

IN THE
**United States Court of Appeals
for the Eighth Circuit**

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

Plaintiff-Appellee,

v.

LARRY CRAWFORD, Director of the Missouri Department of Corrections;
and CYNTHIA PRUDDEN, Acting Superintendent, Women's Eastern Reception,
Diagnostic and Correctional Center, in her official capacity,

Defendants-Appellants.

Appeal from the United States District Court
For the Western District of Missouri, Central Division

**BRIEF FOR CHICAGO LEGAL ADVOCACY FOR INCARCERATED MOTHERS,
JOHN HOWARD ASSOCIATION OF ILLINOIS, LEGAL SERVICES FOR
PRISONERS WITH CHILDREN, NATIONAL ASSOCIATION OF SOCIAL
WORKERS, NATIONAL ASSOCIATION OF SOCIAL WORKERS—MISSOURI
CHAPTER, STOP PRISONER RAPE, AND WOMEN'S PRISON ASSOCIATION AS
AMICI CURIAE IN SUPPORT OF PLAINTIFF-APPELLEE AND AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

Each of the *amici curiae* herein is a not-for-profit organization. None has any parent corporation. None has any capital stock held by a publicly traded corporation.

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STATEMENT OF INTEREST

All parties have consented to the filing of this brief.

The *amici* submitting this brief are a diverse group of not-for-profit social service, advocacy, and professional organizations concerned in various ways with assisting incarcerated or recently incarcerated women. These organizations have extensive and longstanding experience with the difficulties that women prisoners face in maintaining family ties while in prison and in seeking to reintegrate themselves into society after release. The *amici* submit this brief to highlight the devastating impact that Missouri's challenged policy will have on women prisoners and to explain how the policy seriously undermines the important penological interest in rehabilitation.

Chicago Legal Advocacy for Incarcerated Mothers ("CLAIM") provides legal services to imprisoned mothers and their children. CLAIM offers law classes to educate mothers to make sound decisions about their children's placement and to empower women to take steps to protect their parental rights. Through legal aid, CLAIM also enables mothers to obtain guardianship for their children by trusted relatives or friends, avoid foster care placement when possible, enforce mother-child visitation rights, divorce abusive spouses, and reunite with their children upon release.

The John Howard Association of Illinois (“JHA”) has advocated for people in prison, jail, and juvenile correctional facilities for more than a century. JHA promotes fair, humane, and effective correctional policies; educates and counsels incarcerated people, their families, and members of the public; and actively monitors facilities through scheduled visits to inspect conditions.

Legal Services for Prisoners With Children (“LSPC”) is a not-for-profit organization serving incarcerated parents and their family members, and it focuses primarily on women prisoners and their families. LSPC provides legal advice and referrals to prisoners and their loved ones around family law matters, including parental rights. As part of its mission, LSPC seeks to improve medical care for prisoners, help incarcerated mothers maintain ties to their children, assist incarcerated survivors of domestic violence, and support incarcerated women who are advocating for reform within the prison community.

The National Association of Social Workers (“NASW”), established in 1955, is the largest association of professional social workers in the world, with 150,000 members and chapters throughout the United States and in Puerto Rico, Guam, and the Virgin Islands. The Missouri Chapter of NASW has more than 2,400 members. With the purpose of developing and disseminating standards of social work practice while strengthening and unifying the profession as a whole, NASW provides continuing education, enforces the NASW Code of Ethics,

conducts research, publishes books and studies, promulgates professional criteria, and develops policy statements on issues of importance to the social work profession. Among these is the NASW policy statement, Correctional Social Work, which recognizes that female prisoners present unique situations requiring intervention, including pregnancy. It directs that social workers must advocate for prisoners' access to health care, medication, treatment, and support. Social Work Speaks 69 (7th ed. 2006). Social workers fill the majority of clinical positions in the detention and corrections field, id., and thus are uniquely qualified to speak to the needs of the prison inmate population.

Stop Prisoner Rape (“SPR”) seeks to put an end to sexual violence against people in all forms of detention everywhere in the United States. SPR seeks to ensure government accountability for prisoner rape, change ill-informed public attitudes toward sexual assault behind bars, and promote access to resources for survivors of this type of violence.

Women’s Prison Association (“WPA”), founded in 1845, is the nation’s oldest service and advocacy organization working exclusively with women involved in the criminal justice system and their families. WPA provides direct assistance to approximately 2,500 women and their families each year. WPA offers services in prisons and in the community in response to five key areas of need: livelihood, housing, family, health and well-being, and criminal justice

compliance. WPA stresses self-reliance through the development of independent living skills, self-empowerment and peer support, and client involvement in the community.

