Case No. CV07-0104-PR

In the Supreme Court of Arizona

JANE DOE, individually and on behalf
of all others similarly situated,

Plaintiffs-Appellees,

v.

JOSEPH ARPAIO, Maricopa County Sheriff,
in his official capacity, and **MARICOPA COUNTY**,

Defendants-Appellants.

After a Decision by the Court of Appeal,
Division One, Case No. 1 CA-CV 05-0835

BRIEF OF *AMICUS CURIAE* ARIZONA REPRESENTATIVE SAM CRUMP IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL OF THE COURT OF APPEAL

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Affirming the State's[1] compelling interests, *Amicus Curiae* Arizona Representative Sam Crump supports Defendants-Appellants'(County) policy requiring a court order before pregnant inmates are transported for elective abortions. In addition to supporting the State's penological interests in preserving and efficiently utilizing prison security, staff, and funds, *Amicus* affirms the States's valid and compelling interests in protecting the life and health of the women involved, as outlined by the United States Supreme Court in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) and *Gonzales v. Carhart*, 167 L. Ed. 2d 480 (2007) (Carhart II). Furthermore, as a legislator, *Amicus* affirms the State's right to establish policies and regulations that support those interests.

In light of the State's compelling interests, *Amicus* urges this court to reverse the judgment of the appellate court and uphold the constitutionality of the County's policy.

SUMMARY OF ARGUMENT

In addition to penological interests involving safety and resources, the County has compelling interests—affirmed by the United States Supreme Court—in their policy requiring a court order before transporting inmates for elective medical procedures (the Policy). The Supreme Court has continuously affirmed

[1] Hereinafter, "State" refers to both state and local government units.

states' interests in protecting women. It has also provided that no state has a duty to provide, fund, or encourage abortion, and a state may encourage childbirth over abortion. Ignoring these interests would not only deny states the ability to protect women, but it would also elevate the abortion "right" to a level higher than that granted by the Supreme Court.

Moreover, valid medical studies demonstrate that women face drastic physical and psychological risks from abortion. These risks underscore the County's compelling interests in protecting women and confirm that the County is acting according to its compelling interests.

ARGUMENT

The County has adequately laid out the penological interests of safety and security behind their Policy.[2] However, because the Plaintiffs-Appellees have challenged the Policy only insofar as it applies to elective abortions, and because the appellate court limited its discussion of the Policy to its application to elective abortion, the County's interests as specifically applied to abortion have been called into question. In addition to safety and security concerns, the County has a

[2] Contrary to the appellate court in this case, other courts have found that accommodating an elective abortion request would "unarguably" have an effect on the prison guards and prison resources generally. *See*, *e.g.*, *Victoria W. v. Larpenter*, 205 F. Supp. 2d 580, 595 (E.D. La. 2002), *aff'd*, 369 F.3d 475 (5th Cir. 2004). A "crucial resource is affected" when one or two guards must travel with an inmate, and prison authorities have valid penological interests in minimizing instances when inmates are transported for elective procedures. *Id*. at 595.

compelling interest in protecting women from the harms of abortion. Regardless of whether the *Casey* "undue burden" test or the *Turner* test applies, these compelling interests in the health and well-being of women underscore the Policy and require that it be upheld.

I. THE U.S. SUPREME COURT HAS CONTINUOUSLY AFFIRMED THE STATE'S INTERESTS IN PROTECTING WOMEN

The U.S. Supreme Court has recognized that even the most sacred of fundamental rights are subject to some restriction in the prison context, even when such restrictions would be impermissible outside of the prison context.[3] In the abortion context, the Supreme Court has made clear that states have a compelling interest in the protection of women.[4] Moreover, the "right"[5] claimed by the Plaintiffs—transport for an abortion—is a "right" that is not provided by the State even outside of the prison context.[6]

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[3] *See, e.g.*, *Lewis v. Casey*, 518 U.S. 343 (1996) (right of access to courts); *Turner v. Safley*, 482 U.S. 78 (1987) (inmate to inmate correspondence, and family life and reproductive life); *Hudson v. Palmer*, 468 U.S. 517 (1984) (search and seizure) *Jones v. N.C. Prisoner's Labor Union, Inc.*, 433 U.S. 119 (1977) (First Amendment rights).

[4] *See Casey*, 505 U.S. at 873 ("[N]ot every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right.").

[5] An assumption that the abortion "right" survives incarceration at all is a "premise in and of itself debatable under the available jurisprudence." *Victoria W.*, 205 F. Supp. 2d at 595.

[6] *See* Part I.B., *infra*.

A. The State Has Compelling Interests In Protecting Women From The Harms Associated With Abortion.

One need only observe the language of *Roe v. Wade*, *Planned Parenthood v. Casey*, and *Gonzales v. Carhart*—the current bedrocks of abortion jurisprudence—to understand that the Supreme Court affirms states' interests in protecting the health and welfare of women. In *Roe*, the Court stated the following:

> [A]ppellant and some *amici* argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. *With this we do not agree*. Appellant's arguments that Texas either has no valid interest at all in regulating the abortion decision, or no interest strong enough to support any limitation upon the woman's sole determination, are *unpersuasive*. The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. As noted above, *a State may properly assert important interests in safeguarding health*, in maintaining medical standards, and in protecting potential life.

