COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II
CIVIL ACTION NO. 04-CI-01537

CHARLOTTE WOOD, et al PLAINTIFFS

V.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS AND FOR JUDGMENT ON THE PLEADINGS

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

GREGORY D. STUMBO, Attorney General,
Commonwealth of Kentucky INTERVENING DEFENDANT

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Gregory D. Stumbo, Attorney General of the Commonwealth of Kentucky, by and on behalf of the Commonwealth, submits this memorandum of law in support of his motion to dismiss "Count I" of the complaint for lack of jurisdiction and for judgment on the pleadings on "Count II."

STATEMENT OF THE CASE

Plaintiffs bring this "election contest" pursuant to KRS 120.280 seeking to have this Court declare the so called "Gay Marriage Ban Amendment," declared void as a matter of law. Plaintiffs allege the amendment is unconstitutional "because," they say, "it contains a single amendment that deals with more than one unrelated subject."[1] They also claim it is vague.

The plaintiffs are Charlotte Wood, Willie Thomas Boddie, Jr., and Rev. Albert M. Pennybacker. Each allege they are "duly qualified and registered voter who voted in the 2004 General Assembly" who cast votes on the ballot question." Ms. Wood alleges she is a board

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[1]Complaint, page 1 "introduction." This Amendment will be Section 233A, in the Kentucky Constitution.

member of the Kentucky Fairness Alliance and Secretary of the Bluegrass Chapter. Rev. Pennybacker alleges he is a minister of the Christian Church (Disciples of Christ). Plaintiffs opposed the amendment. They do not allege the amendment has caused them any harm.

The originally named defendant in this action is Commonwealth of Kentucky, ex rel.,Trey Grayson, Secretary of State, in his official capacity. Attorney General Gregory D. Stumbo moved to intervene to defend the amendment. A group of voters who favored the amendment, including Kent Ostrander, have petitioned to be made party defendants as contestees, pursuant to KRS 120.280(4).

The facts are undisputed. As plaintiffs and the contestees both acknowledge, Constitutional Amendment 1 reads as follows:

> 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.

The amendment was overwhelmingly approved by the voters, 1,217,236 "yes" votes, to only 415,209 "no" votes. Plaintiffs do not challenge the accuracy of the vote count or the manner by which it was placed on the ballot. See Complaint ¶¶ 8-13.

On its face, the amendment restricts the legislature and courts from enacting, making, or recognizing the validity of any same-sex marriages allowed in other states, or any "substantially similar" relationship for other unmarried individuals. Neither same-sex marriages or civil unions will be recognized as valid. The amendment does not regulate private conduct or religious beliefs. In fact, the amendment does not change the status quo, since Kentucky law has never recognized same-sex marriages any more than it recognizes polygamous marriages, incestuous marriages, or marriages between children under the age of sixteen, unless the girl is pregnant and

court permission is granted.[2] Unmarried same-sex or opposite-sex couples may continue to live together, own property jointly, leave inheritances to each other, or whomever else they please. The state laws concerning transferring property before or after death do not depend upon whether the parties are married. Domestic Violence Orders may still be issued to protect persons in abusive relationships, irrespective of whether the victim was or is married or living together with an alleged abuser. This remains true irrespective of whether the parties involved are same-sex couples or opposite sex couples.[3] Clergy may continue to "bless" these unions and perform any ceremonies their religious convictions allow. Likewise, the amendment does not prohibit employers from giving domestic partner benefits, if that is what they feel is in their best interest. The Plaintiffs have not cited a single example of a case where the new constitutional amendment will harm unmarried individuals who live together. Their speculative claims of potential harm are simply not well founded.

The Kentucky amendment was proposed and overwhelmingly approved by the voters because of fear that the Kentucky Constitution might someday be liberally construed by an activist court so as to establish a state constitutional right of same-sex couples to marry, as the Massachusetts Supreme Court has recognized under the Massachusetts Constitution;[4] or that civil

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[2]See KRS 402.010 and 402.020.

[3]"Any family member *or member of an unmarried couple* who is a resident of this state or has fled to this state to escape domestic violence and abuse may file a verified petition in the District Court of the county in which he resides." KRS 403.725(1)(emphasis added). Protective Orders have been issued to protect divorced couples, unmarried persons living together, and family members living together. It is not necessary that one be married to benefit from this statute. See, *Ireland v. Davis*, Ky.App., 957 S.W.2d 310 (1997) (holding male homosexual was a "member of an unmarried couple" entitled to protection under the domestic violence statutes).

