

NO. 22-CI-003225
ELECTRONICALLY FILED

JEFFERSON CIRCUIT COURT
DIVISION THREE (3)
JUDGE MITCH PERRY

EMW WOMEN’S SURGICAL CENTER, P.S.C., *et al.*

PLAINTIFFS

v.

DANIEL CAMERON, in his official capacity as
Attorney General of the Commonwealth of Kentucky, *et al.*

DEFENDANTS

**ATTORNEY GENERAL DANIEL CAMERON’S
SECOND MOTION TO DISMISS**

Attorney General Daniel Cameron moves the Court to dismiss the claims of Plaintiffs EMW Women’s Surgical Center, P.S.C. (“EMW”) and Ernest Marshall, M.D., as moot.

BACKGROUND

On June 24, 2022, the U.S. Supreme Court issued its decision in *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022). The Court overturned *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992), and held that the U.S. Constitution does not include a right to abortion. Accordingly, the *Dobbs* decision “return[s] the issue of abortion to the people’s elected representatives.” 142 S. Ct. at 2243.

The Plaintiffs here challenge two Acts of the General Assembly. The first, the Human Life Protection Act, KRS 311.772, established the law in Kentucky regarding abortion upon the Supreme Court reversing *Roe*. Once *Dobbs* “restor[ed] to the Commonwealth of Kentucky the authority to prohibit abortion,” KRS 311.772(2)(a),

the law went into effect immediately, prohibiting all abortions in the Commonwealth unless the procedure is necessary to prevent death, substantial risk of death, or “serious, permanent impairment of a life-sustaining organ.” KRS 311.772(4).

The second law challenged by the Plaintiffs, the Heartbeat Law, KRS 311.7707 to 311.7711, prohibits abortion after an unborn child’s “heartbeat has been detected.” KRS 311.7706(1). Like the Human Life Protection Act, the Heartbeat Law contains exceptions for when an abortion is “intended to prevent the death” or “serious risk of the substantial and irreversible impairment of a major bodily function” of the woman. KRS 311.7706(2). Unlike the Human Life Protection Act, the Heartbeat Law became law immediately upon the Governor signing the bill on March 15, 2019. In light of *Dobbs*, a federal court temporary restraining order against the enforcement of the Heartbeat Law was dissolved on June 29, 2022. *EMW Women’s Surgical Ctr., P.S.C. v. Secretary of Kentucky’s Cabinet for Health & Fam. Servs.*, No. 3:19-cv-00178 (W.D. Ky. June 29, 2022). The Plaintiffs’ complaint asserts that each Plaintiff sued on its or his own behalf and on behalf of its or his patients. (Compl. ¶¶ 13–15.)

In *Cameron v. EMW Women’s Surgical Center, P.S.C.*, 664 S.W.3d 633 (Ky. 2023), the Supreme Court of Kentucky held that the Plaintiffs “have first-party, constitutional standing to challenge the [Human Life Protection Act], but they lack such standing to challenge the [H]eartbeat [Law].” *Id.* at 652. Further, the Court “[could not] hold that the [Plaintiffs] have demonstrated that granting them third-party standing to assert the rights of their patients is appropriate,” as to either the Human Life Protection Act or the Heartbeat Law. *Id.* at 659. In sum, the Court held,

the Plaintiffs *only* have first-party, constitutional standing “to challenge the [Human Life Protection Act] on the grounds that it was an unconstitutional delegation of the General Assembly’s legislative power and became effective upon the authority of an entity other than the General Assembly.” *Id.* Accordingly, the Supreme Court affirmed the order of the Court of Appeals dissolving the temporary injunction entered by this Court. *Id.* at 661.

On remand from the Supreme Court, this Court currently has before it only “the determination of the first-party constitutional claims of the [Plaintiffs] as to the [Human Life Protection Act].” *Id.* But at least as to Plaintiffs EMW and Marshall, events occurring after the filing of this action have now made their claims moot. Accordingly, the Court should dismiss their claims.