Roe v. Wade, 410 U.S. 113, 153-54 (1973) (emphasis added). The Court went on to conclude that, at some point in pregnancy, a state's interests in the protection of health become dominant, and that a woman's "privacy right" must be considered against those interests. *Id*. at 154, 155, 159, 162.

In setting up the famed *Roe* trimester framework, the Justices relied upon medical data that, at the time, suggested that abortion in the first trimester carried less maternal risk than childbirth. However, "time has undertaken some of *Roe's*

factual assumptions"[7] and, as is discussed in Part II, *infra*, abortion carries with it maternal medical risks that clearly implicate compelling state interests.

Unfortunately, many courts ignored the state interests affirmed in *Roe*. *Casey*, 505 U.S. at 871.[8] In *Casey*, the Court admonished post-*Roe* courts for going too far in striking down abortion restrictions, stating that such treatment was "incompatible" with the Court's recognition of states' interests. *Casey*, 505 U.S. at 875. The Court affirmed the principle that states have "legitimate ***interests from the outset of pregnancy in protecting the health of the woman*** and the life of the fetus." *Id*. at 846.

The Court went on to state that "[n]ot all governmental intrusion is of necessity unwarranted." *Id*. at 875. In fact, a state "may enact regulations to further the health or safety of a woman seeking an abortion," so long as there is no substantial obstacle. *Id*. at 878.[9]

In *Gonzales v. Carhart*, the Court strongly reaffirmed the abortion restrictions upheld in *Casey*, and reaffirmed the states' interests in protecting

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[7] *Casey*, 505 U.S. at 860.

[8] *See also id.* at 875 ("[T]he Court's experience applying the trimester framework has led to the striking down of some abortion regulations which in no real sense deprived women of the ultimate decision. Those decisions went too far….").

[9] "Regulations designed to foster the health of the woman seeking an abortion are valid if they do not constitute an undue burden." *Id*. at 878.

women and the unborn.[10] Furthermore, the Court specifically held that a state has an interest in ensuring that "so grave a choice is well informed." *Carhart* II, 167 L. Ed. 2d at 510.

In setting forth the correct standard for states and lower courts to follow, the Court stated that "[t]he question is whether the Act … imposes a substantial obstacle…." *Id*. at 508-09. "Where [a state] has a rational basis to act, and it does not impose an undue burden," a state may regulate and restrict abortion. *Id*. at 509-10. "Considerations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends." *Id*. at 515.

Finally, the Court in *Carhart II* scolded the lower courts for deciding such abortion regulation cases under facial challenges, stating that those "***facial attacks should not have been entertained in the first instance***." *Id*. (emphasis added).

In the case at hand, the County's Policy involves a straight-forward court approval process available to every female inmate.[11] There is no evidence of any

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[10] *See*, *e.g*., Carhart II, 167 L. Ed. 2d at 502 ("*Casey* rejected … the interpretation of *Roe* that considered all previabiltiy regulations of abortion unwarranted.").

[11] It may be argued that a court-approval process is time-consuming. However, the Court addressed such concerns in *Casey*, finding that a waiting period did not constitute an undue burden. *Casey*, 505 U.S. at 886-87. This is clearly analogous to any short waiting period an inmate might face before receiving a court order for transportation. ***There is no constitutional right to abortion on demand***. *Id*. at 887. The Policy is also analogous to the judicial bypass provisions upheld in

female prisoner being thwarted from obtaining a desired abortion in a timely manner. There is simply no substantial obstacle.

Moreover, the facial attack of this case cannot survive. The policy was not unconstitutional "as applied" to Ms. Doe; she utilized the timely court order process and obtained her abortion. As for the "class" of Plaintiffs remaining, their challenge amounts to nothing more than a facial attack on the Policy, which the Supreme Court has explicitly stated will not be tolerated.

B. The State Is Under No Duty To Provide, Fund, Or Encourage Abortion, And It May Constitutionally Encourage Childbirth Over Abortion.

The Court's abortion decisions regarding a woman's "choice" do not translate into an affirmative constitutional obligation on the part of the State to facilitate abortions. In fact, through a series of decisions, the Court has made it clear that states are under no duty to provide, fund, or encourage abortion.

In *Maher v. Roe*, the Court upheld a Connecticut prohibition of the use of public funds for abortions, with the exception of those that are "medically necessary." 432 U.S. 464 (1977) (holding that the government has no duty to fund abortions in order to facilitate an indigent woman's "choice," even when the state chooses to fund pro-life options). In the companion case *Beal v. Doe*, the Court

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Casey. *Id*. at 899. While the reasoning behind oversight of female inmates may not be the same as that for minors, the very fact of their imprisonment demonstrates questionable decision-making capacity and indicates a need for some oversight.

upheld a Pennsylvania statute that restricted the use of Medicaid funds for abortion to those that are "medically necessary," rejecting a challenge that the restriction violated Title XIX of the Social Security Act. 432 U.S. 438 (1977). In a third companion case, *Poelker v. Doe*, the Court upheld a St. Louis policy prohibiting the performance of abortion in public hospitals. 432 U.S. 519 (1977).

