

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JANE ROE,

Plaintiff,

v.

SCOTT FRAKES, in his official capacity;
ANGELA FOLTS-OBERLE, in her
official capacity.

Defendants.

Civil Action No. 4:21-cv-03073

COMPLAINT
(42 U.S.C. §1983)

This is an action brought under 42 U.S.C. § 1983 for an emergency temporary restraining order, and all other necessary and proper relief, alleging that Defendants have violated and continue to violate Ms. Roe's constitutional rights through ongoing failure to, *inter alia*, transport Ms. Roe to obtain an abortion, despite her requests. Defendants' actions, taken under the color of state law, violate Ms. Roe's Fourteenth Amendment right to abortion. Ms. Roe is contemporaneously filing a Motion and Memorandum of Law for Leave to Proceed Pseudonymously.

As set forth further in the accompanying Motion and Memorandum of Law for an Emergency Temporary Restraining Order, if Ms. Roe does not receive the state-mandated abortion counseling via phone 24 hours before her procedure, and is not subsequently transported to undergo the abortion procedure on April 13, 2021 (or on another date if deemed medically appropriate by the abortion provider), she may lose the ability to

exercise her right to abortion altogether and may be forced to continue this pregnancy to term against her will.

INTRODUCTION

As the U.S. Supreme Court has repeatedly made clear for nearly 50 years, a person has a fundamental right to decide whether or not to bear a child. It is well-settled that this right survives incarceration. A prison may not, therefore, refuse to provide access to abortion or otherwise delay or obstruct a person in its custody from exercising their right to abortion.

JURISDICTION AND VENUE

1. Ms. Roe's claims arise under the Constitution and laws of the United States. This Court has jurisdiction over these claims under 28 U.S.C. §§ 1331, 1343(a)(3), and authority to grant declaratory and injunctive relief under 28 U.S.C. §§ 2201-2202 and Fed. R. Civ. P. 57 and 65. The federal rights asserted by Ms. Roe are enforceable under 42 U.S.C. § 1983.

2. Venue is proper in this Court under 28 U.S.C. § 1391(e). Ms. Roe is confined in the Nebraska Correctional Center for Women (NCCW) in York, Nebraska, where she is suffering from the deprivation of her constitutional rights.

PARTIES

3. Plaintiff Jane Roe is an adult prisoner at NCCW, where she has resided at all times material to this action. At the time of filing, Ms. Roe is approximately 15 weeks, 3 days pregnant, as measured from her last menstrual period ("LMP").

4. Defendant Scott Frakes is the Director of the Nebraska Department of Correctional Services ("NDCS") and is the ultimate decision-maker as to matters relating to the operation of NDCS facilities and, in particular, relating to the transport of incarcerated people to obtain medical services.

5. Defendant Angela Folts-Oberle is the Warden at NCCW, the Nebraska Department of Correctional Services institution where Plaintiff is incarcerated. With oversight from Director Frakes, Warden Folts-Oberle is the decision-maker on matters relating to the operations of NCCW including the transport of incarcerated people to obtain medical care.

6. At all times material to this action, Defendants were acting under color of state law. This Complaint and the contemporaneously filed Motion for Temporary Restraining Order seek relief against Defendants in their official capacities.

FACTS

7. Ms. Roe has been incarcerated at NCCW, since February 18, 2021.

8. After a positive pregnancy test, Ms. Roe has been transported, without incident, to regular OB/GYN appointments outside of the NCCW facility in York, NE, where she has had ultrasounds to confirm her pregnancy and determine the gestational age of the pregnancy.

9. Ms. Roe is approximately 15 weeks, 3 days LMP. This is a pre-viability stage of pregnancy.

10. On February 18, 2021, Ms. Roe began serving a 26-month prison sentence. Her projected release date is February 18, 2022.

11. Ms. Roe first requested an abortion verbally to her case manager on or around March 21, 2021 or March 22, 2021. The case manager told Ms. Roe she would contact Warden Angela Folts-Oberle the same day.

