NO. 22-CI-005189

JEFFERSON CIRCUIT COURT
DIVISION ELEVEN (11)
JUDGE BRIAN C. EDWARDS

LISA SOBEL, ET AL. PLAINTIFFS

OPINION AND ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

DANIEL CAMERON, ET AL. DEFENDANTS

This matter comes before the Court on Plaintiffs Lisa Sobel, Jessica Kalb, and Sarah Baron's (Sobel) Motion for Summary Judgment. Defendants Daniel Cameron, et al. (Cameron) subsequently filed a Combined Response to Plaintiffs' Motion and Cross-Motion for Summary Judgment; Plaintiffs then filed a Reply and Response; with Defendants then filing a Reply. After a careful review of the pleadings and relevant case law, the Court will deny Plaintiffs' Motion for Summary Judgment and grant Defendants' Cross-Motion for Summary Judgment.

SUMMARY OF FACTS AND PROCEDURAL HISTORY

Plaintiffs Lisa Sobel, Jessica Kalb, and Sarah Baron are three Jewish women who live in Louisville, Kentucky. Plaintiff Sobel began In Vitro Fertilization (IVF) in 2017 with financial help from the Jewish community. After her first retrieval, none of the blastocysts were compatible with life. Sobel then attempted a second round of IVF in 2018, and ultimately transferred a blastocyst which grew into a healthy baby. At twenty weeks pregnant, her pregnancy became high risk and Sobel survived a serious hemorrhage during labor and delivery, but now has a healthy three-year old daughter. Sobel asserts that Kentucky's abortion laws are impeding her from attempting to have a second child.

Plaintiff Kalb has previously faced infertility challenges but was able to become pregnant through IVF. She currently has a two-year old daughter but would like for her daughter to have a sibling; however, she is uncertain if this can be done safely under Kentucky law. Kalb is currently paying fees for storage of nine (9) embryos that were created during the previous IVF process. She was scheduled to transfer a second embryo in August 2022 but decided to cancel due to the overturning of *Roe v. Wade* and her concerns over her safety under Kentucky's abortion laws. Ms. Kalb asserts that concerns that under the HPLA, she could be forced to carry a non-viable fetus to term, are preventing her from trying to become pregnant. Ms. Kalb is also concerned about what to do with the nine (9) embryos currently being stored and she worries about being prosecuted for capital homicide if she chooses to discard these embryos.

Plaintiff Baron is a mother of two young daughters and is currently 38 years old. It took over a year for Ms. Baron to conceive her first child, while her second pregnancy was without complications. Ms. Baron is apprehensive about having a third child at her age since it can carry increased risks and potential complications. She is unwilling to attempt another pregnancy with no protections put in place for her safety, i.e., no exceptions for viability in the law and limited provisions for the health of the mother.

None of the Plaintiffs are currently pregnant however each of these women express a religiously motivated desire to expand their families. In Judaism, having children is considered a blessing, and the commandment to be fruitful and multiply is paramount. Plaintiffs aver that Kentucky's abortion laws pose significant challenges to their religiously mandated requirement to procreate and substantially interfere with the Plaintiffs sincerely held beliefs and their desire to expand their families. Plaintiffs argue that these laws place these desires into jeopardy because, per the Plaintiffs, they are vague and ambiguous, which causes a chilling effect on reproductive

technology in Kentucky. In sum, Plaintiffs argue that they are unable to honor their religious obligations to reproduce without risking their own lives and/or risking being criminally prosecuted.

On June 24, 2022, the U.S. Supreme Court issued its opinion in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022), overruling *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). This "returned the issue of abortion to the people's elected representatives." *Dobbs*, 597 U.S. 215. As a result, Kentucky's legislature passed into law (over gubernatorial veto) *KRS 311.772*, the Human Life Protection Act (HLPA).

Under the HLPA, conduct "to" or "upon a pregnant woman with the specific intent of causing or abetting the termination of the life of an unborn human being" is prohibited. *KRS 311.772(3)*. The HLPA does allow "a licensed physician to perform a medical procedure necessary in [his or her] reasonable medical judgment to prevent the death or substantial risk of death due to a physical condition, or to prevent the serious, permanent impairment of a life-sustaining organ of a pregnant woman." *KRS 311.772(4)(a)*.

Plaintiffs assert that because there remain numerous other Kentucky laws regarding abortion that can be interpreted as being contradictory to the HPLA, this leads to a situation in which it is impossible for ordinary people to understand what conduct is legally prohibited thus rendering all of the laws vague and unintelligible. Plaintiffs specifically raise concerns about how the laws will impact those participating in IVF (In Vitro Fertilization) processes due to uncertainty about the consequences surrounding the handling of unused embryos. Plaintiff's point to different statutes defining when a human life begins which range from the moment of detection of a fetal heartbeat to fifteen (15) weeks.