Then in 1980, the Supreme Court upheld the Hyde Amendment, which restricts federal funding of Medicaid abortions to cases of life endangerment.[12] *Harris v. McRae*, 448 U.S. 297 (1980). The Court held that laws strictly forbidding the use of public funds for abortions are not unconstitutional. *Id*. The Court also held that states participating in the Medicaid program are not required by Title XIX of the Social Security Act to fund medically necessary abortions for which there is no federal reimbursement under the Hyde amendment, reasoning that a state government could distinguish between abortion and "other medical procedures" because "abortion is inherently different" and that "no other procedure involves the purposeful termination of potential life." *Id*. at 325.

Likewise, in *Williams v. Zbaraz*, the Court upheld an Illinois statute prohibiting the use of state funds for abortions, except when necessary to save the woman's life. 448 U.S. 358 (1980). Nine years later, the Court upheld a Missouri statute which prohibited the use of public facilities or public personnel from

[12] Since 1994, rape and incest have been included as exceptions.

performing abortions. *Webster v. Reprod. Health Serv.*, 492 U.S. 490 (1989) (holding that the state can validly ban any public employee within the scope of his employment from performing or assisting in an abortion, and preclude the use of public facilities for such purposes).

Finally, in *Rust v. Sullivan*, the Court upheld federal regulations prohibiting personnel at family planning clinics that receive Title X funds from counseling or referring women regarding abortion. 500 U.S. 173 (1991). The Court held that the government can permissibly condition receipt of federal funding for services related to childbirth on the state's abstention from facilitating abortions in any way, including counseling and referral. *Id.*[13]

Furthermore, states are free to institute "persuasive measures" which encourage childbirth over abortion, even when such policies do not further a health interest. *Casey*, 505 U.S. at 886. The Court in *Maher* held that a state is free to use its power of funding to encourage childbirth over abortion. 432 U.S. 464. In *H.L. v. Matheson*, the Court held that the "Constitution does not compel a state to fine-tune its statutes so as to encourage or facilitate abortions." 450 U.S. 398, 413 (1981).

Later, in *Casey*, the Court stated the following:

[13] This is equally applicable to transport.

> Regulations which do no more than create a structural mechanism by which the State … may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose.[14] Unless it has that effect on her right of choice, a state measure designed to persuade her to choose childbirth over abortion *will be upheld if reasonably related to that goal*.

Casey, 505 U.S. at 877 (citation omitted) (emphasis added). This exact statement was reaffirmed in *Carhart II*. *Carhart II*, 167 L. Ed. 2d at 502. The Court went on to conclude that a state may express a preference for childbirth over abortion. *Casey*, 505 U.S. at 883.

In summary, the State is free to differentiate between elective abortion procedures and other elective medical procedures, and between childbirth and abortion. The State is under *no duty* to provide abortion as the Plaintiffs desire. Requiring a government entity to transport women for abortions—prisoners or otherwise—flies in the face of the aforementioned decisions and imposes an affirmative duty on the government to transport the women and thereby facilitate abortion. Not only can the government set forth policies limiting abortion in order to protect the health and welfare of women, it may set forth policies favoring childbirth even when no health interest is present. Here, however, both a health interest and childbirth interest are present.

[14] As already discussed, the Policy imposes no such obstacle, and such a "right" is not absolute.

Moreover, requiring transport for incarcerated women would provide *greater access* to abortion than the Supreme Court has provided for free women.[15] That result is simply not in line with the Court's abortion jurisprudence. Such a requirement also elevates the abortion "right" above all other rights which have been denied to inmates, including other familial and reproductive rights such as breastfeeding, conjugal visits, and procreation. *See, e.g.*, *Hernandez v. Coughlin*, 18 F.3d 133 (2nd Cir. 1994); *Goodwin v. Turner*, 908 F.2d 1395 (8th Cir. 1990); *Southerland v. Thigpen*, 784 F.2d 713 (5th Cir. 1986).

II. THE DOCUMENTED MEDICAL RISKS ASSOCIATED WITH SURGICAL ABORTION UNDERSCORE THE STATE'S COMPELLING INTERESTS

With the previous discussion in mind, it is important for this Court to understand the documented medical risks of abortion that support the County's compelling interests. Numerous medical studies have demonstrated the devastating health risks—both physical and psychological—of elective abortion. Even if the Plaintiffs disagree with these medical studies, "[t]he [U.S. Supreme] Court has given state and federal legislatures wide discretion to pass legislation in

[15] While it may be argued that incarcerated women are inhibited from pursuing abortion, it is not the State that has placed obstacles before inmates trying to pursue certain rights. Rather, it is the inherent nature of incarceration which, in accordance with long-standing precedent, legitimately brings about the necessary curtailment of many constitutional rights.

areas where there is medical and scientific uncertainty." *Carhart II*, 167 L. Ed. 2d at 513.