SUMMARY OF ARGUMENT

Through its policy of refusing to provide or transport women for medical care to terminate their pregnancies (“the Policy”), the Missouri Department of Corrections (“DOC”) compels women in its custody to continue their pregnancies to term against their will. As a result, the Policy imposes real hardships on these women while they are in prison and creates significant challenges for them that will continue even once they have served their sentence in full. Given the lifetime of repercussions that flow from the decision of whether or not a woman will carry her pregnancy to term, the person who will ultimately bear responsibility for these consequences—the woman herself—should be the one to make this decision, not DOC or the State of Missouri.

At a minimum, limitations on a prisoner’s constitutional rights must be reasonably related to a legitimate penological interest. Barring women in prison from making independent choices about their pregnancies does not serve any such interest and indeed undermines the key penological interest in rehabilitation. Rehabilitation, long a principal objective of the criminal justice system, relies in large measure on an ex-offender learning to stand on her own two feet and to make

independent decisions about her own well-being. The Policy, however, is directly contrary to this key aspect of rehabilitation, as it deprives each pregnant inmate of the ability to effectuate one of the most deeply personal and life-affecting choices a woman may make in her life: the decision whether or not to carry a pregnancy to term. Additionally, the Policy undercuts pregnant inmates' efforts at rehabilitation by imposing on them, against their will, the extremely difficult role of being parents from prison. The Policy also continues to threaten women's efforts at successful rehabilitation by exacerbating the many obstacles that they face when they are released from prison and reenter society.

The District Court correctly held that the Policy is unconstitutional because it advances no legitimate penological interest and deprives prisoners of care for a serious medical need. Because the Policy impermissibly deprives the plaintiff class members of their constitutional rights, and, moreover, because it hinders their prospects of successful rehabilitation and reentry, it cannot be permitted to stand.

ARGUMENT

Women prisoners cannot obtain abortion services inside any DOC facility, and DOC will not transport them off-site for such care. As a result, the Policy compels a prisoner to continue her pregnancy, even when she has decided not to carry it to term. Because the Policy absolutely denies a woman her right to terminate her pregnancy, it violates her rights under the Fourteenth Amendment.

See Planned Parenthood v. Casey, 505 U.S. 833 (1992); Roe v. Wade, 410 U.S. 113 (1973). But even if the Policy is judged under the more deferential standard applied to prisoners' constitutional claims in Turner v. Safley 482 U.S. 78, 89 (1987), it cannot stand. Turner allows a prison policy to infringe constitutional rights that survive incarceration only if the policy reasonably relates to a legitimate penological interest. The Policy challenged here simply does not. Far from relating to a legitimate penological interest, the Policy affirmatively undermines one of the central and long-recognized goals of incarceration: the rehabilitation and successful reentry of prisoners into society. See, e.g., Turner, 482 U.S. at 98-99.

The Policy undercuts the goal of rehabilitation in at least three ways. First, while rehabilitation relies in large part on a woman becoming self-sufficient and empowered to make decisions on her own behalf, the Policy takes away a woman's ability to effectuate one of the most fundamental decisions that she has ever made about her life. Second, in many cases, the Policy imposes on women prisoners the enormous burden of parenting from prison, subjecting them to new psychological and financial pressures. Third, by compelling a prisoner to carry her pregnancy to term against her will, the Policy compounds the obstacles a prisoner faces upon her reentry into society.

I. THE POLICY JEOPARDIZES THE REHABILITATION OF WOMEN PRISONERS BY OVERRIDING THE AUTONOMOUS DECISIONS THEY HAVE MADE ABOUT THEIR OWN WELL-BEING.

As the Supreme Court has recognized, “[f]ew decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy than a woman’s decision . . . whether to end her pregnancy.”

Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 772

(1986). The Policy takes this deeply personal decision away from women, and in doing so makes women less prepared to benefit from the rehabilitative programs available to them.

A. The Legitimate Penological Interest in Rehabilitation Is Achieved by Instilling Self-Sufficiency and Independence in Prisoners.

The rehabilitation of prisoners has long been recognized as a legitimate and important penological interest. See, e.g., Turner, 482 at 98-99 (evaluating role of marriage in penological interest in rehabilitation).¹ Indeed, DOC has made

¹ Turner also recognized institutional security and punishment as legitimate penological interests. With regard to punishment, DOC does not and cannot contend that forcing a woman to carry a child to term and become a mother is an appropriate form of punishment or part of her lawfully imposed sentence. With regard to institutional security, Appellees’ brief discusses at length why the security justifications proffered by DOC are not rationally related to the Policy. *Amici* also note that pregnant prisoners do not pose any obvious security risk that requires that they be denied access to abortion services. Most women prisoners have been incarcerated for nonviolent crimes, and as a group they do not present a heightened risk of violent behavior. See Lawrence A. Greenfeld & Tracy L. Snell, U.S. Dep’t of Just., Bureau of Just. Stat., NCJ 175688, Women Offenders 5 (2000)

(continued)

rehabilitation one of its central missions, recognizing that the development of self-sufficiency and independence in prisoners is central to the process. The DOC has established a Division of Offender Rehabilitative Services that seeks to “enhance offender self-sufficiency, reduce re-incarceration, and improve public safety.”

