IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

JANE ROE, Plaintiff, v. LARRY CRAWFORD, Director of the Missouri Department of Corrections, in his official capacity, and CYNDI PRUDEN, Acting Superintendent, Women's Eastern Reception, Diagnostic and Correctional Center, in her official capacity, Defendants.	CIVIL ACTION NO. 05-4333-CV-C-DW **APPLICATION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION** **EXPEDITED HEARING REQUESTED**

MEMORANDUM OF LAW IN SUPPORT OF EMERGENCY MOTION FOR EXPEDITED TRO/PRELIMINARY INJUNCTIVE RELIEF

PRELIMINARY STATEMENT

As the United States Supreme Court has made clear, a woman has a fundamental right to decide whether or not to bear a child. This right survives incarceration. A prison may not, therefore, completely deny an inmate the right to obtain a timely, safe, and legal termination of pregnancy. Additionally, denying an inmate access to medical care for the purpose of terminating her pregnancy constitutes deliberate indifference to an inmate's serious medical needs in violation of the Eighth Amendment's prohibition on cruel and unusual punishment as applied to the States through the Fourteenth Amendment. Plaintiff Jane Roe has repeatedly requested release in order to obtain medical services to terminate her pregnancy. The Defendants have refused to grant Plaintiff's request. Therefore, without immediate relief from

this Court, Plaintiff will be permanently denied her right to terminate her pregnancy, and forced to carry to term against her will.

Plaintiff is currently incarcerated at the Women's Eastern Reception, Diagnostic and Correctional Center (WERDCC). At the time of this motion, Plaintiff is approximately 16 – 17 weeks pregnant. Medical services to terminate a pregnancy are not offered at the detention facility and thus, Plaintiff must seek the services of an outside medical clinic. Defendants have refused to allow Plaintiff to leave the premises to have this outpatient surgery performed. Because of the prison's refusal, Plaintiff is currently unable to obtain medical services to terminate her pregnancy.

Plaintiff seeks an emergency temporary restraining order/preliminary injunction directing Defendants to arrange Plaintiff's temporary release and transport to Planned Parenthood for the earliest available appointment date on which she can obtain medical services to terminate her pregnancy.

ARGUMENT

Plaintiff seeks injunctive relief under Fed.R.Civ.P. 65. Plaintiff meets all of the elements for injunctive relief.

A. Plaintiff Meets the Standard for Granting Preliminary Relief.

The standard for evaluating a request for preliminary injunctive relief under Rule 65 is well established in this Circuit. To determine whether a plaintiff has met this Circuit's standard for the issuance of preliminary injunctive relief, the court should consider four factors:

1. The threat of irreparable harm to the movant;
2. The balance between this harm and the injury that granting the injunction will inflict on other parties;
3. The probability that movant will succeed on the merits; and

4. The public interest.

Dataphase Systems, Inc. v. C L Systems, Inc., 640 F.2d 109, 114 (8th Cir. 1981)(en banc); *Heartland Academy Community Church v. Waddle*, 335 F.3d 684, 689-90 (8th Cir. 2003); *Easy Returns Worldwide, Inc. v. U.S.*, 266 F. Supp.2d 1014, 1017 (E.D. Mo. 2003). A court should balance these considerations when deciding whether to issue an injunction. *Mid-America Real Estate Co. v. Iowa Realty Co., Inc.*, 406 F.3d 969, 972 (8th Cir. 2005); *Easy Returns* 266 F. Supp.2d at 1018. In balancing the equities, no single factor is determinative, *Dataphase*, 640 F.2d at 113, although there must be a finding of irreparable harm. *Id.* at 114 n. 9; *United Healthcare Ins. Co. v. AdvancePCS*, 316 F.3d 737, 740 (8th Cir. 2002). At core, the question is whether the balance of equities so favors the movant that justice requires the court to intervene until the merits are finally determined. *Dataphase*, 640 F.2d at 113. Thus, for example, where the movant has raised a substantial question and the equities are otherwise strongly in her favor, the showing of success on the merits can be less. *Id.*

In this case, the facts clearly show that Plaintiff will be irreparably harmed by the Defendants' actions; that her likelihood of success is substantial; and that the balance of hardships as well as the public interest strongly favors the issuance of the injunction.

