

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

AMERICAN CIVIL LIBERTIES UNION OF)	
TENNESSEE, et al,)	
)	
Plaintiffs,)	
)	
v.)	Docket No. 05-1010-(IV) (III)
)	Chancellor Ellen Hobbs Lyle
)	
RILEY C. DARNELL, et al.,)	
)	
Defendants.)	

**MEMORANDUM IN SUPPORT OF PLAINTIFFS’
MOTION FOR SUMMARY JUDGMENT**

Pursuant to Tenn.R.Civ.Pro. 56 and Local Rule 26.04, Plaintiffs American Civil Liberties Union of Tennessee, *et al.* respectfully file this memorandum of authority in support of Plaintiffs’ Motion for Summary Judgment.

I. Introduction

This case raises a significant issue of state constitutional law that has yet to be addressed by a Tennessee court. The material facts are surprisingly simple and are not in dispute. The Plaintiffs seek declaratory relief and an injunction to prevent the Tennessee Secretary of State and the Tennessee State Division of Elections from placing on the ballot in 2006 the proposed “Marriage Protection Amendment” to Article XI of the Tennessee Constitution contained in Senate Joint Resolution 31 because of serious procedural deficiencies. The Plaintiffs maintain that the mandatory procedural requirements were not met during the amendment process, thus rendering the amendment process invalid. Plaintiffs further maintain that these deficiencies raise significant questions regarding the Plaintiffs’ rights to fully participate in the democratic process and suggest possible taint in the election.

II. Statement of Facts

Pursuant to Article XI, Section 3 of the Tennessee Constitution, the Tennessee General Assembly may propose amendments to the Constitution. *See* Tenn. Const. art. XI, § 3. A proposed amendment must first be passed by a majority of the membership of each house during one term of the General Assembly. The Tennessee Constitution then specifically requires that the proposed amendment be published six months prior to the election of the next General Assembly. Then, during the next General Assembly term, each house must pass the amendment by a two-thirds majority vote. The amendment must then be put on the statewide ballot, but only at a time when an election for governor is also being held. The amendment must receive over half of the total votes cast in the gubernatorial election in order to be ratified. *Id.*

The 103rd Tennessee General Assembly adopted the following resolution, House Joint Resolution 990 (“HJR 990”), proposing to amend the state constitution by the above-described method:

BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES OF THE ONE HUNDRED THIRD GENERAL ASSEMBLY OF THE STATE OF TENNESSEE, THE SENATE CONCURRING, that a majority of all the members of each house concurring, as shown by the yeas and nays entered on their journals, that it is proposed that Article XI of the Constitution of the State of Tennessee be amended by adding the following language as a new, appropriately designated section:

SECTION __. The historical institution and legal contract solemnizing the relationship of one man and one woman shall be the only legally recognized marital contract in this state. Any policy or law or judicial interpretation, purporting to define marriage as anything other than the historical institution and legal contract between one man and one woman, is contrary to the public policy of this state and shall be void and unenforceable in Tennessee. If another state or foreign jurisdiction issues a license for persons to marry and if such marriage is prohibited in this state by the provisions of this section, then the marriage shall be void and unenforceable in this state.

BE IT FURTHER RESOLVED, that the foregoing amendment be referred to the One Hundred Fourth General Assembly and that this resolution proposing

such amendment be published by the Secretary of State in accordance with Article XI, Section 3, of the Constitution of the State of Tennessee.

BE IT FURTHER RESOLVED, that the Clerk of the Senate is directed to deliver a copy of this resolution to the Secretary of State.

(HJR 990, attached to Statement of Facts at Fact Ex. 6).

House Joint Resolution 990 was filed for introduction in the Tennessee House of Representatives on March 17, 2004. (Bill Information for HJR 990, attached to Statement of Facts at Fact Ex. 9). On May 3, 2004, the House completed the first reading of HJR 990, and on May 5, 2004, completed the second reading. (*Id.*, Fact Ex. 9). On May 6, 2004, the House completed the third reading of HJR 990 and a majority of the members of the House formally voted to adopt it. (*Id.*, Fact Ex.9).