Missouri Reentry Process, at DOC website, <http://www.doc.mo.gov/reentry/>

MissouriReentryProcess.htm (last visited Dec. 11, 2006). One of the goals of the

Division is:

to ensure gender responsive programs are available to female offenders that provide health, mental health, self esteem, parenting, academic education, vocational education, substance abuse and life skills assistance to enhance their opportunities for successful transition back into society.

Offender Rehabilitative Services: Women’s Programs, at DOC website,

<http://www.doc.mo.gov/division/rehab/women.htm> (last visited Dec. 11, 2006).

These DOC policies and procedures are consistent with social research findings on the factors that contribute to the successful rehabilitation of prison inmates. Placing an ex-offender in a position where she is empowered to make important decisions about her own well-being is a vital part of the rehabilitative

(less than 9% of felony convictions of women were for violent offenses). Thus, prohibiting female inmates from obtaining abortion care simply because it must be obtained off site bears no real relationship to the actual security risks posed by this particular population of inmates.

process. Based on interviews with women who had been released from prison, researchers have found that “women who succeed afterward said that they had made the conscious decision to control their own lives.” Candace Kruttschnitt & Rosemary Gartner, Women’s Imprisonment, 30 *Crime & Just.* 1, 54 (2003) (citing Mary Eaton, Women After Prison (1993)). Similarly,

empowerment is critical to understanding how women make a successful transition into society. Empowerment for these women meant gaining intrapersonal, interpersonal, and social power that enabled them to make efficacious choices for everyday life.

Id. (citing Patricia O’Brien, Making it in the “Free World”’: Women in Transition from Prison (2001)).

Precisely because independent decision-making is so important to a woman’s reintegration into society, the programs of many community groups who work with ex-offenders, including those of several of the *amici*, are designed to foster opportunities for women to make decisions on their own behalf. A report of the National Council on Crime and Delinquency found that the most successful community programs for women offenders returning to the community are those that stress accountability and seek to teach them coping and decision-making skills. See James Austin et al., Nat’l Council on Crime & Delinquency, Female Offenders in the Community: An Analysis of Innovative Strategies and Programs 21 (1992). For example, Women’s Prison Association’s Residential Alternative to

Incarceration Program, Hopper Home, stresses independent living skills.

Women's Prison Association has found that when a woman feels empowered to make everyday decisions about her life, her chances of successfully reintegrating into the community increase. A central component to this skill is being able to rely on one's own values and navigate the most basic stresses of life.

B. The Policy Directly Undermines the Self-Sufficiency and Independence of Pregnant Inmates.

In contrast to DOC's overall rehabilitative mission and the findings of those who study and assist offenders who are working toward rehabilitation, the Policy undermines independent decision-making by pregnant inmates. Policies and practices that take away women's ability to make important life decisions for themselves exacerbate the emotional and psychological conditions that in many cases contributed to the criminal behavior for which they were incarcerated. As a Department of Justice study recognized, "retraumatizing people by placing them in environments that reinforce helplessness, scapegoating, isolation, and alienation must be viewed as antitherapeutic, dangerous, immoral and a violation of basic human rights." Barbara Bloom et al., U.S. Dep't. of Just., Nat'l. Inst. of Corrections, Gender-Responsive Strategies: Research, Practice and Guiding Principles for Women Offenders 60 (2003) (citation omitted).

Indeed, the majority of women in prison are survivors of sexual or physical abuse. See infra pp. 23-24. Depriving these women of the opportunity to make

decisions about their own well-being can be especially traumatizing and harmful. Experiences of abuse are marked by the victims' lack of control, and taking away women's ability to make decisions about their own lives can aggravate the sense of trauma and lack of control survivors of abuse already feel. See, e.g., Robert W. Dumond, *The Impact and Recovery of Prisoner Rape* 9 (2001); see also Susan F. McClanahan et al., *Pathways into Prostitution Among Female Jail Detainees and Their Implications for Mental Health Services*, 50 *Psychiatric Services* 1606, 1613 (1999) (concluding that victims of childhood sexual abuse need long-term mental health services to "come to terms with their victimization and restore a sense of a mastery and control over their lives"). The Policy not only disregards these repercussions but compounds them: it creates yet another instance in which a survivor of abuse will be denied control over her personhood.