Furthermore, the Supreme Court has itself concluded that "[s]evere depression and loss of esteem can follow" an abortion, and that "it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained." *Id.* at 510. The Court stated that a state's interest is advanced "by the dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the *consequences that follow*" the abortion decision. *Id*. at 511 (emphasis added).

Thus, the following dangers underscore states' interests in protecting the health and welfare of women:

A. Women Who Abort Face Evidenced Physical Dangers.

Certain immediate risks of abortion are well-known. It is not debated that a woman risks a punctured uterus, infection from an incomplete abortion, pelvic inflammatory disease, and incompetent cervix.

Yet another physical outcome on the forefront of abortion research is the increased risk of preterm birth (PTB)[16] in subsequent pregnancies. At least 60 significant studies published since 1963 have demonstrated the link between

[16] Preterm birth occurs prior to the 37th week of pregnancy. TABER'S CYCLOPEDIC MEDICAL DICTIONARY 1772 (20th ed. 2001).

abortion and subsequent PTB.[17] In 2006, the Institute of Medicine, a subsidiary of the National Academy of Science, listed "prior first trimester induced abortion" as an "immutable medical risk factor" associated with PTB.[18] In addition, a 2005 study by Moreau et al. discovered that, after an induced abortion, women were 50 percent more likely to deliver before 33 weeks, and 70 percent more likely to deliver before 28 weeks in subsequent pregnancies.[19] Induced abortion was associated with an increased risk of premature rupture of the membranes, antepartum hemorrhage, and cervical and uterine abnormalities responsible for an increased risk of PTB.[20]

A 2003 study revealed that women face a doubled risk of "early premature birth" after two prior induced abortions, and that woman who have four or more induced abortions experience nine times the risk of "extremely early premature

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[17] *See* Rooney & Calhoun, *Induced Abortion and Risk of Later Premature Births*, 8[2] J. AM. PHYSICIANS & SURGEONS 46 (2003); Thorp et al., *Long-Term Physical and Psychological Health Consequences of Induced Abortion: Review of the Evidence*, 58[1] OBSTET. & GYN. SURVEY 67 (2003). Studies failing to demonstrate a link have not been statistically significant. Rooney & Calhoun, *supra*, at 46.

[18] Behrman & Butler, PRETERM BIRTH: CAUSES, CONSEQUENCES, AND PREVENTION 519 (2006).

[19] Moreau et al., *Previous Induced Abortions and the Risk of Very Preterm Delivery: Results of the EPIPAGE Study*, 112 BRIT. J. OBSTET. & GYN. 430-37 (2005).

[20] *Id*. at 430, 436.

birth"—an increase of 800 percent.[21] Another 2003 study revealed that induced abortion does in fact increase the risk of preterm birth and very low birth weight in subsequent pregnancies.[22] Furthermore, the risk of PTB increases with every abortion a woman has.[23]

A classic pregnancy resource book has also documented the link between PTB and induced abortion. In *Every Pregnant Woman's Guide to Preventing Premature Birth*,[24] Professor Barbara Luke writes, "[i]f you have had one or more induced abortions, your risk of prematurity with this pregnancy increases by about 30 percent."[25] She also details that birth before 32 weeks is ten times more likely when a woman has an incompetent cervix—itself an accepted risk factor of induced abortion.[26]

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[21] Rooney & Calhoun, *supra*, at 46. "Early premature birth" is defined as birth before 32 weeks gestation, and "extremely early premature birth" is defined as before 28 weeks gestation. *Id*.

[22] Thorp et al., *supra*, at 67, 75, 77.

[23] *Id*. at 75.

[24] This book has been endorsed by a number of leading medical doctors, including George D. Wilbanks, president of the American College of Obstetricians and Gynecologists. *See* Luke, EVERY PREGNANT WOMAN'S GUIDE TO PREVENTING PREMATURE BIRTH (1995) (back cover).

[25] *Id*. at 32.

[26] *Id*. at 40; Rooney & Calhoun, *supra*, at 47.

These findings are significant, as PTB is the leading cause of infant morbidity and mortality, and other preventative measures have proven futile; in fact, the rate of PTB has increased over the last two decades.[27] PTB is also a risk factor for later disabilities, such as cerebral palsy, as well as lower cognitive abilities and greater behavioral problems.[28] Because most women who abort do so early in their reproductive lives and desire to have children at a later time, the PTB-abortion link is particularly troublesome.[29] Moreover, PTB also poses risks to the mother's health. Studies have demonstrated that delivering a child before 32 weeks gestation increases a mother's breast cancer risk.[30]

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[27] Thorp et al., *supra*, at 75. In 2006, the Centers for Disease Control (CDC) announced that premature birth—and not birth defects, as originally believed—is the leading cause of infant mortality. Callaghan, *The Contribution of Preterm Birth to Infant Mortality Rates in the U.S.*, 118[4] PEDIATRICS 1566-73 (Oct. 2006).

[28] Rooney & Calhoun, *supra*, at 46-47.

[29] Moreau et al., *supra*, at 431.