B. Plaintiff will Suffer Irreparable Injury if She is Not Allowed Access to Medical Services to Terminate Her Pregnancy.

The facts of this case demonstrate that Plaintiff will suffer immediate and irreparable harm if she is not granted a temporary release in order to obtain access to medical services to terminate her pregnancy. The right to choose to terminate a pregnancy is, by its nature, of limited duration. A woman who is blocked or seriously delayed in her effort to obtain an such services cannot later exercise her choice even if the impediment to doing so is later removed.

That denial of a woman's right to choose to terminate her pregnancy constitutes irreparable injury was made clear in *Roe v. Wade*, 410 U.S. 113, 153 (1973):

> The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it.

Here, Plaintiff faces irreparable harm if she is not granted the relief that she seeks. The Defendants conduct has already delayed Plaintiff's procedure by six weeks. *See* Verified Complaint at ¶ 24. Defendants will in effect force Plaintiff to carry an unwanted pregnancy to term. After Plaintiff's careful consideration in choosing to terminate her pregnancy, the substantial intrusion on Plaintiff's bodily integrity is a harm of the most serious nature. Any delay caused by Defendants' actions also irreparably harms Plaintiff. Plaintiff will be exposed to increased medical risks, not to mention further substantial expense if she is forced to terminate her pregnancy later in her second trimester. *See Williams v. Zbaraz*, 442 U.S. 1309, 1314 (Stevens, J., sitting as Circuit Justice (increased risk of "maternal morbidity and mortality" supports claim of irreparable injury); *Women's Medical Prof'l Corp. v. Voinovich*, 911 F. Supp 1051, 1091-92 (S.D. Ohio 1995) (enjoining abortion restrictions in Ohio HB 135) *aff'd* 130 F. F3d 187 (6th Cir. 1997) (increased medical risks constitute irreparable harm). "Time is likely to be of the essence in an abortion decision." *H.L. v. Matheson*, 450 U.S. 398, 412 (1981).

C. The State of Balance Between Plaintiff's Harm and The Injury that Granting the Injunction Will Inflict on Defendants Strongly Favors Plaintiff.

As discussed, *supra*, the harm to Plaintiff in the absence of relief from this Court will be irreparable and permanent. In contrast, the injunction would impose no measurable harm on Defendant. In order to facilitate Plaintiff's access to medical services to terminate her pregnancy, Defendants will have to release Plaintiff from WERDCC for part of a day and arrange for transportation to an outpatient clinic in St. Louis. Any minimal expense incurred by Defendants in arranging transportation and/or processing Plaintiff's release is no more than that which is incurred when Defendants allow other inmates to leave to obtain other outside medical care, whether emergent or otherwise.

The impact on Defendants in providing such negligible resources would be *de minimis* compared to the injury Plaintiff suffers from delay in obtaining medical services to terminate her pregnancy or being forced to carry an unwanted pregnancy to term. Moreover, Defendants' conduct has had the effect of delaying the procedure until later in her pregnancy. As discussed *supra*, further delay threatens to make the procedure more burdensome and dangerous to Plaintiff. Moreover, further delays will only serve to force Plaintiff towards a two-day procedure which will require a longer release for Plaintiff. Thus, the sooner Defendants stop obstructing Plaintiff's constitutional right to choose, the less impact her release and transport will have on Defendants' resources. Finally, if Plaintiff is forced to carry her pregnancy to term, Defendants will be required at that time to escort Plaintiff to an outside medical facility for delivery.

A balancing shows that Plaintiff has raised a substantial question and that the equities are manifestly in her favor.

D. Plaintiff is Likely to Succeed on the Merits by Showing that Defendants Actions Impose an Undue Burden on Plaintiff's Right to Choose and by Showing that Defendants are acting with Deliberate Indifference to the Serious Medical Needs of the Plaintiff.

In 1992, the Supreme Court in *Planned Parenthood v. Casey* reaffirmed what it characterized as the "central holding" of *Roe v. Wade*:

> Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.

505 U.S. 833 (1992). In *Casey*, the Supreme Court adopted the "undue burden" standard for assessing state laws or regulations that restrict abortion. The Court explained:

> A finding of an undue burden is shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends.