On May 10, 2004, the Tennessee Senate suspended its Rules to allow HJR 990 to be considered, and the Senate completed the first reading of the proposal that day. (*Id.*, Fact Ex.9). On May 13, 2004, the Senate completed the second reading of HJR 990. (*Id.*, Fact Ex.9). On May 19, 2004, the day of the third reading of HJR 990 in the Senate, five different amendments were proposed, several of which would have changed the meaning and substance of the proposed constitutional amendment. (*Id.*, Fact Ex.9; also Jeff Miller Depo. pgs. 91-97, attached to Statement of Facts at Fact Ex. 10). None of the substantive amendments proposed to HJR 990 on May 19, 2004 were adopted by a majority of the Tennessee Senate, and the resolution was adopted by the Senate. (Bill Information for HJR 990, attached to Statement of Facts at Fact Ex. 9). On May 25, 2004, HJR 990 was signed by the Speaker of the House and the Speaker of the Senate. (*Id.*, Fact Ex.9).

The standard procedure for publishing resolutions proposing amendments to the state constitution has been for the Secretary of State to place legal notices in certain newspapers across

the state. (Def. Thompson's Responses to Interr. No. 7, attached to Statement of Facts at Fact Ex. 3; Kathy Summers Aff., ¶ 2, attached to Statement of Facts at Fact Ex. 4). *See also*, Tenn. Op. Atty. Gen. No. 86-84 (April 7, 1986). In the past, resolutions proposing amendments to the state constitution have directed the Secretary of State to publish the resolution in compliance with Article XI, Section 3. (Def. Naifeh's Responses to Interr. Nos. 7&8, attached to Statement of Facts at Fact Ex. 3; HJR No.2, 101st General Assembly, attached to Statement of Facts at Fact Ex. 5). Further, such resolutions were accompanied by a "Fiscal Note," determining that the resolution had an estimated fiscal impact on the state – the cost of publishing. (HJR 2 Fiscal Note, and HJR 14 Fiscal Note, attached to Statement of Facts at Fact Ex. 7).

The Fiscal Note attached to HJR 990 identified the "Estimated Fiscal Impact" of the proposed amendment to be an increase in State expenditures of "\$20,000 One-Time," and explained that the Fiscal Note "[a]ssumes a one-time cost of \$20,000 to the Secretary of State to print notice of the proposed amendment in certain newspapers as required by this resolution. Publication of this amendment would occur in the Spring of 2004." (HJR 990 Fiscal Note, attached to Statement of Facts at Fact Ex. 6).

On June 20, 2004, as commanded by HJR 990, and in compliance with standard procedure, the Tennessee Secretary of State published the resolution in at least six newspapers in Tennessee, at a cost of \$18,049.60.¹ (Kathy Summers Aff. ¶ 6, attached to Statement of Facts at Fact Ex. 4).

The primary election in Tennessee to select party candidates for the November 2004

¹ The legal notice procured by the Secretary of State included another, unrelated, proposed amendment to the Tennessee Constitution. This proposed amendment is not at issue in this case.

general election was held on August 5, 2004. (Department of State document, attached to Statement of Facts at Fact Ex. 11). The election of the members of the 104th General Assembly took place on November 2, 2004. (Department of State document, attached to Statement of Facts at Fact Ex. 12).

The proposed amendment embodied in HJR 990 was referred to the 104th General Assembly, and was introduced in the Senate as Senate Joint Resolution 31 (“SJR 31”). (Dunn Aff. ¶ 35, attached to Statement of Facts at Fact Ex. 14). Both houses of the 104th General Assembly adopted SJR 31. (*Id.* at ¶ 39, 47, Fact Ex. 14). The proposed amendment is poised to be placed on the ballot in the next general election, in November 2006. (*Id.* at ¶ 51, , Fact Ex. 14).

III. Standard of Review

A party may be granted summary judgment when there is “no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.” Tenn. R. Civ. Proc. 56.04. The party moving for summary judgment bears the initial burden of showing there is no genuine issue of material fact. Taylor v. Nashville Banner, 573 S.W.2d 476, 480 (Tenn. App. 1978). In ruling on a motion for summary judgment, the court must view all the evidence in the light most favorable to the opponent of the motion and all legitimate conclusions of fact must be drawn in favor of the opponent. Hall v. Hall, 764 S.W.2d 544, 547 (Tenn. App. 1988). The court’s function is to review the record and to determine independently whether the undisputed facts entitle the moving party to a judgment as a matter of law. Brown v. City of Manchester, 722 S.W.2d 394, 396 (Tenn. App. 1986). Summary judgment should be rendered “forthwith” if the evidence and pleadings show that there is no material dispute and that the

moving party is entitled to a judgment as a matter of law. Tenn. R. Civ. Proc. 56.04; Watts v. Robertson County, 849 S.W.2d 798, 800.