12. On or about March 25, 2021 or March 26, 2021, Ms. Roe wrote a grievance to Warden Angela Folts-Oberle requesting an abortion. Ms. Roe did not receive a written response to her initial request until on or about April 8, 2021. The response informed Ms. Roe that her request for an abortion was denied.

13. Ms. Roe wrote a second grievance to the warden on or about March 30, 2021.

14. On or about April 1, 2021 Ms. Roe received a response that her request was being forwarded to the central medical office of the Nebraska Department of Correctional Services.

15. On or about April 1, 2021 Ms. Roe was seen at the facility's medical unit.

16. On or about April 2, 2021 there was a meeting including Ms. Roe, the warden, and other NDCS staff.

17. At the meeting on or about April 2, 2021, Ms. Roe was told that she would not be able to have the abortion she requested because there was a 21-day freeze policy on large amounts of money being placed on incarcerated persons' accounts.

18. Ms. Roe was informed that by the time the 21-day freeze would be lifted, it would be too late to get the abortion.

19. Ms. Roe has a scheduled appointment for an abortion with Planned Parenthood's Lincoln location on Tuesday, April 13, 2021.

20. Ms. Roe has made financial arrangements with Planned Parenthood to pay for the abortion, eliminating the need to pay for the procedure through her inmate account.

21. As part of state-mandated informed consent counseling requirements, Ms. Roe must be given the opportunity to listen to information about the abortion procedure at least 24 hours before the procedure via telephone.

22. Planned Parenthood is prepared to provide Ms. Roe with the telephone counseling by April 12, 2021.

23. Ms. Roe has already made financial arrangements with Planned Parenthood to pay for the abortion.

24. Ms. Roe has told her attorneys that she does not want Defendants to prevent her from obtaining the abortion.

25. Counsel for Ms. Roe sent a demand letter to Warden Folts-Oberle, Director Frakes, and Agency Legal Counsel, Candace Bottorf via email on April 8, 2021 requesting that Plaintiff not be denied access to abortion care.

26. Counsel followed up with the recipients of the demand letter later in the day on April 8, 2021 in an effort to communicate the urgency of Plaintiff's request. After counsel left a voicemail with Warden Folts-Oberle on April 8, 2021, counsel later received an email from Warden Folts-Oberle directing her to communicate with Agency Legal Counsel, Candace Bottorf.

27. On April 8, 2021, counsel spoke with Ms. Bottorf via telephone, communicated the medical importance of Plaintiff attending her appointment on Tuesday, April 13, and asked her about the status of the demand letter. Ms. Bottorf indicated that she had nothing to report and Plaintiff would receive any updates.

28. After the phone call, counsel emailed Ms. Bottorf asking her to include Plaintiff's counsel on any updates in this matter and informed Ms. Bottorf that papers were presently being drafted in case a court filing would be necessary to secure Plaintiff's rights.

29. On the evening of April 8, 2021, counsel was informed via Ms. Roe's mother that Ms. Roe received a written denial on her request for an abortion that was first made to Warden Folts-Oberle on or about March 25, 2021 or March 26, 2021 via a grievance form.

30. Ms. Roe does not want to be forced to carry a pregnancy to term against her will.

31. Ms. Roe does not want to proceed in court using her real name because of the intensely personal nature of her decision and because she fears retaliation and humiliation for seeking an abortion.

32. Time is of the essence when seeking access to abortion.

33. Abortion is extremely safe, and far safer than continuing a pregnancy to term.¹ This is true even in the case of an uncomplicated pregnancy: the risk of death associated with childbirth is approximately 14 times higher than that with abortion.²

34. However, even though abortion is safe throughout a pregnancy, the risks and cost increase as the pregnancy progresses.

35. For Ms. Roe to obtain an abortion, she would need to be transported to the Planned Parenthood health center in Lincoln, Nebraska, which provides abortion up to 16.6 weeks LMP.

36. Under Nebraska law, before a patient can obtain an abortion, the patient must receive state-mandated counseling via telephone at least 24 hours before the procedure.