Unnecessarily limiting a woman prisoner's ability to make decisions on her own-behalf, as the Policy does, can also derail the process of rehabilitation more generally. As one scholar explains:

Treating an offender with respect, according the offender 'voice', and genuinely attending to ('validating') that voice are key elements. Offenders are accordingly more likely to be primed for undertaking rehabilitative efforts if those elements are in place. If they are not—if the offender feels he or she was mistreated, ignored or got a raw deal—the rehabilitative prospects may be dramatically lessened.

David B. Wexler, Therapeutic Jurisprudence and Readiness for Rehabilitation, Univ. of Ariz. Legal Studies Discussion Paper No. 06-32, at 3 (2006). By denying pregnant prisoners any input into a decision that will impact their well-being for the rest of their lives, the Appellants' Policy jeopardizes the rehabilitation of each of those women in precisely the way that Wexler discusses.

Moreover, the harm that the Policy poses in this respect is particularly grave, since by prohibiting a woman from exercising her decision not to continue a pregnancy while she is in prison, the Policy often will deny her the opportunity to ever effectuate her choice and subject her to forced parenthood: "[T]he abortion decision is one that simply cannot be postponed, or it will be made by default with far-reaching consequences." Bellotti v. Baird, 443 U.S. 622, 643 (1979). The sentences of the vast majority of women prisoners are far longer than the short period of time within which a woman can effectively, safely and legally obtain the medical care necessary to end a pregnancy. Rachel Roth, Justice Denied: Violations of Women's Reproductive Rights in the United States Prison System, (2004), at http://www.prochoiceforum.org.uk/psy_ocr10.asp (last visited Dec. 11, 2006). As a result, if women are denied access to abortion services while they are in prison, an overwhelming number of them will be prevented from ever safely terminating their pregnancies.

In all of the ways detailed above, by denying pregnant inmates the ability to decide whether or not to carry a pregnancy to term, the Policy purposelessly deprives them of a critical component of the self-determination that is central to their effective rehabilitation.

II. THE POLICY PLACES AN EXTREME BURDEN ON WOMEN PRISONERS AND THEIR FAMILIES.

The Policy also places a substantial hurdle in pregnant inmates' path to rehabilitation by foisting on them the enormous demands that come with parenting from prison. A combination of practical and legal barriers impose extreme obstacles to parenting from prison. To add the consequences of forced childbearing on top of these hurdles will subject pregnant inmates to enormous—and, in some cases, insurmountable—obstacles to their successful rehabilitation and to maintaining parent-child relationships.

A. Factors Beyond a Prisoner's Control Make It Difficult to Maintain the Parent-Child Relationship From Prison.

A host of factors over which a prisoner has no control make it difficult to parent from prison. At the most fundamental level, the physical restrictions that are inherent to incarceration sharply circumscribe a prisoner's opportunity to develop and maintain contact with her child. The majority of mothers in prison are denied any type of regular, physical contact with their children. As a result,

prisoners are prohibited from providing their children with the daily nurturing, affection, and care that children need.

From the time a prisoner gives birth, DOC policies and regulations make it difficult for her to bond with her newborn. DOC policies provide no additional time for a prisoner to stay with the newborn after she gives birth, and in fact require that the woman return to the facility within days of the birth. See DOC, Newborn Custodian/Guardian Consent and Authorization Form (indicating that a non-prisoner custodian or the Missouri Department of Family Services must assume custody of every newborn child immediately following birth). Neither WERDCC nor any other DOC facility for women has a nursery or other residential program that allows a newborn to live with his or her mother. See Response to Interrogatory #16 (JA 275-76).

DOC rules also preclude close contact between women prisoners and their children by limiting the number, length and frequency of the visits that a prisoner may receive. See WERDCC SOP 13-3.1, Offender Visitors (Aug. 1, 2005). DOC, like many other departments of corrections, has only limited visitation programs for children of incarcerated mothers. See, e.g., id. at 7, 15 (visiting sessions specifically for women prisoners and their children are offered only once a month, are not open to all prisoners with children, and prisoners must apply in advance to participate).

DOC also imposes many of the same requirements on child and infant visitors to prison as it does on adult visitors, which can complicate visits between mothers and their children. For instance, a woman may request only one special visit with her newborn child. After that, she will not be able to see the infant at all until a complete “approved visiting application with a social security number” is submitted on the child’s behalf. Id. at 17-18.