[30] *See* Melbye et al., *Preterm Delivery and Risk of Breast Cancer*, 80[3-4] BRIT. J. CANCER 609-13 (1999); Hsieh et al., *Delivery of Premature Newborns and Maternal Breast-Cancer Risk*, 353 LANCET 1239 (1999). This increased risk is due to the fact that breast tissue is only matured into cancer-resistant tissue during the last eight weeks of pregnancy, when women receive protection from the estrogen overexposure experienced during the first two trimesters. Lanfranchi, *The Breast Physiology and the Epidemiology of the Abortion Breast Cancer Link*, 12[3] IMAGO HOMINIS 228-36 (2005).

In addition to PTB, abortion is a risk factor for placenta previa in subsequent pregnancies.[31] Placenta previa increases the risk of fetal malformation, perinatal death, and excessive bleeding during labor.[32]

While a direct link between breast cancer and abortion is controversial, it is *undisputed* that a first full-term pregnancy offers a protective effect against subsequent breast cancer development.[33] A woman who aborts her first pregnancy also loses the protective effect against cancers of the cervix, colon and rectum, ovaries, endometrium, and liver.[34]

B. Women Who Abort Face Evidenced Psychological and Behavioral Dangers.

As stated in *Casey*, "[i]t cannot be questioned that psychological well-being is a facet of health." *Casey*, 505 U.S. at 882. Numerous studies have examined the

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[31] *See* Reardon et al., *Deaths Associated with Abortion Compared to Childbirth: A Review of New and Old Data and the Medical and Legal Implications* 25, available at: http://www.afterabortion.org/research/DeathsAssocWithAbortionJCHLP.pdf (last visited Mar. 12, 2007) and originally published at 20[2] J. CONTEMP. HEALTH LAW & POL'Y 279 (2004) (hereinafter Reardon I).

[32] Barrett et al., *Induced Abortion: A Risk Factor for Placenta Previa*, AM. J. OBSTET. & GYN. 141:7 (1981). "Perinatal" refers to the time period beginning after the 28th week of pregnancy and ending 28 days after birth. TABER'S, *supra*, at 1630.

[33] Reardon I, *supra*, at 24.

[34] *Id*.

effect abortion has on the mental state of women and confirm that it poses drastic effects.

One such study by Fergusson et al. should be particularly interesting to this Court, as it focused on women aged 15 to 25 years—the age category of Ms. Doe.[35] That study, which examined information gathered on children born at a New Zealand hospital over the course of 25 years, found that women having abortions have elevated rates of subsequent mental health problems, including depression, anxiety, suicidal behaviors, and substance use disorders.[36] These disturbances occurred *after* the abortions, dismissing the suggestion that such disturbances led to the abortions in the first place.

The study also explained that contrary conclusions, such as that held by the American Psychological Association (APA), have been based on a relatively small number of studies with certain limitations.[37] In fact, the research detailed in the study prompted the APA to withdraw its position denying the link between abortion and psychological harm.

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[35] In addition, the study was authored by an abortion supporter.

[36] Fergusson et al., *Abortion in Young Women and Subsequent Mental Health*, 47[1] J. CHILD PSYCHOL. & PSYCHI. 16 (2006). For example, girls aged 15 to 18 who had abortions have a 78.6 percent chance of experiencing major depression. *Id*. at 19. "This association persisted after adjustment for confounding factors." *Id*. at 16.

[37] *Id*. at 22-23.

A study in Canada demonstrated that post-abortive women are treated for mental disorders 41 percent more often than delivering women.[38] Another study in Virginia found that post-abortive women had 62 percent more subsequent mental health claims than women who did not have abortions.[39] Other studies have linked a history of abortion to sleeping disorders, eating disorders, and promiscuity—unarguably destructive to women's health.[40]

While the link between abortion and "post-traumatic stress disorder" is debated,[41] abortion can increase stress and decrease coping abilities.[42] "Anxiety and depression have long been associated with induced abortion," and in one study anxiety symptoms were identified as the most common adverse post-abortion response.[43] Another study revealed that post-abortive women who had not

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[38] Badgley et al., *Report of the Committee on the Operation of the Abortion Law* 319 (Government of Canada, Minister of Supply & Services 1977).

[39] Reardon I, *supra*, at 16.

[40] *Id*. at 22-23 (citing numerous studies).

[41] However, one recent study revealed that 65 percent of post-abortive American women experience multiple symptoms of post-traumatic stress disorder. *See* Rue et al., *Induced Abortion and Traumatic Stress: A Preliminary Comparison of American and Russian Women*, 10[10] MED. SCI. MONIT. SR5-16 (2004).

[42] *Id*.

[43] *Id*. at SR6.

previously suffered from sleep disorders are more likely than delivering women to be treated for sleep disorders or disturbances.[44]

The link to psychological effects such as anxiety and depression is alarming. Post-abortive women are reportedly three times more likely to die from causes attributed to mental disease than delivering women.[45] Mental disorders have been linked to subsequent substance abuse as well as suicide.[46] One study demonstrated that up to 30 percent of women experience "clinical levels of anxiety and/or high levels of general stress one month after induced abortion."[47] The Fergusson study found that 42 percent of young post-abortive women experience major depression—almost double the rate of non-pregnant women. The study also found that post-abortive women are twice as likely to drink alcohol at dangerous levels,

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[44] Reardon & Coleman, *Relative Treatment Rates for Sleep Disorders and Sleep Disturbances Following Abortion and Childbirth: A Prospective Record-Based Study*, 29 J. SLEEP 105-06 (2006).

