

**COMMONWEALTH OF KENTUCKY
FRANKLIN COUNTY CIRCUIT COURT
DIVISION NO. II
CIVIL ACTION NO. 01537**

**CHARLOTTE WOOD, WILLIE
THOMAS BODDIE, JR., and
Rev. ALBERT M. PENNYBACKER**

Plaintiffs,

v.

**COMMONWEALTH OF KENTUCKY,
Ex rel. Trey Grayson, Secretary of State,
In his official capacity,**

Defendant,

GREGORY D. STUMBO, Attorney General,

Intervening Defendant,

**KENT OSTRANDER and
the Honorable VERNIE MCGAHA**

Contestees/Defendants

**BRIEF IN SUPPORT OF CONTESTEES/DEFENDANTS' MOTION
TO DISMISS AND FOR JUDGMENT ON THE PLEADINGS**

INTRODUCTION

Constitutional Amendment No. 1 (the "Marriage Amendment"),¹ adopted by seventy-five percent of the electors on November 2, 2004, addresses two intimately-related aspects of a single subject—marriage. The amendment says what marriage is, and what it is not, in clear language:

Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized.

¹The Attorney General improperly denotes the amendment as the "Gay Marriage Ban Amendment." However, the Marriage Amendment does far more than ban "gay" marriage. It preserves the institution of marriage by prohibiting the redefinition of "marriage" to include groups or same-sex couples, and by precluding the extension of marital status to unmarried individuals, couples or groups, regardless of their sex.

Kent. Const. § 233A. The ballot question revealed the essential character and purpose of the proposed amendment as follows:

Are you in favor of amending the Kentucky Constitution to provide that only a marriage between one man and one woman shall be a marriage in Kentucky, and that a legal status identical to or similar to marriage for unmarried individuals shall not be valid or recognized?

Complaint, ¶ 8.

The essence of Plaintiffs' Complaint about the ballot question presented to the voters is that it failed to explain the consequences of adopting the Marriage Amendment. Kentucky law is clear that the ballot question need only state the substance of what the amendment says, not its consequences. The voters themselves are deemed competent to determine the consequences. Plaintiffs' second claim, that the two sentences of the amendment do not relate to the same subject matter, is even more far-fetched. The Plaintiffs' strained interpretation of the amendment as impairing private contracts is implausible under normal rules of statutory construction. It cannot be disputed that both sentences of the Marriage Amendment relate to the subject matter of marriage.

STANDARD OF REVIEW

The Court should grant a motion to dismiss where "it appears the pleading party could not prove any set of facts in support of his claim that would entitle him to relief." *Wood v. Wyeth-Ayerst Laboratories, Div. of Am. Home Prod.*, 82 S.W.3d 849, 851 (Ky. 2002). Plaintiffs cannot prove any set of facts that would entitle them to the relief requested.

Similarly, on a motion for judgment on the pleadings, "[t]he judgment should be granted if it appears beyond doubt that the nonmoving party cannot prove any set of facts that would entitle him/her to relief." *City of Pioneer Village v. Bullitt Co.*, 104 S.W.3d 757, 759 (Ky. 2003).

Assuming the truth of the factual allegations of the Complaint, the Court could not rule in Plaintiffs' favor as a matter of law. Accordingly, the Court should grant Contestees/Defendants' motion for judgment on the pleadings.

I. THE BALLOT QUESTION INFORMED THE ELECTORATE OF THE SUBSTANCE OF THE MARRIAGE AMENDMENT

The Marriage Amendment clearly describes the legal status that will and will not be valid or recognized as a marriage by the Commonwealth. A marriage between a man and a woman will be valid and recognized in Kentucky, and no other marriage-like legal status will be valid or recognized. The question presented to the voters clearly portrayed this. *See* Complaint, ¶ 8.

Plaintiffs assert that the ballot question violated KRS § 118.415 because “[t]here are actual, potential, and unknown deleterious effects of the amendment set out in SB 245 (2004) on the rights, privileges, and religious beliefs of persons, both gay/lesbian and heterosexual, living in the Commonwealth.” Complaint, ¶ 22. Accordingly, Plaintiffs claim that the General Assembly and Secretary of State failed “to adequately inform the electorate that the substance of this amendment would have such deleterious effects” *Id.*, ¶ 23. However, Plaintiffs fail to explain what any of these alleged “deleterious effects” are. In fact, the alleged “deleterious effects” on any rights, privileges or religious beliefs are non-existent. The Marriage Amendment did not change the law; it merely placed existing law into the Constitution. Moreover, even if the Marriage Amendment did change the law, and even if it could be construed to have the “deleterious effects” the Plaintiffs assert, the ballot question complied with § 118.415.