In addition to the obstacles to parenting that prison policies impose on incarcerated mothers, there is a serious practical barrier to women receiving regular visits from their children: on average, women prisoners are housed more than 160 miles away from the place where their children live. Jeremy Travis et al., Urban Inst., Just. Policy Center, Families Left Behind: The Hidden Costs of Incarceration and Reentry 1 (2005); see also Christopher J. Mumola, U.S. Dep’t. of Just., Bureau of Just. Stat., NCJ 182335, Incarcerated Parents and Their Children 1, 5 (2000) (60% of parents in prison are held more than 100 miles from their last place of residence). These distances can make a child’s visits to a mother in prison prohibitively expensive and impossible to arrange within regular visiting hours.

Visits also depend entirely on the willingness and ability of the child’s caretaker to arrange them and to work within the restrictions governing prison visits. Ronnie Halperin & Jennifer L. Harris, Parental Rights of Incarcerated Mothers with Children in Foster Care: A Policy Vacuum, 30 Feminist Studies 339,

342 (2004). Prison visits are not costless; they require money to pay for transportation, for meals and vending machine snacks during visits, and sometimes overnight lodging. J. Creasie Finney Hairston, Prisoners and Families: Parenting Issues During Incarceration 45 (2002). In some cases, a child's guardian is unable to cover these costs. In others, guardians simply refuse to arrange visits or any other forms of contact between children and their mothers in prison. Id. at 46. If a guardian takes this stance, there is little that the mother can do from within prison to change the guardian's decision.

Often, all of these factors interact to make it impossible for a mother to receive visits from her children while she is in prison, and the sad reality is that the majority of mothers in state prison have never been visited by their children. Mumola, supra, at 5.

Short of actual visits between mother and child, it can be difficult for incarcerated parents to maintain any kind of contact with their children. A Department of Justice study reports that more than 10% of mothers have had no contact at all with their children since being incarcerated. Id. Again, the reasons are often beyond the prisoner's control. Prison rules often limit the number and frequency of phone calls and letters a prisoner can make and receive. Travis et al., supra, at 1. In addition, the high surcharges levied by many prisons and their telephone service providers make collect phone calls between a mother in prison

and her child prohibitively expensive. Id. Contact by mail—a poor substitute for actual visits in any event—is also not an option if the children involved are young or unable to read and write.

B. Women Prisoners Are Often Barred by Law from Parenting the Children to Whom They Gave Birth.

The limitations imposed on a women’s ability to parent from prison not only make it difficult to create and maintain the mother-child relationship; they also often work in tandem with legal restrictions to force the termination of the mother’s parental rights altogether. For this reason, in many cases, the Policy will force women to give birth to children whom they will be legally prohibited from raising.

In particular, the Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of Title 42, U.S.C.) (“ASFA”), generally requires the state to petition to terminate the parental rights of a mother whose child has been in foster care for 15 of the past 22 months—and thereby make the child available for adoption—unless the child is in the care of a relative or friend. See 42 U.S.C. § 675(5)(E) (2006); Halperin & Harris, supra, at 344. Missouri has also enacted a nearly identical provision authorizing such petitions as a matter of state law. See Mo. Rev. Stat. § 211.447 (2006).

As an initial matter, the average prison stay of most women prisoners is longer than the 22 month period within which termination procedures are required to begin. Hairston, supra, at 47. While ASFA grants some discretion to state courts and child welfare agencies to consider the specific circumstances of each parent's case, in practice they often do not exercise such discretion, they apply time deadlines strictly, and they regard adoption as the only way to meet ASFA's goal of promoting "permanency" for the child. Amy E. Hirsh et al., Center for Law and Social Policy, Every Door Closed: Barriers Facing Parents With Criminal Records, 64-65 (2002).

Moreover, child welfare agencies often set formal requirements that a parent must fulfill in order to receive an exception from ASFA's termination provisions. To avoid having their rights terminated in many cases, imprisoned mothers must participate in case planning, remain involved in their children's lives, and demonstrate their commitment and ability to reform. Halperin & Harris, supra, at 340. These are extremely difficult conditions to fulfill while incarcerated for a variety of reasons, including physical distance, lack of ability to communicate with the case worker and the child, and prisoners' limited access to specific programs. Id. at 343. As a result, a woman often has no meaningful opportunity to prevent the permanent termination of her parental rights and the adoption of her children by strangers.

C. The Challenge of Parenting from Prison Results in Significant Harm to Some Women Prisoners and Makes Rehabilitation More Difficult.