ARGUMENT

As the Court is aware, constitutional standing is a prerequisite to any suit filed in Kentucky’s courts. *See Commonwealth, Cabinet for Health & Family Servs., Dep’t for Medicaid Servs. v. Sexton ex rel. Appalachian Reg’l Healthcare, Inc.*, 566 S.W.3d 185, 196–99 (Ky. 2018). Constitutional standing requires a plaintiff to prove injury, causation, and redressability. *Sexton*, 566 S.W.3d at 196; *accord Overstreet v. Mayberry*, 603 S.W.3d 244, 260 (Ky. 2020); *Cameron*, 664 S.W.3d at 647–48. “A plaintiff must allege personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.” *Id.* (citation omitted).

Along with standing, mootness also is one of the five “major justiciability doctrines” recognized by the Kentucky and federal courts that affects a court’s

constitutional power to decide a case. *Sexton*, 566 S.W.3d at 193; *Commonwealth v. Hughes*, 873 S.W.2d 828, 829 (Ky. 1994) (stating courts have “no jurisdiction to decide issues which do not derive from an actual case or controversy”). “A moot case is one which seeks to get a judgment upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a *then* existing controversy.” *Morgan v. Getter*, 441 S.W.3d 94, 98–99 (Ky. 2014) (cleaned up; emphasis in original); see *Cameron*, 664 S.W.3d at 652 (quoting *Morgan*). Mootness is related to standing because, with certain exceptions not relevant here, a moot issue “cannot support the [Plaintiffs’] assertion of constitutional standing, as no redressability regarding those issues is available.” *Cameron*, 664 S.W.3d at 652. The role of courts in our system of separated powers “does not extend to the issuance of merely advisory opinions” on moot issues. *Morgan*, 441 S.W.3d at 99.

As it relates to this case, Plaintiffs EMW and Marshall have listed for sale the real property where they perform abortions.¹ By all appearances, they are getting out of the abortion business, and therefore, any decision ultimately rendered by this Court will not redress any then-existing issue as to them.

And it is no wonder why. None of the Plaintiffs in this case has standing to challenge the Heartbeat Law, which generally prohibits abortions after six weeks. As the Plaintiffs have alleged, “[m]any patients do not yet know they are pregnant at this early stage. . . . By banning abortion at this early point in pregnancy, the

¹ See Cushman & Wakefield flyer, attached hereto as Exhibit A.

[Heartbeat Law] would prohibit the vast majority of abortions currently provided in the Commonwealth.” (Compl. ¶ 33.)

Prior to *Dobbs*, “EMW provided medication abortion up to 10 weeks LMP and procedural abortion up to 21 weeks and 6 days LMP.” (Compl. ¶ 13.) By EMW and Marshall’s own account, a vast majority of those abortions were after six weeks and thus are prohibited by the Heartbeat Law. As a result, no matter how the Court decides the issues regarding the Human Life Protection Act, the Heartbeat Law will prevent Plaintiffs EMW and Marshall from resuming performing enough abortions to make their business profitable. Their apparent decision to sell the real property where they perform abortions confirms as much.

Because any ruling by this Court as to the Human Life Protection Act will have no practical legal effect on Plaintiffs EMW and Marshall, their claims are moot. *Morgan*, 441 S.W.3d at 99. Because their claims are moot, they lack the requisite redressability factor necessary for constitutional standing. And absent constitutional standing, the claims of EMW and Marshall cannot proceed and must be dismissed.

CONCLUSION

The Supreme Court remanded this action to this Court after finding that none of the Plaintiffs “have third-party standing to challenge the [Human Life Protection Act] or the [Heartbeat Law] on the grounds that those statutes violated their patients’ constitutional rights, and they do not have first-party, constitutional standing to challenge the [Heartbeat Law].” *Cameron*, 664 S.W.3d at 661. Thus, the Plaintiffs’ third-party claims must be dismissed; so too, the Plaintiffs’ challenge to the Heartbeat Law also must be dismissed.