[4]*Goodridge v. Department of Pub. Health*, 440 Mass. 309, 798 N.E.2d 941 (2003). The U.S. Supreme Court denied discretionary review on November 10, 2004.

unions between same-sex couples might be mandated, as the Vermont Supreme Court held that state's constitution required.[5] By contrast, in 1973, the former Kentucky Court of Appeals summarily rejected an argument that same-sex couples had any fundamental right to marry under Kentucky law. *Jones v. Hallahan*, Ky., 501 S.W.2d 588, 590 (1973).

The liberal trend in other states recognizing same-sex marriages began in 1993, when the Hawaii Supreme Court held the Hawaii marriage laws discriminated on the basis of sex, leading to an amendment to the Hawaii Constitution reserving for the Hawaii legislature the right to define marriage as the union between a man and a woman.[6] Similar court challenges to state marriage laws were successfully pursued by proponents of same-sex marriages in Vermont and Massachusetts. But the Arizona Court of Appeals rejected arguments that either the state or federal constitution required legalizing same-sex marriages.[7] Proponents of gay marriage have urged their supporters to file selective litigation in the states where they had the best likelihood of winning.[8] Then using the full faith and credit clause of the U.S. Constitution, they could attempt to compel other states to recognize such marriages. Meanwhile, religious and social conservatives worried that activist judges in liberal states would redefine marriage and leave state legislators powerless to stop what they view as an attack on the institution of marriage.

Responding to these court challenges that, depending upon one's viewpoint, seek to redefine marriage or attack "traditional marriage," between 1995 and 2001, thirty-three state

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[5] *Baker v. State*, 170 Vt. 194, 744 A.2d 864 (1999).

[6] *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44 (1993).

[7] *Standhardt v. Superior Court*, 77 P.3d 451 (Ariz. Ct. App. 2003).

[8] See, Baker, STATUS, BENEFITS, AND RECOGNITION: CURRENT CONTROVERSIES IN THE MARRIAGE DEBATE, 18 BYU J. Pub. L. 569, 583 (2004).

legislatures, including Kentucky's General Assemby, enacted new laws or amended existing marriage laws, defining marriage as the union between a man and a woman and providing that their states would not recognize a same-sex marriage contracted in another jurisdictions.[9] In three other states, ballot measures were enacted to amend state constitutions to produce the same results.[10] And, reacting to these same concerns, Congress enacted the Defense of Marriage Act, signed by President Bill Clinton in 1996.[11]

Wanting to avoid any possibility that an activist Kentucky court, or a court in a more liberal state, might someday redefine the traditional concept of marriage between opposite-sex couples, the public approved the amendment to Kentucky's constitution by an overwhelming majority: 1, 217,236 "yes" votes, compared to 415,209 "no" votes. Similar state constitutional amendments were approved by large majorities of the voters in ten other states during the November 2, 2004 election.[12] Lawsuits challenging these state constitutional amendments have already been filed in Oklahoma and Georgia, according to news reports. These suits were modeled on a case in Louisiana, where a single state judge struck down an amendment for violating that state's constitutional one subject rule. The Kentucky plaintiffs raise similar claims.

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[9]See, KRS 402.005 and 402.020. For other state statutes see W. Ducan, WHITHER MARRIAGE IN THE LAW? 15 Regent U. L. Rev. 119, 120 nn. 9-11 (2002-2003).

[10]See, Alaska Const. art. I, § 25; Haw. Const. art. I, § 23; Neb. Const. art. I, § 29.

[11]In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife. 1 U.S.C. § 7. See, *In re Kandu*, 315 B.R. 123 (2004) (discussing legislative history and upholding federal law).

[12]Amendments passed during the November 2004 election in Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Ohio, Oklahoma, Oregon and Utah. Missouri and Louisiana passed amendments in August and September, respectively. No proposed amendments failed

The Kentucky plaintiffs raise two claims that, in essence, challenge the ballot language quoted above: First, in Count I of their complaint, plaintiffs allege this wording did not adequately inform the electorate of the substance of the amendment and that this will cause "actual, potential, and unknown deleterious effects . . . on the rights, privileges, and religious beliefs of persons, both gay/lesbian and heterosexual, living in the Commonwealth." (Complaint ¶¶ 23-24). Second, in Count II, plaintiffs allege the wording of the amendment violates § 256 of Kentucky's constitution. That provision prohibits unrelated subject matters appearing on the same ballot. The relevant language in § 256 of our state constitution reads:

> If two or more amendments shall be submitted at the same time, they shall be submitted in such manner that the electors shall vote for or against each of such amendments separately, *but an amendment may relate to a single subject or to related subject matters and may amend or modify as many articles and as many sections of the Constitution as may be necessary and appropriate in order to accomplish the objectives of the amendment.* (emphasis added).

