independently fails to state a legitimate governmental interest sufficient to justify the County's policy." *Monmouth*, 834 F.2d at 336. In *Victoria W*, by contrast, the Fifth Circuit recognized that the interests advanced in support of the prison policy were presumptively valid. "It is the inmate's burden to disprove the validity of the regulation." *Victoria W*, 369 F.3d at 484. In so doing, the Fifth Circuit upheld financial and administrative burdens as legitimate interests advanced to support the policy. "The policy aims to reduce the total number of off-site transports and thereby reduce the effects on prison resources, inmate security, and potential liability." *Id.* at 486-87.

On the second *Turner* factor — "whether there are alternative means of exercising the right that remain open to prison inmates" — *Monmouth* and *Victoria W* also disagreed. *Monmouth* found that the court order alternative to the policy denying transport for abortions was an insufficient alternative for pregnant inmates wishing to terminate their pregnancies. The Third Circuit cited time constraints and possible delay in obtaining the needed order as defeating the legitimacy of the court order alternative. "[I]nmates imprisoned for less serious offenses are exposed to an unconstitutional risk of delay under the County's court-ordered release requirement and have no viable alternative available." *Monmouth*, 834 F.2d at 339. *Victoria W*, by contrast, found the court order requirement was sufficient as an "alternative means of exercising the right." "Elective treatment is not prohibited, although not viable within the prison. Rather, an inmate can receive the treatment by following a set procedure." *Victoria W*, 369 F.3d at 486.

In evaluating the third *Turner* factor — what impact accommodation of the right to terminate one's pregnancy would have on inmates and prison personnel — the *Monmouth* court fashioned this element of the test into a basis for requiring funding for abortions. "[P]roviding an inmate who elects to have a nontherapeutic abortion with both transportation to an appropriate medical facility and the necessary funding for the procedure will not burden 'the use of the prison's limited resources.' " *Monmouth*, 834 F.2d at 341. *Victoria W* again reached the opposite conclusion.

> Victoria contends that the prison would have lost no resources by transporting her to the abortion

> clinic because Victoria was willing to pay for the procedure and the cost of the guard. This fact mitigates one concern underlying the policy — the resources lost by the prison — but it ignores the fact that the prison is still either short-handed or out the cost of added personnel. It also forgets that the policy's simple means of reducing potential liability of the Parish is avoiding unnecessary transports.

Victoria W, 369 F.3d at 487 (emphasis added).

On the fourth and final *Turner* factor — an absence of alternative means of exercising the right[7] — *Monmouth* and *Victoria W* also diverge. The *Monmouth* court simply applied its conclusions from the prior three elements to eliminate the fourth one.

> MCCI [jail] inmates seek provision of all medical services related to their pregnancies — including abortion-related services — on the same terms that medical services are currently provided to pregnant inmates who opt to give birth. As indicated above, we perceive no significant disruption of valid penological interests that would accompany the provision of the requested services.

834 F.2d at 344. *Victoria W* recognized the court order alternative as a viable means of exercising the right "by following a set procedure," which was to file a motion, schedule a hearing, then get an order. 369 F.3d at 486.

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[7]The fourth factor is not a requirement that the government only impose a lesser alternative regulation, but rather "asks instead whether the prisoner has pointed to some obvious regulatory alternative that fully accommodates the asserted right while not imposing more than a de minimis cost to the valid penological goal." *Overton v. Bazzetta*, 539 U.S. 126, 136 (2003). This is a "high standard" imposed on the prisoner, not the state, to identify such "ready alternatives." *Id.*

The *Victoria W* court held that the challenger did not meet the burden of showing no more than de minimis costs to the prison's liability concerns and that in any event "a ready alternative is only some evidence affecting the reasonable relationship standard; it is not dispositive." *Id.* at 487. Thus, on this final *Turner* factor, the two cases are also diametrically opposed.

The *Monmouth* and *Victoria W* decisions place the Third and Fifth Circuits in dramatic conflict on a federal constitutional question. The cases scrutinized comparable policies, but exhibit a fundamental departure in their interpretation of *Turner*. More specifically, when compared, these cases illustrate the difficulty in determining what level of deference is due to prison officials when their policies and regulations affect a prisoner's exercise of a constitutional right. The question is further complicated when, as here, exercise of the subject right requires transport outside prison walls to an unsecure medical facility of the prisoner's choosing without a determination that the procedure is a "serious medical need" invoking the protections of the Eighth Amendment prohibition on cruel and unusual punishment.

