IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
CASE NO: 3:19-CV-851-JRW

(*electronically filed*)

CHELSEY NELSON PHOTOGRAPHY, LLC AND CHELSEY NELSON — PLAINTIFFS

v.

LOUISVILLE/JEFFERSON COUNTY METRO GOVERNMENT, ET AL. — DEFENDANTS

DEFENDANTS' REPLY TO PLAINTIFFS' RESPONSE TO MOTION TO DISMISS PLAINTIFFS' CLAIMS

The Defendants, Louisville/Jefferson County Metro Government ("Metro Government" or "Metro"), Louisville Metro Human Relations Commission-Enforcement ("HRC" or "HRC-Enforcement"), Louisville Metro Human Relations-Commission-Advocacy ("HRC" or "HRC-Advocacy"), Kendall Boyd, in his official capacity as Executive Director of the HRC ("Director Boyd"), Marie Dever, Kevin Delahanty, Charles Lanier, Sr., Laila Ramey, William Sutter, Ibrahim Syed and Leonard Thomas (hereinafter collectively "Defendants"), by counsel, for their Reply to Plaintiffs' Response to Motion to Dismiss Plaintiffs' Claims state as follows:

Plaintiffs, Chelsey Nelson ("Nelson") and Chelsey Nelson Photography, LLC, ("Chelsey Photography") (collectively "Plaintiffs") have sued Metro Government so she does not have to photograph same-sex weddings, even though not a single same-sex couple has asked her to do so. In Plaintiffs' Response to Defendants' Motion to Dismiss (hereinafter Dkt. 33, "Plaintiffs' Response") Plaintiffs admit no one has asked Nelson to photograph a same-sex marriage but she still claims that she is faced with a credible threat of enforcement and prosecution under Louisville's ordinance that reasonably chills her exercise of constitutional rights. (Plaintiff's

Response at p.10). Nelson claims to have standing because she cannot promote her business and that Metro's Ordinance harms her business in numerous ways "that deter her from exercising her constitutional freedoms". Id.

Plaintiffs ignore Supreme Court and Sixth Circuit case law that govern a pre-enforcement challenge concerning standing. The standing doctrine requires the allegation of a personal stake in the controversy to justify the exercise of the court's powers. *McKay v. Federspiel*, 823 F. 3d 862, 867 (6th Cir. 2016), citing, *Warth v. Seldin*, 422 U.S. 490, 498-99, 95 S. Ct. 2197, 2205 (1975). Courts evaluate "constitutional standing" considering whether or not the plaintiff has alleged "'injury in fact' that is 'fairly traceable to the challenged action of the defendant' and is capable of being 'redressed' by the court." *McKay*, 823 F.3d at 867, quoting, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130 (1992). The party invoking jurisdiction has the burden of proving the elements of standing. *McKay*, 823 F.3d at 867, citing *Lujan*, 504 U.S. at 561, 112 S. Ct. 1230.

"In a pre-enforcement challenge, whether the Plaintiff has standing to sue often turns upon whether he [or she] can demonstrate an 'injury in fact' before the state has actually commenced an enforcement proceeding against him." *McKay*, 823 F.3d at 867, quoting, *Kiser v. Rietz*, 765 F. 3d 601, 607 (6th Cir. 2014). The United States Supreme Court has recognized that "[a]n allegation of future injury may" satisfy the injury-in-fact prerequisite if the alleged "threatened injury is 'certainly impending,' or if there is a 'substantial risk that harm will occur." *Susan B. Anthony List*, 134 S. Ct. 2341 (quoting *Clapper v. Amnesty Int'l USA*, 134 U.S. 149, 157-58, 133 S. Ct. 1138, 1147, 1150 n.5 (2013). "[A] plaintiff satisfies the injury-in-fact requirement" in the pre-enforcement context "where he alleges 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by statute and there exists a credible threat

of prosecution thereunder.'" *McKay*, 823 F.3d at 876, quoting, *Clapper*, 134 S.Ct. at 2342 (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S. Ct. 2301 (1979)).