The Attorney General, having intervened, now urges the Court to dismiss Count I of the complaint for lack of jurisdiction, and grant the Commonwealth judgment on the pleadings on Count II, for the reasons more particularly set forth below:

ARGUMENT

I.

THE PLAINTIFFS LACK STANDING AND HAVE NOT PRESENTED A RIPE JUSTICIABLE CONTROVERSY REGARDING ANY UNKNOWN "DELETERIOUS EFFECTS" OF THE AMENDMENT

The first count of plaintiffs' complaint must be dismissed for lack of standing, lack of ripeness, and failure to allege a justiciable controversy.

The plaintiffs bring this action pursuant to KRS 120.280, as an "election contest." This statute provides that any elector who was qualified and did vote on any constitutional amendment

submitted to the voters of the state for ratification or rejection may contest the election or demand a recount. The court, within five days of the filing of the petition shall determine whether there are sufficient grounds to justify the contest. Following publication, any elector who voted on the amendment may make himself a party, as a contestee in the action. If no elector makes himself a party, the Commonwealth's Attorney for the Franklin Circuit Court shall attend the trial of the cause, and may file motions and pleadings in the cause on behalf of the Commonwealth to insure a fair and honest determination of the contest.

Insofar as plaintiffs have named the Secretary of State as a defendant and asserted constitutional claims about "actual, potential, and unknown deleterious effects of the amendment on the rights, privileges, and religious beliefs of persons, both gay/lesbian and heterosexual," the plaintiffs lack standing and they have failed to present a ripe justiciable controversy. The Secretary of State did not draft the challenged language. He is not a proper party to defend this action. Moreover, plaintiffs have not alleged a justiciable controversy with their first claim. As with any court proceeding, it is an inherent jurisdictional limitation that a plaintiff or petitioner asking for relief in an original action have standing to bring his claim. "Standing" is "[a] party's right to make a legal claim or seek judicial enforcement of a duty or right." *Moore v. Asente*, Ky., 110 S.W.3d 336, 355 (2003). "Standing to sue means that a party has a sufficient legal interest in an otherwise justiciable controversy to obtain some judicial decision in the controversy." *Kraus v. Kentucky State Senate*, Ky., 872 S.W.2d 433, 439 (1993).

It has been established by a long line of federal cases that a party seeking to invoke a federal court's jurisdiction must demonstrate three things:

> (1) injury in fact, by which we mean an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) a causal relationship between the injury and the challenged

> conduct ... and (3) a likelihood that the injury will be redressed by a favorable decision.

Associated Gen. Contractors v. Jacksonville, 508 U.S. 656 (1993) (internal quotation marks and citations omitted). These principles derive from Article III of the Constitution, but the same basic principles also apply in state court.

It is a well-established tenet of standing that a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties. See *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 474-75 (1982); *Warth v. Seldin*, 422 U.S. 490, 499 (1975); and *Associated Industries of Kentucky v. Com.*, Ky., 912 S.W.2d 947, 951 (1995)("AIK"). To justify an action for declaratory relief there must be a real or justiciable controversy involving specific rights of the parties. *HealthAmerica Corp. of Kentucky v. Humana Health Plan, Inc.*, Ky., 697 S.W.2d 946, 948 (1985). "Kentucky courts cannot grant advisory opinions or rule on hypothetical questions, but rather must rule on real disputes." *Spanish Cove Sanitation, Inc. v. Louisville-Jefferson County Metropolitan Sewer Dist.*, Ky., 72 S.W.3d 918, 921 (2002). "A justiciable controversy does not include questions 'which may never arise or which are merely advisory, or are academic, hypothetical, incidental or remote, or which will not be decisive of any present controversy.'" *Curry v. Coyne*, Ky.App., 992 S.W.2d 858, 860 (1998) (quoting *Dravo v. Liberty National Bank & Trust Co.*, Ky., 267 S.W.2d 95, 97 (1954)). "A mere difference of opinion is not an actual controversy...." *Curry*, at 860, (quoting *Jefferson County v. Chilton*, 236 Ky. 614, 33 S.W.2d 601, 605 (1930) (citations omitted)."An actual controversy requires that a

controversy be ripe for adjudication." *AIK, supra*, at 951 (citing, *Pacific Gas & Elec. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983). Standing also requires that a party have a real "personal stake in the outcome." *Id.*