[45] Reardon et al., *Deaths Associated with Pregnancy Outcome: A Record Linkage Study of Low Income Women*, 95[8] S. MED. J. 834, 838 (2002) (hereinafter Reardon II).

[46] See *infra* this Section.

[47] Coleman, *Induced Abortion and Increased Risk of Substance Abuse: A Review of the Evidence*, 1 CURRENT WOMEN'S HEALTH ISSUES 21, 23 (2005) (citing Bradshaw & Slade, *The Effects of Induced Abortion on Emotional Experiences and Relationships: A Critical Review of the Literature*, 23 CLIN. PSYCHOL. REV. 929-58 (2003)).

three times as likely to be addicted to illegal drugs, and twice as likely to experience anxiety disorders.[48]

Similarly, a study by Cougle et al. found that women who abort their first pregnancies were 65 percent more likely to score in the "high risk" range for clinical depression than women who delivered.[49] Noting that depression is a risk factor for suicide, the study explained that its findings were in line with others linking abortion to increased risk of suicide.[50] The study also explained that childbirth may have a protective effect against suicide, while abortion may have a "deleterious effect."[51]

In addition to these documented psychological risks, medical research also indicates a link between abortion and certain behavioral risks, such as increased substance abuse.[52] This is of particular import in the case at hand, in which Ms.

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[48] *See generally* Fergusson et al., *supra*; *see also* Ertelt, *British Psychologists: Abortions Cause Women Mental Health Problems*, available at: http://www.lifenews.com/nat2697.html (last visited Mar. 21, 2007).

[49] Cougle et al., *Depression Associated with Abortion and Childbirth: A Long-Term Analysis of the NLSY Cohort*, 9[4] MED. SCI. MONIT. CR157, CR162 (2003).

[50] *Id*.

[51] *Id*.

[52] For a list of numerous medical studies, s*ee* Reardon I, *supra*, at 16 nn.91-92. Substance abuse is the "misuse of a variety of substances," including "alcohol, tobacco, illegal and legal drugs, and/or other mood-altering substances." Coleman, *supra*, at 21. "Stress has been strongly implicated in the etiology of substance

Doe already has a history of abusing alcohol. One study reviewing research over the last few decades concluded that there is a significant association between abortion history and substance abuse.[53] Another study indicated that, among women with no prior histories of abuse, post-abortive women are 4.5 times more likely to report subsequent abuse.[54]

A 2006 study revealed that the rate of post-pregnancy substance abuse was 3.8 percent for women who did not abort a first pregnancy, but 14.6 percent for those who did.[55] With an estimated 870,000 first-time abortions per year, a reasonable projection indicates that 54,000 women each year begin abusing drugs or alcohol after their abortions.[56] Furthermore, "use of illicit drugs other than marijuana was 6.1 times higher among women with a history of induced abortion

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abuse," and thus a link between the anxiety caused by abortion and substance abuse is entirely plausible. *Id*. at 24.

[53] *Id*. at 21, 23.

[54] *Id*. at 22 (citing Reardon & Ney, *Abortion and Subsequent Substance Abuse*, 26 AM. J. DRUG ALCOHOL ABUSE 61-75 (2000)).

[55] Reardon, *New Study Confirms Link Between Abortion and Substance Abuse* (Elliot Inst. 2006), available at: http://www.afterabortion.info/drugs.html (last visited Mar. 21, 2007).

[56] *Id*.

when compared to women without a history."[57] Moreover, many women carry such negative behaviors—as well as anxiety—into subsequent pregnancies.[58]

C. Women Who Abort Face A Greater Risk of Death.

While the Court in *Roe* relied on now-outdated evidence that abortion in the first trimester is safer than childbirth,[59] the "best available evidence" now contradicts the facts relied upon in *Roe*.[60] Instead, "[r]ecent analyses of large medical databases" have now shown that "when mortality rates associated with abortion and childbirth are examined using a single uniform standard, ***significantly higher mortality rates are associated with abortion***."[61] Specifically, women who

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[57] Coleman, *supra*, at 22 (citing Yamaguchi & Kandel, *Drug Use and Other Determinants of Premarital Pregnancy and its Outcome: A Dynamic Analysis of Competing Life Events*, 49 J. MARRIAGE FAM. 257-70 (1987)).

[58] *Id*. at 23. *See also* Coleman et al., *Substance Use Among Pregnant Women in the Context of Previous Reproductive Loss and Desire for Current Pregnancy*, 10 BRIT. J. HEALTH PSYCHOL. 255-68 (2005) (finding that women with a history of induced abortion are three times more likely to use illegal drugs during subsequent pregnancies).