To establish Article III standing, an injury must be "concrete, particularized, and actual or imminent: fairly traceable to the challenged action; and redressable by a favorable ruling." *Clapper*, 58 U.S. at 409, 133 S. Ct. at 1147, quoting, *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149-50, 130 S.Ct. 2743, 2752 (2010). Additionally, as stated in *Plunderbund Media, L.L.C., v. Dewine*, 753 Fed. Appx. 362 (6th Cir. 2018), "in the free speech context, where 'some other indication of imminent enforcement' is lacking, 'mere allegations of a 'subjective chill' on protected speech are insufficient to establish an injury-in-fact for pre-enforcement standing purposes.'" Id. at 366, quoting *McKay*, 823 F.3d at 868-69 (quoting *Berry v. Schmitt*, 688 F.3d 290, 296 (6th Cir. 2012).

In *McKay*, 823 F.3d at 869, *Plunderbund Media, L.L.C.* 753 Fed. Appx. at 366 and *Schickel v. Dilger*, 925 F.3d 858, 866-68 (6th Cir. 2019), the Sixth Circuit looked at pre-enforcement challenges involving standing and First Amendment and other constitutional law claims. In these cases, the Sixth Circuit analyzed multiple factors when plaintiffs rely on allegations of subjective chill to show the potential of enforcement in determining whether standing exists. Satisfying the essential elements of standing is more difficult in a pre-enforcement context. The factors to evaluate include (1) a history of past enforcement against the plaintiffs or others **for the same or similar conduct**; (2) enforcement warning letters sent to the plaintiffs for their specific conduct; (3) an attribute that makes enforcement easier or more likely such as where any member of the public can initiate an enforcement action. See *Plunderbund Media, L.L.C.*, 753 Fed. Appx. at 366-67; *McKay*, 823 F.3d at 868-69, *Schickel*, 925 F.3d at 866-68. As the Schickel Court noted "[s]tanding is not 'an ingenuous exercise in the conceivable." Id. at 868 (quoting *United States v.*

Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 688, 93 S. Ct. 2405 (1973)).

It has also been recognized "[t]o merit a preliminary injunction, [like Plaintiffs are seeking here,], an injury 'must be both certain and immediate, not 'speculative or theoretical.'" *D.T. v. Sumner County Schools*, 942 F.3d 324, 327 (6th Cir. 2019) (internal citation omitted). In a free-speech claim in the pre-enforcement context standing in some instances may be available if "threatened enforcement [is] 'sufficiently imminent'- that is, there is 'a credible threat' that the provision will be enforced against the plaintiff." *Phillips v. Dewine*, 841 F.3d 405, 415 (6th Cir. 2016), quoting, *Susan B. Anthony List*, 573 U.S. at 158-59, 134 S. Ct. at 2342.[1]

Here, Metro took no action against Plaintiffs pre-suit. Indeed, Metro did not know who Nelson or Chelsey Nelson Photography LLC was before this suit was filed. Additionally, Metro does not have a substantial history of litigating cases against others for refusing to photograph same-sex marriages. (See Affidavit of Director Kendall Boyd attached as **Exhibit 1** to Defendants' Memorandum in Support of Motion to Dismiss Plaintiffs' Claims; See also Supplemental Affidavit of Kendall Boyd attached as **Exhibit A**). Plaintiffs claim they have standing in this case because they have sustained ongoing harms and have plausible claims. Nelson claims the subject Ordinance poses a substantial risk to her and she claims without any proof that she "has individual standing to recover business losses sustained while operating her company as a sole proprietorship and to recover damages and attorneys' fees as a business. (Plaintiffs' Response at pp. 3-4).[2]

[1] In *Dewine*, the Sixth Circuit affirmed the trial court's dismissal for lack of standing involving free-speech and prior- restraint claims where no one had threatened action under the statute, and where any injury was 'conjectural and hypothetical' and did not satisfy the injury-in fact requirement." Id.,841 F.3d at 416.

[2] Plaintiffs claims are governed by a one-year limitation of action for an injury to the person of the plaintiff. See KRS 413. 140 (1)(a); see also *Creech v. McQuinn*, 957 S.W. 2d 261, 262 (Ky. App. 1997).