The practical and legal barriers that prevent a woman from maintaining a close relationship with her child while she is in prison can be psychologically and emotionally devastating for her. Hairston, supra, at 47 (“Incarcerated mothers cite separation from their children as one of the most difficult aspects of imprisonment.”); see also ACLU et al., Caught in the Net: The Impact of Drug Policies on Women and Families 49 (2004) (“Incarcerated mothers experience significant emotional trauma when separated from their children, contributing to depression, loneliness and despair.”); Bloom et al., supra, at 56 (“Many of these women felt enormous guilt about being absent from their children’s lives and worry about whether they would regain custody of their children following their release.”). The extreme emotional trauma that women in prison suffer as a result of being separated from their children leads to substantial anxiety that can give rise to depression and other mental health problems. Hairston, supra, at 47; see also Austin et al., supra, at 4.

Barriers to maintaining relationships with their children not only inflict severe mental distress on women prisoners but also hurt their chances of rehabilitation. A study from the Department of Justice’s National Institute of Corrections determined that

there is significant evidence that the mother-child relationship may hold significant potential for community reintegration. Incarcerated women tend to experience a sense of isolation and abandonment while in prison because of their inability to keep their families together. Research demonstrates that recidivism is less likely among both male and female offenders who maintain ties to their families and communities during incarceration.

Bloom et al., supra, at 57. Similarly, another researcher in the field of corrections found that “research on female offenders identified family process variables as the strongest predictors of female offenders’ success and . . . found family relationships to have a significant influence on relapse prevention among parolees.” Hairston, supra, at 43.

In light of the challenges that come with being a parent from prison and the likelihood in many cases that a woman will not legally be permitted to parent a child, the Policy places pregnant prisoners who have decided to terminate their pregnancies in an untenable position. A woman who chooses to terminate her parental rights, must nevertheless suffer the permanent injury of having been forced to carry a pregnancy to term against her will. A woman—having been left no option but to carry to term—who chooses to maintain her legal rights over her newborn will be subject to the significant distress that comes from being separated (perhaps permanently and by law) from her child, which in itself is a psychological injury that can derail her rehabilitation.

* * *

Taken together, these practical and legal barriers can be devastating to an incarcerated mother's ability to care for and form intimate relationships with her existing children and to her ability to succeed in her own rehabilitation. In light of these consequences it is difficult—indeed, impossible—to imagine a legitimate reason DOC imposes a Policy of forcing unwanted parenthood on pregnant inmates.

III. THE POLICY EXACERBATES THE EXISTING OBSTACLES TO A WOMAN PRISONER'S SUCCESSFUL REENTRY INTO SOCIETY.

When a woman is released from prison, she faces a number of challenges as she tries to reestablish herself in the community. The obstacles to successful reentry that she already faces are amplified by the Policy, which demands that a woman also take into account a child that she was forced to bear while in custody.

A. Women in Prison Already Face Substantial Obstacles With Respect to Supporting Themselves and Their Families.

The vast majority of incarcerated women come to prison from disadvantaged social and economic backgrounds and carry with them experiences of past abuse and mental illness. Together, these factors make it very difficult for women prisoners to support themselves and their existing families, both while they are incarcerated and when they are released.

1. Women Prisoners Face Serious Economic and Educational Barriers to Self-Sufficiency.

Women prisoners face direct barriers to financial self-sufficiency in the form of low educational attainment and high unemployment rates. Approximately 40% of women in state prisons across the country have not graduated from high school, and more than 13% of women prisoners in state facilities have not completed school beyond the eighth grade. Caroline Wolf Harlow, U.S. Dep't. of Just., Bureau of Just. Stat., NCJ 195670, Education and Correctional Populations 5 (2003). Prior to going to prison, many women prisoners were unemployed or worked at low paying jobs. Only about four of every ten women in state prison were employed full time prior to their arrest and almost 40% of women in state prison had an income of less than \$600 per month before their incarceration. Greenfeld & Snell, supra, at 8.

It is hard enough for women to support themselves with little or no steady income, but most women prisoners also already have children who rely on them for support. More than 70% of women in prison have children, id. at 7, and the number of children with a mother in prison nearly doubled in the eight years between 1991 and 1999, Mumola, supra, at 2. Many of these women are single parents who must shoulder the burden of raising their children alone. Close to half of women prisoners with children were the only parent living with their children in the month before their arrest. Id. at 4; see also Bloom et al., supra, at 56. Once a

woman enters a state correctional facility, she often must bear sole responsibility for arranging care for the children. Fewer than three out of ten mothers in state prison reported that their children lived with their father during their incarceration (in contrast, nine in ten fathers in state prison reported that their children were living with their mother). Mumola, supra, at 4. While most children are taken in by their grandparents or another family member, approximately 10% of children with mothers in prison go into foster care. See id., at 4; see also Halperin & Harris, supra, at 340. Regardless of where a child is placed, a mother's incarceration is a difficult situation for all involved, since the mother is unable to raise her children or provide them with steady financial support as long as she is incarcerated.