Kentucky courts have considered and resolved the level of detail required in a ballot question to satisfy the requirements of § 118.415. In *Funk v. Fielder*, 243 S.W.2d 474 (Ky. 1951), taxpayers

attempted to prevent the submission of a question on the ground that it was “not stated ‘in a manner calculated to inform the electorate of the substance of the amendment.’” *Id.* at 476.² The Kentucky High Court ruled that because the provision

is but a statute implementing the machinery of the Constitution . . . it should be given a liberal construction in its application. If the question is not misleading or inconsistent and reveals the essential character and purpose of the proposed amendment, it must be deemed to meet the requirements of the Constitution and the statute.

Funk, 243 S.W.2d at 476. The question at issue in *Funk* omitted certain procedural matters, but otherwise addressed every part of the amendment. *Id.* at 477. The Court noted approvingly that “[i]t has been expressly held in other jurisdictions to be proper to submit the amendment only *without reference to what it will abrogate or alter.*” *Id.* at 478 (emphasis added). The question complied with the statutory requirements.

The High Court subsequently ruled that the Attorney General erred by crafting a ballot question that attempted to explain the effects of a constitutional amendment. *Ferguson v. Redding*, 304 S.W.2d 927, 930 (Ky. 1957).³ The ballot question stated that the office of Superintendent of Public Instruction would be abolished at the end of the term of the incumbent, even though the amendment was silent on the issue. *Id.* The Court held that it was invalid for the question to address implications of the amendment:

[W]e do not conceive it to be [the Attorney General’s] function to determine possible side-effects or ultimate consequences, or to expand interpretation to the extent of

²The statute at issue in *Funk* was former § 118.430, which has been replaced by § 118.415. See KRS § 118.430.

³Section 118.415 permits either the General Assembly or the Attorney General to state the substance of the proposed amendment. The Court’s description of the Attorney General’s function in drafting the question is just as applicable to the General Assembly.

supplying omissions or making clarifications, even by use of well established rules of construction. It is his duty to *state the substance* of the amendment as actually set out in the legislative proposal, *without interpretative expansion or restriction*.

Id. (emphasis added). The Court affirmed the trial judge’s decision, but criticized his view that the question should describe the effects of the amendment:

The circuit courts seemed to be of the opinion that the question should call attention to possible ultimate consequences of the adoption of the amendment. As previously indicated, we think the function of the question is only to state *the substance of the terms* of the amendment, *leaving it to the voters to judge of its possible consequences*.

Id. at 931 (emphasis added).

Most recently the Kentucky Court of Appeals addressed the validity of a ballot question in *Chandler v. City of Winchester*, 973 S.W.2d 78 (Ky. Ct. App. 1998). In *Chandler* the Attorney General argued that a predecessor erred in preparing a ballot question because the question did not mention what he considered the amendment’s most important feature—the “abolish[ment of] the requirement that any debt incurred by a local government in excess of its revenue for any given year must be approved by a two-thirds vote of its citizenry.” *Id.* at 81. The plaintiff argued that, accordingly, the question failed to state the substance of the amendment as required by § 118.451(2).

Citing *Funk* and *Ferguson*, the Court of Appeals rejected the claim:

We conclude that the trial court was correct when it stated that it was not the responsibility of the attorney general to include the changes or consequences of the amendment, but only to state the basic substance of the amendment.

Chandler, 973 S.W.2d at 82.

Plaintiffs’ claim in Count I raises the precise argument rejected in *Funk*, *Ferguson*, and *Chandler*—the claim that the ballot question presented to the voters should have explained the consequences (i.e., “deleterious effects,” Complaint ¶¶ 22-23) of the amendment. The cases have

uniformly ruled that the question need only state the substance of what the amendment says, not what the amendment does. See *Funk*, 243 S.W.2d at 478; *Ferguson*, 304 S.W.2d at 931; *Chandler*, 973 S.W.2d at 82. In fact, a question attempting to state the consequences, or “deleterious effects,” of the Marriage Amendment would have been improper. *Ferguson*, 304 S.W.2d at 930. Because Plaintiffs make no claim that the question failed to state the substance of what the amendment says, Count I fails to state a claim for which relief can be granted.