B. Other Decided and Currently Pending Cases

Courts faced with this issue have expressly recognized the split between *Monmouth* and *Victoria W*.[8] The trial court in the present case declared: "[T]his court finds the reasoning in *Monmouth County* more persuasive

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[8] Two federal district courts addressing similar jail policies after *Monmouth* adopted its holding without conducting any further inquiry because *Victoria W* had not yet been decided. *See Doe v. Barron*, 92 F. Supp. 2d 694 (S.D. Ohio 1999); *Roe v. Leis*, No. C-1-00-651, 2001 WL 1842459, at *1 (S.D. Ohio Jan. 10, 2001).

than *Victoria W.*" *Arpaio I*, 2005 WL 2173988 at *3. App. D. *See also Roe v. Crawford*, 439 F. Supp. 2d 942 (W.D. Mo. 2006) (implicitly rejecting *Victoria W* by citing and relying exclusively on *Monmouth*). The Eighth Circuit is currently considering a similar prison policy on appeal in *Crawford v. Roe*, No. 06-3108 (8th Cir. 2007), and will be issuing yet another decision regarding the questions presented by this case (oral argument in *Crawford* took place on September 24, 2007).[9] Granting review in this case would thus resolve the clear split between the Fifth and the Third Circuits before the federal courts become even further divided.

III.
THE LOWER COURT ANALYSIS IN THIS CASE WAS MANIFESTLY ERRONEOUS

Review is also needed because, in this case, the Arizona courts have "decided an important federal question in a way that conflicts with relevant decisions of this Court." *See* Sup. Ct. R. 10(c).

A. Arizona Courts' Manifestly Erroneous Undue Burden Analysis

In affirming the injunction prohibiting the County from enforcing its policy in this case, the Arizona courts made two fundamental errors of federal constitutional law. First, purportedly applying the "undue burden" test to invalidate the policy as unconstitutional, the trial court here ruled that "any delay" would necessar-

[9] Oral argument before the Eighth Circuit in *Crawford v. Roe* can be reviewed at *http://www.ca8.uscourts.gov/oralargs/-oaFrame.html.*

ily constitute an undue burden. "Since abortions are so time sensitive, any delay will inevitabl[y] result in an undue burden." *Arpaio I*, 2005 WL 2173988 at *1 (emphasis added). App. D. The trial court's ruling in this regard directly contravenes existing Supreme Court precedent. *See Casey*, 505 U.S. at 873-75 ("Not all burdens on the right to decide whether to terminate a pregnancy will be undue," and "not every law which makes a right more difficult to exercise is, ipso facto, an infringement of that right."). The Arizona Court of Appeals not only failed to reverse this legal error, but added its own by refusing to conduct any constitutional analysis at all, concluding that *Casey* did not apply. "We conclude that the undue burden test does not apply to the Policy at issue." *Arpaio II*, 214 Ariz. at 241, 150 P.3d at 1262. App. B. The Arizona Court of Appeals ruled that *Casey* and *Turner* were "alternative" rather than "sequential" tests. Thus, the court below held that a prison regulation is subject to judicial scrutiny under *Turner* regardless of whether the subject regulation infringes any constitutional rights at all.

B. The Lower Court Substitued Its "Easy Alternative" and Defied the Deference Required by a Proper Application of *Turner*

The second error manifest in the Arizona court's opinion is the lack of deference given to the decisions of the prison officials here. Instead ‹ 439 F. Supp. the County defendants' expert judgment, the Arizona Court of Appeals substituted its own "easy alternative" to replace the prison's policy now enjoined. "[W]e determine that there is an obvious, easy alternative." 214 Ariz. at

246, 150 P.3d at 1267. "[I]n doing so, it placed too high an evidentiary burden upon the [County]," and "offer[ed] too little deference to the judgment of prison officials about such matters." *Beard*, 126 S. Ct. at 2581. Irrespective of the "determination" that there was an "obvious easy alternative," Arizona courts are not at liberty to ignore the sound reasoning offered to support the Policy here and substitute a different policy in its place. *Overton*, 539 U.S. at 132 ("We must accord substantial deference to the professional judgment of prison administrators who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them."). Once it found a rational connection between the Policy and the interests offered to justify it, "its inquiry should have ended. The court's further 'balancing' resulted in an impermissible substitution of its view on the proper administration of [the Maricopa County Jail] for that of experienced administrators of that facility." *Block v. Rutherford*, 468 U.S. 576, 589 (1984).

The erroneous analysis employed to invalidate the Maricopa County prison policy prohibiting prisoner transport for elective medical procedures (including abortions) is further support for this Court's review as the court of last resort. It demonstrates why review of the important questions presented as well as reversal of the Arizona courts' erroneous conclusions on those questions is now needed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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