37. The Planned Parenthood health center in Lincoln Nebraska only provides abortion care on Tuesdays.

38. To be able to provide Ms. Roe's abortion prior to the 16.6 LMP cut-off, Planned Parenthood would need to perform the mandatory 24-hour counseling by Monday April 12, 2021. She would need to have the procedure on Tuesday, April 13, 2021, an appointment for which she is already scheduled and has arranged for payment with the provider.

¹ See Ushma Upadhyay et al., *Incidence of Emergency Department Visits and Complications After Abortion*, 125 *Obstetrics & Gynecology* 175, 175 (2015).

² See Elizabeth G. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 *Obstetrics & Gynecology* 215, 215 (2012).

39. Therefore, if Ms. Roe is not permitted to hear the state-mandated counseling via phone at least 24 hours prior to the procedure and is not transported for her appointment on April 13, 2021, she will be forced to remain pregnant, and if she is delayed further she may not be able to obtain an abortion at all.

40. Abortion is banned in Nebraska after 22 weeks LMP absent extreme circumstance. There is only one abortion provider in the state that provides abortion up to 21 weeks and six days, and that provider is located in Omaha. Therefore, if Ms. Roe is delayed further, she will have to travel further to Omaha for the abortion. Although abortion is very safe, each week of delay increases the risks associated with the procedure. And if she is delayed too long, she will be forced to carry her pregnancy to term against her will.

41. Defendants' refusal and failure to respond to Ms. Roe's requests to be transported to obtain a safe, timely, and legal abortion are not reasonably related to legitimate penological interests. Indeed, Defendants have transported Ms. Roe off-site multiple times for prenatal appointments, without incident.

42. Arrangements have been made to cover the entire cost of the abortion procedure.

CAUSE OF ACTION

SUBSTANTIVE DUE PROCESS: UNCONSTITUTIONAL DENIAL OF ACCESS TO ABORTION UNDER THE FOURTEENTH AMENDMENT, 42 U.S.C. § 1983

43. The allegations of the foregoing paragraphs are incorporated as though fully set forth herein.

44. A state actor may not prohibit any person from making the ultimate decision to terminate their pregnancy before viability.

45. By preventing Ms. Roe from obtaining medical services to terminate her pregnancy, including but not limited to failing to allow Ms. Roe to listen to state-mandated

counseling at least 24 hours before the procedure and failing to transport Ms. Roe for the abortion procedure, Defendants are depriving her of her constitutional rights guaranteed under the Due Process Clause of the Fourteenth Amendment. Defendants are outright obstructing and preventing Ms. Roe from exercising her constitutional right under the Fourteenth Amendment to terminate her pregnancy. The deprivation of Ms. Roe's rights may be redressed pursuant to 42 U.S.C. § 1983.

WHEREFORE, as a result of the foregoing, Ms. Roe would respectfully request that this Court award a judgment to her as follows:

A. Issue a declaration that Defendants' actions preventing Ms. Roe from obtaining an abortion, including but not limited to the failure to allow her to listen to state-mandated counseling via telephone at least 24 hours before the procedure and failing to transport her for the abortion procedure, violate the Fourteenth Amendment to the U.S. Constitution, as the denials violate her constitutionally protected right to terminate her pregnancy;

B. Issue an emergency temporary restraining order, a motion for which is being contemporaneously filed, enjoining Defendants from denying Ms. Roe's requests for access to a timely abortion procedure as requested and ordering Defendants to make without any further delay the necessary arrangements, including allowing her to hear the state-mandated counseling via telephone at least 24 hours before the procedure, and to obtain the abortion procedure on April 13, 2021, or on whatever other dates deemed appropriate by the abortion provider.

D. Grant an award to Ms. Roe of attorneys' fees and costs pursuant to 42 U.S.C. § 1988; and/or

E. Grant such other and further relief as this Court deems appropriate.

Respectfully submitted,

/s/Adam Sipple

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CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2021 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system and that I emailed a copy of the pleading to Candace Bottorf, NDCS Legal Counsel, at her publicly listed email address:

candace.bottorf@nebraska.gov

By: /s/ Adam J. Sipple