II. SECTION 233A CONTAINS A SINGLE SUBJECT

The two sentences of the Marriage Amendment contain only forty-one words. The first sentence incorporates the age-old meaning of marriage into the Constitution: “Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky.” The second sentence proscribes extending official status to marriage imitations or substitutes in unambiguous terms: “A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized.” These two sentences together describe the kinds of relationships to which marital status will be extended in Kentucky.

Prior to 2000, the second sentence would have been extraneous. However, the Vermont civil union status, effective July 1, 2000, created “marriage” in everything but name only for same-sex couples. The ACLU described the new status as follows: “A civil union is a comprehensive legal status parallel to civil marriage for all purposes under Vermont state law. . . . According to the Vermont civil union law, spouses in a civil union will enjoy the same state law protections and responsibilities as are available to spouses in a marriage.” ACLU Lesbian & Gay Rights Freedom

Network, *A Historic Victory: Civil Unions for Same-Sex Couples—What’s Next!* at 1 (2000).⁴ A subsequent California statutory scheme grants all of the rights of spouses to same-sex and certain opposite-sex “domestic partners” as of January 1, 2005. *See* Cal. Fam. Code §§ 297 & 297.5 (“Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties . . . as are granted to and imposed upon spouses”). In view of the redefinition of “spouses” in Vermont and California, the General Assembly and the voters could well have thought it necessary to explain what marriage is not in order to fully preserve the institution of marriage.

A. The Second Sentence Relates to Marital Status

The sole basis for Plaintiffs’ claim that the Marriage Amendment addresses multiple and unrelated subject matters is their strained and unnatural construction of the second sentence to conclude that it impairs “existing contractual rights.” Complaint, ¶ 30. Plaintiffs allege that the second sentence of the Marriage Amendment “purports to regulate a wide range of legal and contractual relationships between unmarried persons.” Complaint, ¶ 29. This is patently false. On its face, the second sentence simply precludes recognition of a legal status identical or substantially similar to marriage for unmarried individuals. It says nothing whatsoever about private legal or contractual arrangements, and does not purport to regulate them in any way.⁵ The second sentence

⁴Available at http://archive.aclu.org/issues/gay/civil_union_publ.html, last visited December 3, 2004.

⁵Private contractual arrangements differ substantially from what has traditionally been known as the “marriage contract.” The Commonwealth has no involvement in private contracts; parties may begin and end a contractual relationship without the Commonwealth ever knowing about it unless one party sues the other for breach. In contrast, marriage, although “the result of a contract, after its consummation . . . is impressed with a public character and is no longer in the nature of a contract, but is a status deeply affecting the public welfare as well as the parties to the union. . . . [A]lthough

does not purport to impact existing contracts, and normal rules of statutory construction would not permit it to be construed to do so.

It is well settled that there is no room for construction where statutory language is unambiguous:

[G]enerally a statute is open to construction only if the language that is used is ambiguous and requires interpretation. If the language is clear and unambiguous and if applying the plain meaning of the words would not lead to an absurd result, further interpretation is unwarranted.

Autozone, Inc. v. Brewer, 127 S.W.3d 653, 655 (Ky. 2004) (citations omitted). Furthermore, it is an elementary rule of statutory construction that a measure ““must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score.”” *Martin v. Gage*, 134 S.W.2d 966, 969 (Ky. 1939) (citation omitted). In *Martin* the Court held as follows:

“It is a universal rule that the interpretation of statutes should be such as to confine their operation and effect within the power and authority of the Legislature that enacted them, and if the language employed is capable of two interpretations, one applicable to some matters beyond the authority of the lawmaking body to legislate upon, and the other within such power and authority, the latter should be adopted.”

Id. (quoting *Petroleum Exploration, Inc. v. Superior Oil Corp.*, 24 S.W. 2d 259, 260 (Ky. 1930)).

The second sentence of the Marriage Amendment is clear and unambiguous: “A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized.” By its express terms, the sentence prohibits governmental recognition or creation of

the mutual assent of the parties is a prerequisite to the marriage, the consummation of the marriage is of such public concern that the status acquired cannot be brought about or maintained except by consent of the state [I]t follows that the relationship cannot be dissolved except in the manner and under the conditions prescribed by law.” *Hensley v. Hensley*, 151 S.W.2d 69, 70 (Ky. 1941). The second sentence simply precludes unmarried persons from attaining a status in relation to the Commonwealth that is similar to that arising from a marriage contract.

a marriage-like legal status for unmarried couples or groups, and has no application to private contracts. Because “applying the plain meaning of the words would not lead to an absurd result, further interpretation is unwarranted.” *Autozone*, 127 S.W.3d at 655. Thus, Plaintiffs’ implausible interpretation of the second sentence must be rejected.

