No. 07-839

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

REPLY BRIEF OF PETITIONERS

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The points addressed in Respondents' Brief in Opposition demonstrate why review should be granted.

I.
FEDERAL CIRCUITS ARE SPLIT ON THE QUESTIONS PRESENTED.

Respondents argue in their Brief in Opposition (at 16-19) that the decisions in *Monmouth County Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir. 1987), and *Victoria W v. Larpenter*, 369 F.3d 475 (5th Cir. 2004), do not represent a split between those circuits. Yet, respondents conclude (at 18) that *Monmouth* and the courts which followed its reasoning were correct that no-transport policies violated the Fourteenth Amendment, while respondents (at 18-19) characterize *Victoria W* as "premised on faulty reasoning" and as "wrongly decided." If the two cases applied the same, correct legal standards and departed only on their facts, then respondents would have no need to disagree with *Victoria W*'s legal analysis or outcome. Thus, respondents are tacitly acknowledging that the Third Circuit and Fifth Circuit are split.

That there is a split is only further buttressed by the recent opinion in *Roe v. Crawford*, ___ F.3d ___, 2008 WL 187513 (8th Cir. 2008). The Eighth Circuit essentially decided to straddle the line dividing *Monmouth* and *Victoria W* by adopting certain portions of each. Notably, the Eighth Circuit distinguished the policy at issue in *Victoria W* from its own policy on the ground

that the court-order alternative was a valid means of otherwise exercising the right, which implicitly recognizes that *Victoria W* was correctly decided. Indeed, the Eighth Circuit's opinion even alludes to the fact that the Policy at issue here (court ordered transport in lieu of unappealable denial) would have been upheld had it been before that Eighth Circuit panel. "Alternatively, the MDC could implement a policy similar to that in *Victoria W*, requiring inmates to obtain a court order authorizing the abortion." *Id.* at *6. Additionally, on the second *Turner* factor, the Eighth Circuit expressly agreed with the Fifth Circuit's *Turner* analysis that a court-order alternative gave pregnant prisoners wishing to terminate their pregnancies an adequate vehicle by which to exercise the constitutional right notwithstanding the policy prohibiting transport. "The [*Victoria W*] policy was rationally related to these goals, and there were alternatives available, because the procedure was not onerous, and did not act as a complete bar to elective abortion." *Id.* at *5. Thus, on each element of *Turner*, the Eighth Circuit's opinion supports the analysis used in *Victoria W*, not *Monmouth.* In fact, the Eighth Circuit expressly disagrees with *Monmouth*'s ruling on the Eighth Amendment and certain critical aspects of its ruling on the Fourteenth Amendment (*e.g.*, the requirement that the jail actually fund the abortion). Thus, at a minimum, the Eighth Circuit's opinion does exactly what the Petition for Certiorari here expressed concern about — it muddies the waters on this issue even more, which is why review by this Court is so important.

Respondents acknowledge that the reasoning in *Roe* presents a problem for their position insofar as it supports the validity of the court-order alternative provided

in the Policy at issue here (at 18, n.17), but nevertheless discount this analysis as "dicta" to downplay its significance. Respondents' efforts to brush aside *Roe*'s reasoning on these points further demonstrates the inherent flaw in their argument that no conflict among the federal courts exists on the issues presented. Were there any question regarding whether a conflict between *Monmouth* and *Victoria W* existed before, *Roe* dispels the notion that no conflict is present by highlighting the points on which those two cases diverge. Moreover, because the reasoning in *Roe* correctly observes that a court-order alternative is a permissible regulation on a prisoner's abortion rights, it further supports the ultimate reversal of the Arizona courts' erroneous decision to invalidate the Maricopa County Jail Policy, which *does* contain the court-order alternative that was missing in the Missouri Department of Corrections' policy that the Eighth Circuit considered in *Roe*. Respondents' efforts to dissuade this Court from considering the impact *Roe* has on the existing and conflicting state of the law in the federal courts is unavailing. Review of this issue is warranted.

II.
CASEY AND *TURNER* ARE SEQUENTIAL, NOT ALTERNATIVE, TESTS.

Respondents' Brief in Opposition (at 6) states that the test of *Turner v. Safely*, 482 U.S. 78, 89 (1987), is more deferential than that of *Planned Parenthood v. Casey*, 505 U.S. 833, 873 (1992).[1] Respondents then conclude

[1] *Turner* recognizes the deference to which prison administrators are entitled. Respondents' Brief in Opposition (at 7-8) misconstrues the Policy to shift to courts the decision as to whether inmates should be transported. To the contrary, the professional

[footnote continued]

that if a prison rule fails *Turner*, it must necessarily fail *Casey*, as well. This is clear error.

The test of *Turner v. Safely* applies *only* "when a prison regulation impinges on inmates' constitutional rights." 482 U.S. at 89. Where is the determination that the Policy at issue "impinges on inmates' constitutional rights"? The Arizona Superior Court (trial court) applied an ipso facto test that "any delay" in obtaining a requested abortion is an "undue burden," although *Planned Parenthood v. Casey* disapproved any ipso facto test. 505 U.S. at 873. The Arizona Court of Appeals abrogated any review of whether the Policy impinged on constitutional rights and applied *Turner* without conducting a *Casey* analysis. As Respondents' Brief in Opposition (at 5) concedes: "In affirming, the Arizona Court of

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judgment of the prison administrators (the County defendants) is that transport is undesirable for any purpose. Transport for a medical procedure that is necessary to save the life of an inmate is as subject to security, safety, and economic concerns as transport for non-medically necessary procedures. Why is no court order required for those transports? None is required because the Eighth Amendment intervenes. For non-therapeutic medical procedures, the Eighth Amendment does not mandate transport. The prison administrators are free to apply their expertise and exercise their judgment that transport for such elective procedures should be avoided, or at least minimized. The Policy accomplishes that, but yields to the possibility that a court might be persuaded by an inmate that the specific circumstances of the particular inmate, or the particular medical procedure the inmate seeks, warrants an order overriding the Policy and directing that transport be provided in that instance. That is not an abdication of responsibility to the courts; that is providing the inmate with a reasonable alternative to the rationally based Policy against providing transport for non-therapeutic medical procedures. *See Roe v. Crawford.*

Appeals first held that the Policy should be tested solely under *Turner*, not *Casey*."[2]

The predicate to any *Turner* analysis is that there is a prison regulation infringing a constitutional right. In the case of a regulation impacting the abortion decision, that invokes a determination whether the regulation imposes an "undue burden" pursuant to *Casey*. Hence, they are sequential tests, not alternatives between which a court may select at its discretion. Since there has been no appellate determination that the subject Policy imposes an "undue burden" pursuant to *Casey*, the predicate to conducting a *Turner* analysis did not exist.

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[2]The Arizona Court of Appeals extended the application of *Turner* to apply to any challenged policy, even if the underlying policy did not infringe a constitutional right. That is an extension by the state court which is not warranted by *Turner* or any other opinion of this Court and further demonstrates why review is warranted.

CONCLUSION

The Petition For A Writ Of Certiorari should be granted.

Respectfully submitted,

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