As directed by the Supreme Court, the only issues remaining to be decided by this Court on remand are “whether the [Human Life Protection Act] was an unlawful delegation of legislative authority in violation of Sections 27, 28, and 29 of the Kentucky Constitution and if the [Human Life Protection Act] became effective upon the authority of an entity other than the General Assembly in violation of Section 60 of the Kentucky Constitution.” *Id.* But for the reasons discussed above, the first-party claims of Plaintiffs EMW Women’s Surgical Center, P.S.C. and Ernest Marshall, M.D., as to the Human Life Protection Act are moot and also should be dismissed. The Court therefore should enter the attached proposed order.

Respectfully submitted,

Daniel Cameron
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CERTIFICATE OF SERVICE

I certify that on May 31, 2023, a copy of the above was filed electronically with the Court and served through the Court's electronic filing system on counsel of record and additionally by email as indicated below:

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FOR SALE



136 W. MARKET STREET

Louisville, KY 40202

14,124 SF Available

PROPERTY HIGHLIGHTS

- Built to ambulatory surgical center specifications
- Renovated in 2017
- Includes (18) secure parking spaces
- Elevator provides ease of access between first floor and basement
- Excellent visibility, high foot traffic & over 11,800 ADT
- Easy access to Downtown Medical District, CBD, I-65 and I-64
- Building uses include medical, office, retail and restaurant



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136 W. MARKET STREET

Louisville, KY 40202

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AERIAL MAP



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ORDER OF PARTIAL DISMISSAL

This action having been remanded to this Court from the Supreme Court of Kentucky, *Cameron v. EMW Women’s Surgical Center, P.S.C.*, 664 S.W.3d 633, 661 (Ky. 2023), this action coming before the Court on Attorney General Daniel Cameron’s second motion to dismiss, and the Court being sufficiently advised,

IT IS HEREBY ORDERED AND ADJUDGED that, as directed by the Supreme Court of Kentucky, the Plaintiffs’ third-party claims on behalf of their patients challenging the constitutionality of the Human Life Protection Act, KRS 311.772, and the Heartbeat Law, KRS 311.7707 to 311.7711, are hereby **DISMISSED WITH PREJUDICE**.

IT IS FURTHER ORDERED AND ADJUDGED that, as directed by the Supreme Court of Kentucky, the Plaintiffs’ first-party claims challenging the constitutionality of the Heartbeat Law, KRS 311.7707 to 311.7711, are hereby **DISMISSED WITH PREJUDICE**.

IT IS FURTHER ORDERED AND ADJUDGED that the Attorney General’s second motion to dismiss be, and hereby is, **GRANTED**. The first-party

claims of Plaintiffs EMW Women’s Surgical Center, P.S.C. and Ernest Marshall, M.D., challenging the constitutionality of the Human Life Protection Act, KRS 311.772, are moot, and therefore, are DISMISSED WITH PREJUDICE.

The first-party claim of Plaintiff Planned Parenthood Great Northwest, Hawai’i, Alaska, Indiana and Kentucky, Inc., challenging the constitutionality of the Human Life Protection Act, KRS 311.772, is not affected hereby and remains pending. As directed by the Supreme Court of Kentucky, the sole issues remaining to be decided as to that claim are “whether the [Human Life Protection Act] was an unlawful delegation of legislative authority in violation of Sections 27, 28, and 29 of the Kentucky Constitution and if the [Human Life Protection Act] became effective upon the authority of an entity other than the General Assembly in violation of Section 60 of the Kentucky Constitution.” *Cameron*, 664 S.W.3d at 661.

There being no just cause for delay, this is a final and appealable order.

SO ORDERED, on this the ____ day of _____, 2023.

JUDGE, JEFFERSON CIRCUIT COURT