Moreover, if the Court were to accept the Plaintiffs’ legal interpretation of the Marriage Amendment, it would be ruling that the Amendment impairs existing contractual rights. A law impairing the obligation of contracts would be a direct violation of Article I, Section 10 of the United States Constitution. In addition, according to Plaintiffs, if the second sentence were construed to impair existing contracts, it would violate Section 256 of the Kentucky Constitution. The Marriage Amendment should not be construed to impair contracts unless the language is incapable of any other construction. *Martin*, 134 S.W.2d at 969; *Petroleum Exploration, Inc.*, 24 S.W.2d at 260. The second sentence does not facially impair contractual rights, and, in its context, it clearly prohibits governmental recognition or creation of a marriage-like legal status for unmarried couples or groups. Accordingly, the second sentence must be construed, consistent with its clear and unambiguous terms, to prohibit governmental recognition or creation of a marriage-like legal status for unmarried persons. It may not be construed to impair existing contractual rights.

B. The Sentences Are Logically Related

Under the only plausible and permissible interpretation of the Marriage Amendment, the two sentences are intimately related to the single subject of marriage—the Amendment describes what is a valid marital status and what is not. Nevertheless, Plaintiffs allege that the Marriage Amendment:

impermissibly combined multiple unrelated subject matters and, on November 2, 2004, forced voters to make an unfair and, by virtue of the single subject rule, a constitutionally improper choice. Those voters who wished to vote in favor of

constitutionally defining marriage as the union of man and woman, but who also wished to vote against [the second sentence] were faced with the improper choice that the single-subject rule is designed to prevent.

Complaint, ¶ 32. This is like saying that a provision defining what legal tender is, with a second sentence prohibiting counterfeits, involves multiple, unrelated subject matters. It is like saying it would be unfair to require voters to vote against issuing counterfeit currency in order to adopt a provision stating the requirements for valid currency. The claim is without merit.

Section 256 of the Kentucky Constitution, in rather broad language, states that “an amendment may relate to a single subject *or to related subject matters . . .*” (Emphasis added.) Two sentences saying what marriage is and what it is not are clearly related to the subject of marriage. That much was clear under the case law construing the former, narrower version of Section 256.⁶

The guiding principle in addressing whether a constitutional amendment submitted to or adopted by the voters complies with constitutional requirements is deference to the voters:

[C]ourts should be reluctant to declare legislative acts unconstitutional, and will resolve doubts in favor of their validity and will sustain such acts unless clearly in conflict with constitutional limitations. [Citing Kentucky cases.]

* * *

It may be said that the Act proposing the amendment is obscure, or that it would not be wise to adopt it, but these are questions in the first instance for the General Assembly and in the latter instance for the people. . . .

. . . The people of Kentucky have the right to amend its Constitution as they please and, if mistakes are made, we must patiently await the time when experience will lead to their correction.

⁶The former language stated that “[n]o Amendment shall relate to more than one general subject.” *Funk*, 243 S.W.2d at 477. An earlier version provided that “no amendment shall relate to more than one subject.” *Curry v. Laffoon*, 88 S.W.2d 307 (1935).

Hatcher v. Meredith, 173 S.W.2d 665, 669, 670 (Ky. 1943) (citations omitted). In *Hatcher*, an amendment was proposed that would bring about two substantive changes to Section 246. The first would remove a salary cap for public officials and allow the General Assembly to regulate the salary, and the second provided that the General Assembly’s regulation would affect the compensation of those currently in or elected to office. *Id.* at 667. The plaintiff claimed that these two substantive changes were two amendments that should be submitted separately. The Court described the issue before it as follows:

Thus our inquiry narrows to the question of whether the whole matter found in the amendment is so related to the general subject of the amendment as to have a natural connection with it, or is so foreign to it as to have no bearing upon the general subject matter and the object sought to be accomplished. Constitutional limitations such as the one now under consideration are intended to prevent the submission, as one amendment, of two or more propositions which are so widely separated in meaning and purpose as to have no logical interdependence. A single question on such a double proposal cannot be truthfully answered, “Yes” or “No”, by a voter who favors one proposal, while opposing the other. He cannot vote at all without supporting what he desires to oppose or opposing what he desires to support. In this manner, the fate of one proposal might turn, not upon its own merits, but upon the popularity or unpopularity of the unrelated proposal with which it was linked. Such a proposal would relate to more than one subject and would violate section 256 of the Constitution. *If, however, each provision of a proposed amendment is an integral part of a general plan, the amendment is not plural.*

* * *

It is further provided by section 256 of the Constitution that amendments thereto shall be so submitted as to allow a separate vote upon each. It is forcefully insisted that the proposed amendment to section 246 does not allow to a voter a separate vote as to whether the salary limitation, which is now a part of section 246, shall be removed, and a separate vote on the other proposition as to whether it shall apply to officials in office or elected at the time of the adoption. The argument is plausible, and somewhat persuasive, *but it does not accord with the law.*

Hatcher, 173 S.W.2d at 667-68 (emphasis added). The Court held that because the two substantive provisions were closely related to a single plan, they did not have to be submitted as separate

questions. *Id.* at 669. It was not unfair to require electors to vote on the two substantive provisions together, even though some voters may have favored one and opposed the other.

Plaintiffs are essentially arguing that the two sentences of the Marriage Amendment should have been submitted as separate questions. However, the fact that two provisions could be separated into separate amendments does not mean they must be separated. In a challenge to the amendment repealing prohibition and reinstating a prior provision regulating alcohol at the same time, the High Court stated that the following proposition “is clearly right”:

“The fact that an amendment can be separated into two or more propositions concerning the value of which diversity of opinion may exist is not alone decisive. If, in the light of common sense, the propositions have to do with different subjects, if they are so essentially unrelated that their association is artificial, they are not one; but if they may be logically viewed as parts or aspects of a single plan, then the constitutional requirement is met in their submission as one amendment.”

Curry v. Laffoon, 88 S.W.2d 307, 308 (1935) (citation omitted).⁷ The Court held that repealing one amendment and reinstating a former provision at the same time complied with the single subject rule because both related to regulation of alcohol. *Id.*

An amendment to Section 256 itself resulted in a claim that it addressed multiple subjects because the amendment contained multiple propositions. The Court readily rejected the assertion:

It is generally held that a single amendment may cover several propositions if they are not distinct or essentially unrelated. The demand of the Constitution that an amendment shall relate to but one subject is met if several propositions in it are congruous and germane to a general object or purpose, and all are legitimately connected or related to one subject; . . . The present proposed amendment deals with one subject, namely, Amendments to the Constitution.

Funk, 243 S.W.2d at 478.

⁷The *Hatcher* Court cited *Curry* in support of its ruling that the two substantive issues there did not need to be submitted as separate amendments.

The Marriage Amendment meets the tests articulated in these cases. Both sentences refer and relate to the same subject, marriage. The first sentence recognizes that a relationship may qualify as a marriage only if it involves one man and one woman; relationships among three or more people, or between persons of the same sex, do not qualify as a marriage. The second sentence prohibits the Commonwealth from creating or recognizing a legal status like marriage for unmarried individuals, couples or groups, regardless of their sex. Thus, while the first sentence states the requirements for a valid marriage, the second prohibits granting legal status to marriage counterfeits or imitations. Together, the two sentences determine the relationships that may be accorded marital status in Kentucky. The Marriage Amendment comports with the cited cases because the two sentences are closely related to a single plan and germane to a general object or purpose: to protect the institution of marriage. *See Hatcher*, 173 S.W.2d at 668; *Curry*, 88 S.W.2d at 308; *Funk*, 243 S.W.2d at 478. There was nothing unfair about requiring the electors to vote for marriage and against counterfeits at the same time. *See Hatcher*, 173 S.W.2d at 667-68; *Curry*, 88 S.W.2d at 308. Plaintiffs' claim under Count II that the Marriage Amendment addresses multiple subjects fails as a matter of law. The facts alleged cannot support the legal interpretations and claims asserted.

CONCLUSION

For the foregoing reasons, Contestees/Defendants respectfully request that the Court dismiss Plaintiffs' Complaint for failure to state a claim for which relief may be granted, or, in the alternative, enter judgment on the pleadings against Plaintiffs.

Dated: December 6, 2004

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent by U.S. Mail on this ____ day
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