Plaintiffs' alleged injuries are hypothetical and conjectural; not actual and sufficiently imminent. *Lujan*, 504 U.S. at 560; *Phillips*, 841 F.3d at 415; *Sumner County Schools*, 924 F.3d at 327. Nelson states in her Response and in her Complaint that she wants to post statements online explaining her religious beliefs that marriage is solely between one man and one woman and why she can only promote this position in the context of her business. (Plaintiff's Response at pp. 5-6). Any damages claimed by Plaintiffs are purely speculative. While Plaintiffs have provided a lengthy Complaint with affidavits and other attachments, no proof has been provided of any damages. No injury in fact has occurred. No action has been taken against Plaintiffs by any of the Defendants. No showing has been made of an actual injury or imminent injury based upon the facts as they existed when this complaint was filed. See *Hyman v. City of Louisville*, 53 Fed. Appx. 740, 743-44 (6th Cir. 2002). Any future loss of business is hypothetical, conjectural and speculative. See also *Schickel*, 925 F.3d at 867-68; *Phillips*, 841 F.3d at 414-17.

Plaintiffs' claims are also not sufficiently ripe for review. In fact, Plaintiffs have not alleged in the Complaint or other documents submitted that she has "'an intention to engage in a course of conduct arguably affected with constitutional interest but proscribed by statute' [or ordinance] [thereby satisfying] …. "the injury-in-fact requirement" in the pre-enforcement context." *McKay*, 823 F.3d at 867, quoting, *Susan B. Anthony List*, 573 U.S. at 158-59, 134 S. Ct. at 2342. Indeed, Nelson claims she "would be foolish to speak her desired message and operate her business as her faith compels without first seeking clarity and protection from this Court." (Plaintiffs' Response at p. 2.) While Plaintiffs claim ongoing speech and chilling injuries, Plaintiffs simply do not have an injury-in-fact nor do they have an imminent threat of injury as required for standing. (Plaintiffs' Response at pp. 10, 20). Further, the fact that Metro or the other Defendants have not disavowed future action is not determinative of whether standing exists.

Plaintiffs claim that Metro has actively enforced the subject Public Accommodations Ordinance against others. (Plaintiffs' Response at pp. 8-9). However, Plaintiffs have not shown a substantial history of enforcement with respect to sexual orientation discrimination. Such a history does not exist. Plaintiffs only claim in general terms that Metro has actively enforced its law against others. (Plaintiffs' Response at pp. 8-9, 17). However, Plaintiffs recognize the case of *Hyman v. City of Louisville*, 53 Fed. Appx. 740 (6th Cir. 2002), as the last time a pre-enforcement constitutional challenge on the basis of gender identity or sexual orientation was made to the City of Louisville's fairness Ordinance. (See Plaintiffs' Response at pp. 9 n.4). In broad terms Plaintiffs claim that for the period of 2010-2017, records show there have been 93 Public Accommodations complaints brought by Metro. (Id. at pp. 8-9, 17). This assertion overly generalizes the relevant enforcement history of Metro's Public Accommodations Ordinance.

Metro's Ordinance prohibits discrimination finding it an unlawful practice "for a person to deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation, resort or amusement on the grounds of race, color, religion, national origin, disability, sexual orientation or gender identity." Metro Ordinance Sec. 92.05 (A). In addition, Sec. 92.05 (B) makes it an unlawful practice for a person to publish or circulate items indicating that goods or services will be refused, withheld or denied to individuals including on account of his "race, color, religion, national origin, disability, sexual orientation or gender identity."

In *Plunderbund Media, L.L.C.*, 753 Fed. Appx. at 368-69, the Sixth Circuit analyzed a telecommunication harassment statute in a case involving First and Fourteenth Amendment claims. The Court looked at the history of past enforcement and considered whether that history supplies a credible threat of prosecution. The Court noted that with respect to the statute at issue

that there were no appellate decisions dealing with the context of political speech. Rather, plaintiffs in that case cited and relied on cases concerning an entirely different section of the telecommunications statute at issue in considering whether standard existed. Id. 753 Fed. Appx. at 369. The court found that because there was not a history of past enforcement against them for the types of online posts they made the plaintiffs had not sufficiently shown that a substantial risk of "harm will occur" and therefore because the allegations were "too speculative" the court affirmed the trial court's dismissal for lack of standing.