2. The Majority of Women Prisoners Must Also Overcome Mental Health Conditions, Substance Abuse, and Experiences of Sexual and Physical Abuse.

Most women prisoners also have some form of serious mental health condition. A study by the Department of Justice determined that an estimated 73% of women in state prisons and 60% of women in federal prisons currently have a verifiable mental health condition. Doris J. James & Lauren E. Glaze, U.S. Dep't. of Just., Bureau of Just. Stat., NCJ 213600, Mental Health Problems of Prison and Jail Inmates 4 (2006). (This is much higher than the rate at which incarcerated men suffer from mental health problems. See id., at 1.)

In many cases, women prisoners' mental health conditions are linked to sexual and physical abuse that they experienced. As many as 88% of incarcerated women have been the victims of prior sexual or physical violence. Human Rights Watch, All Too Familiar: Sexual Abuse of Women in U.S. State Prisons 23 (1996) [hereinafter HRW Report]; see also Austin et al., supra, at 5 (earlier study found that over half of all female offenders had been victims of physical abuse and 36% had been sexually abused). Many of those women now suffer from a significant mental disorder. Bloom et al., supra, at 53.

Sexual abuse of women prisoners by corrections staff has also been widely documented across the country. See Allen J. Beck & Paige M. Harrison, U.S. Dep't. of Just., Bureau of Just. Stat., NCJ 214646, Sexual Violence Reported by Correctional Authorities, 2005 14 (2006) (54 complaints of sexual misconduct between staff and inmates in Missouri were made in 2005); Amnesty International, AMR 51/001/1999, "Not Part of My Sentence": Violations of the Human Rights of Women in Custody (1999). While there are no precise statistics on the number of women who have become pregnant as a result of sexual misconduct by corrections' staff, several pregnancies resulting from rapes by staff members have been reported at facilities for women across the country. See HRW Report 105, 162, 201, 276, 347, 425 (1996) (documenting cases of prisoners impregnated by correctional employees in all six of the state systems investigated in the report).

Furthermore, many women in prison—who already face the combined challenge of dealing with a history of abuse and an existing mental health problem—must also grapple with problems relating to substance abuse and addiction. Researchers have suggested a direct relationship between abuse experienced by women and problematic drug use. See Marsha Rosenbaum, Women: Research and Policy, Part I, in Substance Abuse, A Comprehensive Textbook 654-665 (3d ed. 1997). But no matter what the specific reasons that an individual woman may have begun to abuse drugs, the overall number of women prisoners with a substance abuse problem is high. Roughly six out of ten women in state prison used drugs in the month before their offense, and five out of ten women prisoners describe themselves as daily users of drugs. Greenfeld & Snell, supra, at 9.

The damaging trio of serious mental illness, a history of sexual or physical abuse, and substance abuse present substantial challenges to women’s ability to support themselves and their families. Together, these factors make it even more difficult for women prisoners to overcome the economic and educational barriers to becoming self-sufficient that they already face.

B. The Policy Exacerbates These Existing Obstacles to Successful Community Reentry.

The difficulties that an incarcerated woman faces in supporting herself and her family and in overcoming past harms to her physical and emotional well-being

do not evaporate at the end of her sentence. When women are released from prison, they are confronted with new and additional challenges related to finding work, housing and a means of support while being labeled as ex-offenders. These challenges become more difficult to meet when a newly released woman must also assume responsibility for the care and support of a child.

Most women leave prison with few marketable skills and minimal education, making it difficult to find employment. See Hirsh et al., supra, at 11; see also Greenfeld & Snell, supra, at 8; Harlow, supra, at 1, 5. In addition, many employers refuse to hire persons with criminal records, which “typically create an employment barrier for the rest of their lives.” Hirsh et al., supra, at 14, 18-19. Legal prohibitions also prevent ex-offenders from joining certain professions and holding particular occupational licenses. Id. at 14; Travis et al., supra, at 7.

Moreover, the close to 40% of women offenders who are currently serving time for a drug offense, see Greenfeld & Snell, supra, at 5, Table 11, are barred from federally subsidized housing and other vital benefits that could help cover their basic living expenses and those of their families when they are released. Applicants who have engaged in certain types of criminal activity, including drug offenses, cannot live in Section 8 low-income housing, see 42 U.S.C. § 13661, and family members who are currently living in such housing face eviction if they

permit a woman who has been convicted of these crimes to live with them, see id. § 1437d(l)(8); see also Hirsh et al., supra, at 42.