Plaintiffs are also concerned about the lack of exceptions under the law, namely regarding complications during pregnancy, and lethal fetal anomalies and argue that these concerns impinge upon their willingness to follow their religious decrees to reproduce and expand their families in a manner that does not jeopardize their health or the health of their unborn children.

Thus, Plaintiffs brought this case in October 2022 alleging that all statutes relating to abortion under *KRS 31.772* are 1) unconstitutionally vague and unintelligible, and 2) violate the Kentucky Religious Freedom Restoration Act (RFRA) and 3) denigrate Jews and Jewish practice, and are sectarian Christian and thereby violate Plaintiff's rights under Section 5 of the Kentucky Constitution. Plaintiff now seeks summary judgment on all of their claims. Attorney General Daniel Cameron (as substituted by Attorney General Russell Coleman) objects to the Plaintiff's Motion for Summary Judgment arguing that Plaintiffs raise no justiciable claims and therefore lack standing; and that the Plaintiffs cannot succeed on the merits of their claims.

STANDARD

The applicable standard to apply is that of summary judgment. The legal standard is whether there are "no genuine issues as to any material fact and that the moving party [is thus] entitled to judgment as a matter of law". *Scrifes v. Kraft*, 916 S.W.2d 779, 781 (Ky. Ct. App. 1996). "The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present" evidence establishing a triable issue of material fact. *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. Ct. App. 2001). The party that opposes a summary judgment motion "cannot defeat it without presenting at least some affirmative evidence showing the existence of a genuine issue of material fact for trial." *City of Florence, Kentucky v. Chipman*, 38 S.W.3d 387, 390 (Ky. 2001).

OPINION

To begin, "constitutional standing is an essential element of a justiciable case or controversy." *Cameron v. Beshear,* 628 S.W.3d 61, 68 (Ky. 2021) (internal citations omitted). In Kentucky, "courts have the constitutional duty to ascertain the issue of constitutional standing…to ensure that only justiciable causes proceed in court." *Id.* "Constitutional standing is defined by three requirements: (1) injury, (2) causation, and (3) redressability." *Id.* (internal citations omitted). Accordingly, "a plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Commonwealth Cabinet for Health and Family Servs. v. Sexton*, 566 S.W.3d 185, 196 (Ky. 2018).

A plaintiff "must demonstrate that she has suffered a concrete and particularized injury that is either actual or imminent." *Id.* To be 'particularized', the injury "must affect the plaintiff in a personal and individual way" and "the plaintiff [has] personally suffered some actual or threatened injury." *Overstreet v. Mayberry*, 603 S.W.3d 244, 252 (Ky. 2020). For concreteness, the injury "must actually exist." *Id.* As to 'actual or imminent', imminence "cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative…that the injury is certainly impending." *Id.* (internal citations omitted). Ultimately, as the United States Supreme Court has held: a "threatened injury must be certainly impending to constitute injury in fact and [] allegations of possible future injury are not sufficient." *Id.* (internal citations omitted). Further, individuals "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 416 (2013).

Ripeness is also an element of standing and justiciability. *Bingham Greenebaum Doll, LLP v. Lawrence*, 567 S.W.3d 127, 129 (Ky. 2018). The ripeness requirement is designed "to prevent the courts, through the avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Id.* Accordingly, "ripeness involves weighing two factors: (1) the hardship to the parties of withholding court consideration; and (2) the fitness of the issues for judicial review." *W.B. v. Com., Cabinet for Health and Family Servs.*, 388 S.W.3d 108, 114 (Ky. 2012). In essence, "courts cannot decide matters that have not yet ripened into concrete disputes. Courts are not permitted to render advisory opinions." *Bingham*, 567 S.W.3d at 130. If presented with an unripe claim, "the circuit court has no subject matter jurisdiction over it." *Doe v. Golden & Walters, PLLC*, 173 S.W.3d 260, 270 (Ky. Ct. App. 2005).

In the matter before this Court, Plaintiffs are proceeding under Kentucky's Declaratory Judgment Act, *KRS 418.040*, which states that "In any action in a court of record of this Commonwealth having general jurisdiction wherein it is made to appear that an actual controversy exists, the plaintiff may ask for a declaration of rights…and the court may make a binding declaration of rights." The purpose of a declaratory judgment is to allow "the parties to have their rights and obligations declared without being forced to act improperly and initiate litigation after an injury has occurred." *Jarvis v. National City*, 410 S.W.3d 148, 153 (Ky. 2013). However, as stated above regarding constitutional standing, there still must be an "actual controversy" and "justiciable issue" present. *Id.* In other words, "the existence of an actual controversy respecting justiciable questions is a condition precedent" for a declaratory judgment action. *Foley v. Com.*, 306 S.W.3d 28, 31 (Ky. 2010) (internal citations omitted). An 'actual controversy' in these situations, "requires a controversy over present rights, duties, and

liabilities; it does not involve a question which is merely hypothetical or an answer which is no more than an advisory opinion." *Id.* (internal citations omitted).