The prohibition against third-party standing promotes the fundamental purpose of the standing requirement by ensuring that the courts hear only concrete disputes between interested litigants who will frame the issues properly. See *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 220-21 (1974). Permitting the plaintiffs to sue for the speculative harms described in Count I of their complaint would require this Court to "decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." *Warth*, 422 U.S. at 500. As stated by the Supreme Court of the United States in *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270 (1941), where a controversy between the parties is not of "sufficient immediacy and reality," the Court must dismiss the complaint.

With the foregoing case-law and legal principles in mind, we turn to the plaintiff's first challenge–which seemingly is a vagueness challenge about potential harms that may occur due to wording of the constitutional amendment. The Secretary of State is not a proper defendant to defend this claim. In the words of the former Kentucky Court of Appeals, "Between these parties there [is] no grist for the judicial mill." *Veith v. City of Louisville*, Ky., S.W.2d 295, 298 (1962).

Moreover, this vagueness "ballot question" claim is not justiciable at this time. Wood, Boddie, and Pennybaker have only alleged a generalized grievance shared by all Kentucky residents alike, or at least those common to the minority of voters that opposed the amendment on philosophical grounds. But such a general grievance does not give them standing to sue. See

Schlesinger v. Reservists Comm. to Stop the War, *supra*, 418 U.S. at 220(1974) ("[S]tanding to sue may not be predicated upon an interest ... which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share").

The allegation that the Gay Marriage Ban Amendment will cause "potential and unknown deleterious effects" on the rights, privileges and religious beliefs of the plaintiffs or other persons is simply not ripe for judicial review. Ripeness separates those matters that are premature because the injury is speculative and may never occur from those that are appropriate for the court's review. See, *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967), overruled on other grounds, *Califano v. Sanders*, 430 U.S. 99, 105 (1977). The plaintiffs have not suffered from a "concrete and particularized"... "invasion of a legally protected interest.," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Therefore, this Court lacks jurisdiction to consider Count I of the Complaint and it should be dismissed without prejudice for lack of jurisdiction.

II.

COUNT II OF THE COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED; THE AMENDMENT DID NOT VIOLATE SECTION 256 OF THE KENTUCKY CONSTITUTION

In Count II of their Complaint, Plaintiffs assert that the challenged constitutional amendment overwhelmingly approved by the voters is void because Senate Bill 245 "impermissibly combined multiple unrelated subject matters" and "forced voters to make an unfair, and by virtue of the single subject rule, a constitutionally improper choice." (Complaint 32). Plaintiffs base this argument on Section 256 of the Kentucky Constitution. This claim simply fails as a matter of law; and this Court should so declare.

Attorney General Stumbo strongly supports the citizens' right to decide this issue for themselves. Kentucky case law backs up General Stumbo's legal position. When the vast majority of Kentuckians voted on the proposed Constitutional Amendment it was "an expression of the inalienable right of the ultimate sovereign to reform the government. That right is guaranteed by Section 4 of the Bill of Rights," and is not easily defeated by challenges to the wording of proposed amendments. See, *Gatewood v. Matthews*, Ky., 403 S.W.2d 716 (1966).

Section 256 of the Kentucky Constitution, in its present form, permits multiple subjects to appear on the ballot, so long as they are "related subject matters." See, Ky. Acts 1978, ch. 433, ratified November 1979 (copy attached, Exhibit A). There are no reported cases construing the "related subject matter" language. However, this language is broader language than previous versions of this section of Kentucky's constitution, and this distinguishes this case from court challenges in other state where state constitutions more strictly restrict amendments to no more than one general subject.[13] Kentucky's constitution does not have the same narrow language that led a Louisiana lower court judge to strike down a similar "gay marriage amendment."[14]

Even before the single subject rule language was amended, Kentucky courts very liberally construed this section in the Kentucky Constitution and rejected the type of challenge asserted here by the plaintiffs. For example, in *Funk v. Fielder*, the Court cited the debates of the last Kentucky Constitutional convention while laying down the rule:

> [A] single amendment may cover several propositions if they are not distinct or essentially unrelated. The demand of the Constitution that an amendment shall

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[13]Prior to the 1979 amendment to this section, the text read: "No amendment shall relate to more than one general subject." See, *Funk v. Fielder*, Ky, 243 S.W.2d 474, 477 (1951).