Id. at 877. This principle was reaffirmed by the Supreme Court in *Stenberg v. Carhart*, 530 U.S. 914 (2000).

There is no question that by preventing Plaintiff from obtaining medical services to terminate her pregnancy, Defendants, who are state actors, are permanently depriving Plaintiff of her constitutional rights guaranteed under the Eighth and Fourteenth Amendments of the U.S. Constitution. The right to privacy in general, and the right to choose to terminate a pregnancy in particular, survive incarceration. *Monmouth County Correctional Inst. Inmates v. Lanzaro*, 834 F.2d 326, 334 n.11 (3d Cir. 1987), *cert. denied*, 486. U.S. 1006 (1988); *Doe v. Arpaio*, No. CV 2004-009286, 2005 WL 2173988, *1 (Ariz. Super. Aug. 25, 2005). In *Lanzaro*, the defendants,

the warden and medical staff at a correctional facility refused to provide access to medical services to terminate pregnancy to pregnant females without an order from a state court. The Third Circuit found the *Lanzaro* defendants' actions impermissibly infringed on the inmates' constitutional rights under the Fourteenth Amendment. Thus the Third Circuit directed the defendants to end the court order policy and ordered defendants to arrange transportation and funding for inmates seeking medical services to terminate their pregnancies. *See also Doe v. Barron*, 92 F. Supp. 2d 694, 697 (S.D. OH. 1999).

The obstacle imposed by Defendants in this case far surpasses even those of the defendants in *Lanzaro*. Here Defendants are not creating irrational procedural obstacles for Plaintiff, they are outright obstructing and preventing her ability to terminate her prgnancy. Because Plaintiff is unable to obtain medical services to terminate her pregnancy without a temporary release from prison, Defendants' refusal completely eviscerates her constitutional right to do so. In the current circumstance, Defendants' refusal serves as a complete bar to Plaintiff, because they will continue to incarcerate her past the point at which Plaintiff could exercise her right. Since Defendants' conduct will prevent Plaintiff from terminating her pregnancy, this necessarily violates her right of reproductive choice by creating a substantial obstacle, *Casey*, 505 U.S. at 877.

Further, Defendants' extreme action in this case is not part of a general policy reasonably related to prison security. "'[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.'" *Lanzaro*, 834 F.2d at 334 (quoting *Turner v. Safely*, 482 U.S. 78, 89 (1987)). Legitimate penological interests are the deterrence of crime, rehabilitation of prisoners and institutional

safety. *See id*. at 333. Administrative and financial burdens are not legitimate penological interests. *Id*. at 336. The Defendants' conduct in this case serves no penological interest and cannot be distinguished from other medical situations where the State allows procedures to be performed and provides security and transportation.. WERDCC arranges for the transport of inmates for other reasons including for treatment of other medical conditions. "[A]ll other things being equal, inmates who wish to have an abortion pose no greater security risk than any other inmate who requires outside medical attention." *Id*. at 338 (citation omitted). Moreover, "[s]ecurity is no less protected … by the exercise of a prisoner's right to [elect] … an abortion." *Id*. (*quoting* Vitale, *Inmate Abortions--The Right to Government Funding Behind Prison Gates*, 48 Fordham L.Rev. 550, 556 (1980)).

Defendants' conduct also violates Plaintiff's Eighth Amendment rights, as applied to the States through the Fourteenth Amendment. A prison official's deliberate indifference to a serious medical need violates the Eighth Amendment. *See Estelle v. Gamble*, 429 U.S. 97, 104 (1976). Deliberate indifference occurs when prison officials "intentionally deny[] or delay[] access to medical care or intentionally interfe[] with prescribed treatment." *Meloy v. Bachmeier*, 302 F.3d 845, 849 (8th Cir. 2002); *see also Estelle*, 429 U.S. at 104 (the State is obligated "to provide medical care for those whom it is punishing by incarceration.").