[59] It must be noted that, when *Roe* was decided, the evidence relied upon indicated that the deaths attributable to immediate *abortion complications occurred primarily among healthy women* who had little or no risk of dying from childbirth. Reardon I, *supra*, at 26. No studies have demonstrated when, if ever, abortion reduces a woman's risk of death compared to childbirth. *Id*. One study has demonstrated that therapeutic abortion would not have prevented any of the maternal deaths examined in that study. *Id*.

[60] *Id*. at 2.

[61] *Id*.

abort face a higher likelihood of death from suicide, accidents, homicide, violence, and natural causes.[62] One study has revealed that ***post-abortive women are 62 percent more likely to die from these causes*** than women who carry to term.[63]

1. Death from Suicide

Medical studies have demonstrated that women who abort are far more likely than women who deliver to later commit suicide.[64] A 2002 study examined the effects on women in California over an eight-year period following abortion.[65] That study revealed that post-abortive women were 3.1 times more likely to die from suicide than delivering women.[66] Likewise, a study in Finland demonstrated that post-abortive women are 3.7 times more likely to die from suicide in the year following abortion than non-pregnant women, and 6.5 times more likely to die from suicide than women who delivered.[67] Occurrences of post-abortive women

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[62] *See generally id*.

[63] Reardon II, *supra*, at 836.

[64] *See*, *e.g*., Reardon I, *supra*, at 12 n.64 (citing numerous resources documenting that an undisturbed pregnancy is associated with a reduced suicide rate).

[65] Reardon II, *supra*, at 834.

[66] *Id*. at 838; *see also* Reardon I, *supra*, at 11.

[67] Gissler et al., *Pregnancy-Associated Deaths in Finland 1987-1994: Definition Problems and Benefits of Record Linkage*, 76 ACTA OBSTET. ET GYN. SCANDIAVICA 651, 653 (1997); *see also* Reardon I, *supra*, at 11.

killing their born children in concert with a suicide attempt have also been documented in the United States.[68]

While women with prior psychiatric illness have higher suicide rates following their abortions, findings indicate that childbirth is likely to reduce subsequent suicide attempts in women with prior psychological problems.[69] Some have suggested that self-destructive women may be more likely to abort in the first place, but a study in Great Britain revealed that "the increased risk of suicide after an induced abortion" was likely "a consequence of the procedure itself."[70] The study in California also revealed that abortion may aggravate pre-existing psychological disturbances and place post-abortive women at a higher risk of

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[68] Reardon I, *supra*, at 12.

[69] *Id*. at 12. In one study of women with a previous history of psychiatric problems, none who carried to term committed suicide over an eight to thirteen year follow-up, but five percent of those who aborted subsequently committed suicide. *Id*.

[70] Morgan et al., *Suicides After Pregnancy: Mental Health May Deteriorate as a Direct Effect of Induced Abortion*, 314 BRIT. MED. J. 902 (1997).

suicide.[71] In other words, studies indicate that the increased suicide rate is not related to any previous tendencies, but to the abortion incidents.[72]

Teenagers are generally at an even higher risk of suicide.[73] This is of particular import here, where Ms. Doe was 19 at the time of her incarceration and requested abortion.

2. Death from Accidents

The study in Finland also found that the risk of death from accidents was more than four times higher for women who had aborted in the prior year as compared to women who had carried to term.[74] Likewise, the study in California found that women who aborted and had no known subsequent pregnancies were eighty-two percent more likely to die from accidental injuries than women who delivered and had no subsequent pregnancies.[75] At least two other studies have

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[71] Reardon I, *supra*, at 14.

[72] Interestingly, the suicide rate among Chinese women is the highest in the world, where women are forced to undergo abortions in order to comply with the "one child" family planning policy. *Id*. at 15.

[73] *Id*.

[74] *Id*.; Gissler et al., *supra*, at 653.

[75] Reardon II, *supra*, at 838; *see also* Reardon I, *supra*, at 15.

also found that women who abort are more likely to be treated for injuries in the year following abortion.[76]

One suggested explanation for these results is that women who deliver are more careful, while women who abort are more prone to taking dangerous risks.[77] If that is the case, the State should be even more concerned about prisoners, who have already demonstrated a tendency toward "risky" behavior. Higher rates of alcohol consumption and drug use, as discussed *supra*, also tend to increase a woman's risk of fatal accidental injuries.[78]

3. Death from Homicide and Violence

Another finding of the Finland study revealed that the risk of dying from homicide for post-abortive women was more than four times higher than the risk of homicide among the general population.[79] In California, deaths by homicide of post-abortive women were 93 percent higher.[80] Further investigation of this link is necessary, but it is possible that many of these deaths are related to domestic

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[76] Reardon I, *supra*, at 15.

[77] *Id*.

[78] *Id*. at 16-17.

[79] *Id*. at 17; Gissler et al., *supra*, at 654.