[14]See, *Forum for Equality PAC v. City of New Orleans*, 881 So.2d 777, 780, 2004-1521 (La.App. 4 Cir. 8/30/04), and La. Const. art. XIII, § 1 (discussing controversy). This case will likely be eventually decided by the Louisiana Supreme Court.

> 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.

Funk v. Fielder, 243 S.W.2d 474, 478 (1951). The new constitutional amendment meets this test.

Likewise, in *Hatcher v. Meredith*, 295 Ky. 194,173 S.W.2d 665, 667 (1943), the former Kentucky Court of Appeals said: "Constitutional limitations such as the [previous version of Section 256] 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." The Court also said: "The fact that an amendment impliedly repeals sections not mentioned therein does not thereby render it unconstitutional." *Hatcher*, at 668. The new amendment also satisfies the "no logical interdependence test."

And in *Curry v. Laffoon*, 261 Ky. 575, 88 S.W.2d 307, 307 (1935), the former Court of Appeals construing the former version of Section 256, rejected an argument that placing the repeal of prohibition and restoring former local liquor option provisions to Kentucky's constitution violated the single subject rule. It was argued by the challengers to the amendment that a voter might favor repeal of the prohibition amendment but be opposed to local option, or might be opposed to the repeal of the prohibition amendment and in favor of adding thereto local option as to medicinal liquor. This is similar to the Plaintiffs' argument in the present case that a voter might favor banning gay marriages but favor allowing civil unions. However, the Court of Appeals rejected this fairness argument and held:

> "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, supra, at 308 (quoting of *State v. Alderson*, 49 Mont. 387, 142 P. 210, 212, Ann. Cas. 1916B, 39 (1914). This refutes plaintiffs appeal to "fairness."

Because these court challenges to previous constitutional amendments failed under the former and even more restrictive version of §256 of the Kentucky Constitution, it follows as a matter of logic and commonsense that the current challenge also fails. "Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky." This sentence prohibits the courts or legislature from recognizing same-sex marriages in Kentucky. "A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid." This sentence prohibits the courts or legislature from recognizing or mandating a recognition of same-sex civil unions. The two sentences are obviously related given the political and legal debate that led to the amendment. The two sentences would have survived scrutiny even before the 1979 amendment to § 256 under the case law cited above. Since that is true, they obviously survive scrutiny under the more relaxed "related subject" rule which became the law in Kentucky following the 1979 voter ratification of an amendment to § 256.

In the final analysis, the plaintiffs' challenge to the Gay Marriage Ban Amendment appears to be based on speculation and fear that the voters made an unwise choice which will have unforseen "dire" consequences. They allege "there are approximately 130 instances where "marriage" or "spouse" is contained in the Kentucky Revised Statutes; that there are religious institutions in Kentucky that conduct blessings on "couples" who will not be able to be married; and that numerous businesses and private education institutions afford employment benefits to same-sex partners.[15] They speculate the amendment will undermine of all these.

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[15]Complaint, ¶¶ 15-18.

However, to paraphrase Kentucky's former highest court in *Hatcher v. Meredith*:

> It may be said that the Act proposing the amendment was obscure, or that it was not 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 right of the people to decide whether or not the Constitution shall be amended as proposed cannot be denied because of a fear that they did not make a wise decision. The court cannot be governed by a foreboding as to the consequences of the adoption of the amendment. . . .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.

Hatcher v. Meredith, *supra*, at 670.

As then, so now. We still live in a democracy. The people having determined to amend the Kentucky Constitution, and the court challenge to the wording of the Amendment under the "related subject rule" being clearly unsustainable, this Court must declare the challenged amendment valid. It is not for this Court to judge the wisdom of the amendment. The people made a valid choice to amend the constitution and protect traditional marriage.

CONCLUSION

For all the reasons argued above, this Court should dismiss Count I of the Complaint for lack of standing, lack of ripeness and failure to allege a justiciable controversy, and should reject plaintiff's clam asserted in Count II of the Complaint that the challenged amendment is void for having multiple "unrelated" subject matters on the ballot. This Court should declare, instead, that because the subjects matters were rationally related that the wording of the amendment was in proper form under Section 256 of the Kentucky Constitution and it was therefore validly ratified by the Kentucky electorate.

Respectfully submitted,

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