Similarly, unless the state affirmatively passes legislation to opt out of the ban, women with felony drug convictions for conduct after August 22, 1996 are barred for life from receiving the benefits offered under the Temporary Assistance for Needy Families and Food Stamps programs. 21 U.S.C. § 862a(a)(1); see also Hirsh et al., supra, at 29. Missouri is one of the states that has elected to entirely deny benefits to former prisoners, and, thus, the federal lifetime ban on welfare benefits for former prisoners applies to women reentering the Missouri community from DOC custody. See Patricia Allard, The Sentencing Project, Life Sentences: Denying Welfare Benefits to Women Convicted of Drug Offenses 3, Table 1 (2002).

For those women who obtain custody of their children on release, it is often difficult to overcome these barriers to getting on their feet financially while trying to support and care for a child. See Kruttschnitt & Gartner, supra, at 55-56. This is so not only because of the financial resources necessary to raise a child but also because the obligations associated with parenting can themselves compete with the steps a woman ex-offender must take to become self-sufficient. For instance, the difficulty of finding adequate child care can make it hard for a released woman to find regular and well-paid work. Id., at 55. In other cases, the programs and

criteria a woman is required to fulfill in order to avoid the termination of her parental rights may conflict with the time she is required to spend in other programs to qualify for government benefits or to meet the conditions of her parole. See Hirsh et al., supra, at 64.

The Policy also makes it more difficult for former prisoners to successfully reintegrate into the community by compounding the psychological barriers to rehabilitation that they must grapple with upon their release. Many women prisoners are not emotionally prepared to take all of the steps they need to in order to become self-sufficient. See generally Austin et al., supra; Greenfeld & Snell, supra; James & Glaze, supra. In many cases, a woman must surmount a preexisting mental health condition, the aftermath of being physically or sexually abused, and a substance abuse problem, all at the same time.

By inflicting on a woman prisoner the additional emotional injury that results from being compelled to carry a pregnancy to term against her will, the Policy makes these obstacles all the more difficult to surmount. First, even if a woman does not seek custody of the child, she must deal with the emotional aftermath of being forced to give birth against her will. Alternatively, if a woman wants to regain custody of her child but is barred from doing so by ASFA and the related provisions of the state's family law, the devastating psychological effects can seriously undermine her rehabilitation. Researchers have noted the strong

correlation between the termination of parental rights and increased rates of recidivism among women offenders. See, e.g., Bloom et al., supra, at 57. Even for women who choose to and are able to obtain custody of their children after they are released from prison, the Policy still extracts an emotional toll: “Relationships with children, which are a source of both stress and self-esteem while in prison, can be difficult to reestablish for women upon their release.” Kruttschnitt & Gartner, supra, at 56 (citation omitted).

* * *

For all these reasons, the resulting injury to each individual woman prisoner harmed by the Policy will be devastating. Prison regulations such as the Policy are coming to have an impact on more and more women because of the rapid growth in the incarceration rate of women in the past three decades. A study by the Women's Prison Association determined that “[t]he number of women serving sentences of more than a year grew by 757 percent between 1977 and 2004—nearly twice the 388 percent increase in the male prison population.” Natasha A. Frost et al., Women’s Prison Ass’n., Hard Hit: The Growth in the Imprisonment of Women 9 (2006). As the ranks of women in prison have grown, so too has the number of women who have to make decisions about childbearing from prison. Nine percent of women are pregnant when they enter into custody. Bloom et al., supra, at 57; see also Jennifer G. Clarke et al., Reproductive Health Care and

Family Planning Needs Among Incarcerated Women, 96 Am. J. Pub. Health 834 (2006) (nationally between 6% and 10% of incarcerated women are pregnant at any point in time); Greenfeld & Snell, supra, at 8 (earlier study estimates that 5% of women in state prisons are pregnant when admitted). If prison regulations such as the Policy are validated, these women could each be forced to carry their pregnancies to term against their will, causing each of them and their existing families substantial harm and threatening the success of their efforts at rehabilitation.

CONCLUSION

The Missouri Policy undermines the penological goal of rehabilitation without any legitimate justification, and it arbitrarily and needlessly imposes hardship and suffering on incarcerated women and their families. The Policy violates both the Fourteenth Amendment's protection of liberty interests and the Eighth Amendment's prohibition on cruel and unusual punishments, and it was properly enjoined. *Amici* respectfully urge the Court to affirm the District Court's judgment.

Respectfully submitted,

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² Rosa Castello, whose admission to the Bar of the State of New York is pending, also assisted in the preparation of this brief.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and 32(a)(7)(B) because this brief contains 6,994 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 14-point Times New Roman. The CD ROM submitted with this brief has been scanned for viruses and is virus-free.

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