A Court "may declare the rights of litigants in advance of action when [it concludes] that a justiciable controversy is presented, the advance determination of which would eliminate or minimize the risk of wrong action by any of the parties." *Jarvis*, 410 S.W.3d at 153 (internal citations omitted).

In the matter at bar, the Court must find that Plaintiffs have failed to demonstrate the existence of a justiciable controversy as defined by generations of case law. Although overturned in part by the United States Supreme Court in *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228 (2022), *Roe v. Wade*, 410 U.S. 113 (1973) still provides guidance as to the question of standing in cases challenging the constitutionality of abortion statutes. In *Roe*, the Supreme Court found that because Jane Roe, at the time of the filing of the suit, was "a pregnant single woman thwarted by the Texas criminal abortion laws, [she thus] had standing to challenge those statutes." *Id.* at 124. It was further held that "Jane Roe had standing to undertake this litigation, that she presented a justiciable controversy, and that the termination of her 1970 pregnancy has not rendered her case moot." *Id.* However, the Supreme Court found that the Does, a married couple also challenging the constitutionality of the Texas laws, did not have standing. *Id.* at 127-28. The Does were at that point childless, Mrs. Doe was not pregnant, and the couple had been given medical advice that Mrs. Doe should avoid pregnancy. *Id.* at 127. However, the Does sought relief from the Court arguing that the Texas laws banning abortion impacted them in the event Mrs. Doe became pregnant due to contraceptive failure, and that if this occurred, they could want to terminate the pregnancy, which they would not be able to do legally in Texas. *Id.* at 127-28. The Court ultimately found that the Does claims were too

speculative, that "their alleged injury rests on…possible future pregnancy…and possible future impairment of health [and] any one or more of these several possibilities may not take place and all may not combine." *Id.* at 128. Thus, "the bare allegation of so indirect an injury is [not] sufficient to present an actual case or controversy…thus the Does therefore are not appropriate plaintiffs in this litigation." *Id.* at 128-29.

In the case before this Court, the facts relevant to the determination of standing are identical to the facts in *Roe*. Plaintiffs are three women, with none of the three currently pregnant. Plaintiffs Sobel and Kalb both assert that the current abortion laws are impeding them from attempting to expand their families. Plaintiff Baron is unwilling to attempt a pregnancy at her advanced maternal age because she believes there are no protections for her safety (however, the Court does point out that *KRS 311.772(4)* does provide that abortion is not a violation of the statute when it is done to prevent the death or substantial risk of death due to a physical condition, or to prevent the serious, permanent impairment of a life-sustaining organ of a pregnant woman).

In the case before this Court, the alleged injuries of the three Plaintiffs are hypothetical as none are currently pregnant or undergoing IVF at the present time. Accordingly, the Court simply cannot find that the Plaintiffs have shown "the existence of an actual controversy respecting justiciable questions" which is a required condition precedent for a declaratory judgment action. *Foley v. Com.*, 306 S.W.3d 28, 31 (Ky. 2010) (internal citations omitted). Therefore, the Court must conclude that the Plaintiffs here lack standing to proceed in this action.

Having found that the Plaintiffs lack standing to proceed, the Court need not address the merits of the Plaintiff's claims in this opinion. However, the Court will note that the Plaintiffs

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claims relating to concerns about being criminally prosecuted for participation in in IVF processes are misplaced. The Court notes the conclusions articulated in the Attorney General's October 26, 2022 Advisory Opinion stating that the HPLA "does not apply to the use, care, or disposition of embryos fertilized by in vitro fertilization." The Court also notes the express language of *KRS 507A.010(2)(b)* which states:

> **In a prosecution for the death of an unborn child, nothing in this chapter shall apply to acts performed by or a at the direction of a health care provider that cause the death of an unborn child if those acts were committed: As part of or incident to …fertility treatment …"**

In conclusion, in that the Court has found that summary judgment is appropriate as to Defendants based on a lack of standing, the inquiry will end here and the Court need not address the issues of the abortion statutes being void for vagueness/unintelligibility, nor will the Court address the RFRA and Section 5 of the Kentucky Constitution violation claims. However, the Court does acknowledge serious concerns regarding the substantive constitutionality of *KRS 311.772* and these questions will ultimately need to be revisited and addressed by the Kentucky Supreme Court.

ORDER

WHEREFORE IT IS HEREBY ORDERED AND ADJUDGED that Plaintiffs' Motion for Summary Judgment is **DENIED**, and Defendants' Cross-Motion for Summary Judgment is **GRANTED**.

BRIAN C. EDWARDS, JUDGE
JEFFERSON CIRCUIT COURT

cc:
Attorneys of Record