The same is true in the subject case. There is not a substantial history of enforcing that part of the subject ordinance that concerns sexual orientation and same sex marriages. While Plaintiffs cite statistics regarding enforcement of housing discrimination and other complaints based on race, religion, gender, origin, color, and ethnicity these cases are dissimilar and concern primarily discrimination based on race, color, and national origin. (Plaintiffs' Response at pp. 8-9). As previously stated in Defendants' Motion to Dismiss it has been 18 years since there was a constitutional case involving the subject ordinance and sexual orientation. *Hyman*, 53 Fed. Appx. 740.

As indicated in the Affidavit of Executive Director Kendall Boyd[3] of the Louisville Metro Human Relations Commission: "[t]he central mission of the Louisville Metro Human Relations Commission is to promote unity, understanding and equal opportunity among all people of Louisville Metro which consists of Jefferson County, Kentucky and to eliminate all forms of bigotry, bias and hatred from the community. 'The Human Relations Commission conducts investigations on allegations of discrimination in housing, employment and for alleged hate crimes and conciliates claims of discrimination that may be filed with the agency….' The Human

[3] A copy of the Affidavit of Kendall Boyd is attached as **Exhibit 1** to the Defendants' Memorandum in Support of Motion to Dismiss.

Relations Commission seeks to bridge the many ethnic, racial and religious groups in Louisville Metro through a combination of education/outreach and civil law enforcement."

While there have been two complaints based on sexual orientation discrimination that have proceeded to an administrative hearing in Metro Louisville, like in *Plunderbund Media, L.L.C.* there is no history of the Defendants litigating a case similar to this one under the subject ordinance See **Exhibit A**, Supplemental Affidavit of Director Boyd.

In *Plunderbund Media, L.L.C.*, the Court stated: "Plaintiffs… have not cited a single case that shows a history of enforcement against them or against the type of online posts they make." Id. at 370. Indeed, Plaintiffs have made no online posts. Like in *Plunderbund Media*, Plaintiffs cannot allege a history of enforcement by anyone against them. In fact, HRC-Enforcement and HRC-Advocacy have a long history of conciliation. Similar to *Plunderbund Media*, the Plaintiffs have no injury-in fact. Plaintiffs have "failed to allege a factual non-conjectural basis for their fear." Id. at 372.

Even so, Plaintiffs claim "Chelsey need only prove a 'substantial risk' of" the subject Ordinance harming her. Nelson claims she meets the "quite forgiving" test in the context that the credible threat of prosecution standard is as forgiving as espoused in *N.H. Right to Life Political Action Committee v. Gardner*, 99 F.3d 8, 14 (1st Cir. 1996). This First Circuit case was decided before the United States Supreme Court's decision in *Clapper*, 134 U.S. 149, 133 S. Ct. 1138 and is no longer the position followed by the First Circuit or the Sixth Circuit in this area. In *Sever v. City of Salem* 390 F. Supp. 3d 299, 308 n. 6 (D. Mass. 2019), the United States District Court for the District of Massachusetts recognized that the "quite forgiving" test is irreconcilable with later First Circuit decisions coming after the Supreme Court's opinion on *Clapper*. The *Sever* Court cited *Blum v. Holder*, 744 F.3d 790, 796-98 (1st Cir. 2014), where the First Circuit Court of Appeals

found "[a]llegations of a subjective chill' [analysis] are not an adequate substitute for a claim of a specific present objective harm or a threat of a specific future harm. "Id., 350 F. Supp. 3d at 308, quoting, *Blum*, 744 F.3d at 796. The *Sever* Court found the plaintiff's "future injury" in that case "too speculative" to satisfy standing and also found plaintiff's subjective chill to be "insufficient to establish standing. Id. at 311.