Procedures to terminate pregnancy are a serious medical need. *See Lanzaro*, 834 F.2d at 348-49; *accord Reproductive Health Services v. Webster*, 662 F. Supp. 407, 429 (W.D. Mo.1987), *rev'd in part on other grounds*, 492 U.S. 490 (1987); *Doe v. Arpaio*, No. CV 2004-009286, 2005 WL 2173988, *1 (Ariz. Super. Aug. 25, 2005). Prison officials display deliberate indifference when they prevent an inmate from obtaining medical services to terminate her

pregnancy. *See Lanzaro*, 834 F.2d at 347. Indeed, even delaying such a procedure amounts to deliberate indifference. *See id*. at 347 (noting that "[t]he *failure of [prison] officials even to attempt to minimize the delay* in access to abortion services constitutes deliberate indifference to the medical needs of inmates electing to terminate their pregnancies.") (emphasis added). Thus, there can be no doubt that wholly denying an inmate the ability to obtain this medical care constitutes deliberate indifference.

Such emphasis on minimizing delay and ensuring access is unsurprising. The right to choose to terminate a pregnancy is, by its nature, of limited duration. A pregnant woman who is blocked in her effort to terminate her pregnancy will not be able to exercise her choice if too much time passes. In addition, while medical services to terminate a pregnancy remain safe throughout pregnancy, delay significantly increases the risks. *See id.*, 834 F.2d at 339. For all these reasons, a prison is obliged not only to provide an inmate with access to medical services to terminate a pregnancy, but also that access must be timely if it is to be meaningful. *See id.*; *Roe v. Leis*, No. C-1-00-651, 2001 U.S. Dist. LEXIS 4348, at *10 (S.D. Ohio Jan. 10, 2001) (court issued injunction requiring county sheriff to provide inmate with access to medical services to terminate her pregnancy); *Doe v. Barron*, 92 F. Supp. 2d 694 (S.D. Ohio 1999)(ordering director of correctional center to provide pregnant inmate with access to medical services to terminate her pregnancy); *Ptaschnick v. Luzerne County Prison Bd.*, No. 3 CV-98-1887 (M.D. Penn. Nov. 20 1998) (enjoining defendants from preventing inmate from obtaining medical services to terminate her pregnancy).

Thus, by Defendants absolutely barring Plaintiff from obtaining medical services to terminate her pregnancy, Defendants demonstrate a deliberate indifference to a serious medical

need of Plaintiff's in violation of her Eighth Amendment rights.

E. Relief is Not Inconsistent with the Public Interest.

Ordering Defendants to assist Plaintiff in obtaining medical services to terminate her pregnancy is not inconsistent with the public interest because the public has no interest in effectuating an unconstitutional policy in a correctional facility. In *Planned Parenthood Ass'n v. City of Cincinnati*, 822 F.2d 1300 (6th Cir. 1987), the court held that "the public is certainly interested in the prevention of enforcement of ordinances which may be unconstitutional." *See also, Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 568 (6th Cir. 1982). "[T]he public interest … requires obedience to the Constitution." *Carey v. Klutznick*, 637 F.2d 834, 839 (2d Cir. 1980). Indeed, the public is "always well served by protecting the constitutional rights of all of its members." *Reinert v. Haas*, 585 F. Supp 477, 481 (S.D. Iowa 1984).

In the instant case, there is no conceivable way the public interest will be adversely affected by Plaintiff's terminating her pregnancy, the most private and intimate of decisions that is a well-established, constitutionally protected right. *See Doe*, 92 F. Supp2d at 697 (S.D. OH. 1999) ("It is in the public's interest to uphold that right [to choose to terminate a pregnancy] when it is being denied by prison officials absent medical or other legitimate concerns.") Further, Plaintiff or others, not the State, will be paying her own medical expenses. Thus, there is no harm done to the public interest. Moreover, immediate relief will reduce the burden on the State by avoiding the need for a longer release for a procedure after 18 or 20 weeks.

CONCLUSION

Since Plaintiff will suffer irreparable injury if Defendants prevent her from securing access to medical services to terminate her pregnancy; since Plaintiff will succeed on her Section

1983 claim because Defendants' actions place an undue burden on her right to reproductive choice and violate the Eighth Amendment; since the public interest will not be violated; and since Defendants will not be harmed by permitting Plaintiff to terminate her pregnancy, she more than adequately demonstrates that she meets the standards for a TRO or preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2005, the Complaint, Motion, Memorandum of Law in Support, and Declarations of Sharon Tobin and James G. Felakos were served via Facsimile and First Class Mail upon the following:

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