[80] Reardon II, *supra*, at 838; *see also* Reardon I, *supra*, at 17.

violence.[81] For example, women who are in violent relationships may be more likely to choose abortion (which, in that case, calls into question the woman's "choice" to have the abortion); on the other hand, women may face violence when a secret abortion is revealed.[82]

Post-abortive women are also more likely to die from violence, generally.[83] The study in Finland revealed that women who gave birth had a 47 percent risk of death from violence compared to women who had not been pregnant the previous year; but women who had abortions had a 181 percent risk of death.[84] In the California study, the risk of death for post-abortive women was 178 percent the risk of delivering women.[85] A study in Canada revealed that post-abortive women are treated 25 percent more often for injuries or other conditions resulting from violence.[86]

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[81] Reardon I, *supra*, at 17.

[82] *Id*.

[83] *See*, *e.g*., Coleman, *supra*, at 27.

[84] Reardon I, *supra*, at 19 (citing Gissler & Hemminki, *Pregnancy-Related Violent Deaths*, 27 SCANDINAVIAN J. PUB. HEALTH 54 (1999)).

[85] Reardon II, *supra*, at 835; *see also* Reardon I, *supra*, at 19.

[86] Badgley et al., *supra*, at 319.

"[A]bortion is at least a marker, if not a causal factor, for increased risk of death from violence. A causal interpretation is supported by other research, clinical experience, and the self-reports of post-abortive women."[87] Based upon the California study, it is estimated that between 766 and 4,021 violent deaths per year may be related to or aggravated by a prior abortion.[88]

4. Death from Natural Causes

The Finland study demonstrated that the risk of death from natural causes was 60 percent higher for women who had abortions than for women who delivered.[89] Only one woman in the group studied had an abortion for maternal health reasons, so prior maternal health could not be cited as an explanation.[90] Likewise, the study in California revealed that post-abortive women were 44 percent more likely to die from natural causes than women who delivered.[91] A

[87] Reardon I, *supra*, at 21.

[88] *Id*.

[89] *Id*.

[90] *Id*.

[91] Id.; Reardon II, *supra*, at 838.

study in London also demonstrated an 80 percent increase in requests for healthcare services by post-abortive women during the year following abortion.[92]

One study examining the health ratings of women found that women with a history of pregnancy loss possessed significantly lower general health ratings than other women.[93] While miscarriage was also associated with a lower health score, induced abortion was more strongly associated and more frequently identified by women as the cause of their decreased health status.[94]

What causes these natural deaths? As discussed previously, risks associated with abortion include placenta previa and other conditions that may harm the woman. Some studies have also linked increased rates of genital tract infection, pelvic inflammatory disease, endometritis, ectopic pregnancy, retained placenta, and preeclampsia in subsequent pregnancies.[95]

However, not all injuries and deaths from abortion are pregnancy related. Abortion has been linked to mental disorders and substance abuse, *see supra*, which in turn have a negative impact on health. For example, "[h]eavier smoking

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[92] Berkeley et al., *Demands Made on General Practice by Women Before and After an Abortion*, 34 J. ROYAL COLLEGE GEN. PRACTITIONERS 310, 313 (1984).

[93] Reardon I, *supra*, at 22.

[94] *Id*.

[95] *Id*. at 25.

has been correlated to higher levels of anxiety among women with a history of abortion," and smoking itself carries drastic risks.[96] Current medical literature reveals that, at a minimum, there is a two percent increase in smoking among women who have abortions.[97] That would lead to 4,310 additional cancer cases each year, and at current mortality rates, 3,750 would die.[98]

The California study revealed that post-abortive women are also three times more likely to die from circulatory diseases (for example, heart disease) and five times more likely to die of cerebrovascular disease than women who delivered.[99] Depression, discussed *supra*, is also an independent risk factor for heart disease, further evidencing the link between abortion and heart disease.[100] Depression is

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[96] *Id*. at 23.

[97] *See* Strahan, *Women's Health and Abortion: Risk of Premature Death in Women From Induced Abortion, Preliminary Finding*, 5[2] ASS'N FOR INTERSDIS. RESEARCH IN VALUES & SOC. CHANGE NEWSLETTER 1-8 (1993).

[98] Reardon I, *supra*, at 23.

[99] *Id*.; Reardon II, *supra*, at 838.

[100] Reardon I, *supra*, at 24 (citing various medical studies).

also associated with several forms of cancer.[101] As many as 32,000 cancer deaths per year may be attributable to the negative maternal health effects of abortion.[102]

[101] Linkins & Comstock, *Depressed Mood and Development of Cancer*, 132 AM. J. EPIDEMIOLOGY 962 (1990).

[102] Strahan, *supra*.

CONCLUSION

The bottom line is that ***abortion hurts women***, and the County has compelling interests in protecting the health and welfare of its female inmates from the dangers of abortion. These compelling interests underscore and support affirmance of the County's Policy. Therefore, the decision of the lower court must be reversed.

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CERTIFICATE OF COMPLIANCE

Pursuant to ARCAP 14, I certify that the attached brief uses proportionally spaced type of 14 points or more, is double-spaced using a roman font, and contains 6,748 words, in accordance with ARCAP 16.

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CERTIFICATE OF SERVICE

I hereby certify that on _____, 2007, I served two paper copies of the foregoing Brief to counsel listed below by depositing said copies in U.S.P.S. first-class mail, postage paid.

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