As indicated in *Sever* that the First Circuit now applies an "objectively reasonable fear of prosecution injury standard" rather than the "quite forgiving standard" that Plaintiffs' counsel advocates. See *Sever*, 390 F. Supp. 3d at 308 n. 6. In any event, these tests do not apply in analyzing pre-enforcement challenges in the Sixth Circuit.

The Sixth Circuit in a pre-enforcement challenge context has analyzed several factors in looking at cases involving issues of standing and constitutional law claims in determining whether standing exists as previously discussed in the cases cited above; see *McKay*, 823 F.3d at 869; *Plunderbund Media, L.L.C.* 753 Fed. Appx. at 366. Similar to the Sixth Circuit's finding in *Plunderbund Media*, that there was no standing, this Court should also find Plaintiffs lack standing to bring this pre-enforcement challenge.

In *D.T. v. Sumner County Schools*, 942 F.3d at 326-28, the Sixth Circuit affirmed the trial court's denial of the plaintiff's motion for a preliminary injunction holding that the hypothetical fear of prosecution was not an immediate, irreparable injury. While Plaintiffs' philosophical debate on what constitutes free speech may be interesting, Plaintiffs' underlying claim is not justiciable. The Plaintiffs' allegations inherently call for conjecture and speculation and rely on a hypothetical claim of injury. Even in the Department of Justice's recently filed Statement of Interest in Support of Plaintiffs' Motion for a Preliminary Injunction (Dkt. 38), the Department of Justice does not contest the Plaintiffs' lack of standing, because the argument cannot be sustained. The alleged

injury is too speculative under Article III and Sixth Circuit precedent and this Court should dismiss this action.

Respectfully submitted,

MIKE O'CONNELL,
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/s/ John F. Carroll

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CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing Defendants' Reply to Plaintiffs' Response to Motion to Dismiss was electronically filed on this 28th day of February, 2020, via the Court's electronic mail system which in turn will email a copy of this Pleading to the following persons:

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SUPPLEMENTAL AFFIDAVIT OF KENDALL BOYD

Kendall Boyd, the Executive Director of The Louisville Metro Humans Relations Commission, after first being duly sworn, states as follows:

1. I am the Executive Director/Director of the Louisville Metro Human Relations Commission and have held this position since being appointed by Mayor Greg Fischer in 2017.

2. The Human Relations Commission conducts investigations on allegations of discrimination in housing, employment and for alleged hate crimes, and conciliates claims of discrimination that may be filed with the agency. Under Sec. 92.09 (D) of the Ordinance, the Human Relations Commission must attempt to informally resolve or conciliate, every complaint it receives. The Human Relations Commission conciliates the large majority of the discrimination complaints it receives.

3. As indicated in my affidavit initially submitted in this case, based upon information and belief and a reasonable inquiry, I believe the last time Metro Government or its predecessors

the City of Louisville and/or Jefferson County last addressed a constitutional law challenge to the Public Accommodations Ordinance was in 2002 in the *Hyman*[1] case.

4. Based upon information and belief and a reasonable inquiry, Metro Government or its predecessors the City of Louisville and/or Jefferson County received a total of 173 complaints based on sexual orientation discrimination under Chapter 92 of the Louisville Metro Code of Ordinances between January 1, 2002 and the date of this affidavit. Of these types of cases, only two complaints proceeded to an Administrative Hearing, one in 2012 and one in 2014. All other matters were conciliated or dismissed.

Further the Affiant sayeth naught on this 27th day of February 2020.

KENDALL BOYD

COMMONWEALTH OF KENTUCKY
COUNTY OF JEFFERSON

The foregoing Affidavit was subscribed and sworn to before me by Kendall Boyd on this 27 day of February 2020.

My commission expires: Notary Public, State at Large, KY My commission expires Mar. 16, 2022.

NOTARY PUBLIC
State at Large, Kentucky

[1] *Hyman v. City of Louisville*, 53 Fed.Appx. 740 (6th Cir. 2002)