In order to defeat a motion for summary judgment, the opposing party must go beyond the pleadings and present specific facts showing that there is a genuine issue for trial. Sanders v. First Nat'l Bank, 114 Bankr. 507, 515 (M.D. Tenn. 1990). A fact is “material” for summary judgment purposes if it must be decided in order to resolve the substantive claim at which the motion is directed. Edwards v. Banco Lumber Co., 101 S.W.3d 69, 73 (Tenn. App. 2002).

IV. The Constitutional Publication Requirement

Article XI, Section 3 of the Tennessee Constitution provides for a specific procedure in amending the constitution:

Any amendment or amendments to this Constitution may be proposed in the Senate or House of Representatives, and if the same shall be agreed to by a majority of all the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals with the yeas and nays thereon, and referred to the General Assembly then next to be chosen; and *shall be published six months previous to the time of making such choice*; and if in the General Assembly then next chosen as aforesaid, such proposed amendment or amendments shall be agreed to by two-thirds of all the members elected to each house, then it shall be the duty of the General Assembly to submit such proposed amendment or amendments to the people at the next general election in which a governor is to be chosen. ... [emphasis added]

According to the Tennessee Attorney General, the purpose of the Article XI, Section 3 publication requirement is notice. *See* Op. Tenn. Atty Gen. 84-205 (June 21, 1984); Op. Tenn. Atty Gen. 86-084 (April 7, 1986). The electorate is notified of the proposed amendment six months prior to the election of the General Assembly that will decide whether to submit the amendments to the people. In this way, the proposed amendment may be debated and may become an election issue. Late publication of the full amendment necessarily leads to a less

informed public, thereby tainting the election of members to the General Assembly charged with the critical task of deciding whether to submit the proposed amendment to the people for ratification. Op. Tenn. Atty Gen. 84-205 (June 21, 1984).

Tennessee constitutional jurisprudence makes it clear, and has long held, that constitutional provisions are presumptively mandatory. See State v. Burrow, 104 S.W. 526, 527 (1907); State ex rel. Knight v. McCann, 72 Tenn. (4 Lea) (1879); Biggs v. Beeler, 180 Tenn 198, 173 S.W.2d 144 (1943). The word “shall” generally evidences a mandate. State v. Brown, 179 S.W. 321, 322 (1915). See also, Louisville & N. R. Co. v. Hammer, 236 S.W.2d 971, 973 (Tenn. 1951) (“It is a general rule of law that the word “shall” ordinarily is construed as being mandatory and not directory when used in constitutions or statutes.”). By the use of such compulsory language, the Constitution mandates that any amendment proposed by the General Assembly must be published six months prior to the election of the next General Assembly. Such publication is not merely advisory, nor is it a minor technicality. Quoting the noted constitutional scholar Thomas M. Cooley, the Tennessee Supreme Court made it clear nearly a century ago that the Tennessee Constitution, like other such instruments, “do[es] not usually undertake to prescribe mere rules of procedure except where such rules are looked upon as essential; they must, therefore, be considered as limitations upon the power to be exercised.” State v. Burrow, 104 S.W. 526, 527-28 (1907).

V. Failure to Meet the Mandate of Article XI, Section 3

A. It was impossible for the State to meet the publication deadline, because HJR 990 was not adopted until after the critical deadline ran.

The proposed amendment embodied in HJR 990 was not properly published. Indeed, it could not possibly have been published six months prior to the election of the 104th General

Assembly, as it was not even *adopted* until the critical deadline had passed. Therefore, the publication requirement was not met—without regard to what means of publication would satisfy the requirement.

Resolutions adopted by the General Assembly do not become law, rather they serve to express the views of the majority of one or both houses of the Legislature. *See* <<http://www.legislature.state.tn.us/info/billtolaw.htm>>, pg. 4, attached hereto as Memo Ex. 1. Logically, the precise view or opinion the General Assembly means to express cannot be ascertained until a resolution is actually adopted. Until adopted, any proposed resolution is only the opinion or view of the individual legislator(s) proposing said resolution, and is subject to substantive amendment or may simply fail to be adopted. By its express language, Article XI, Section 3 mandates that the proposed resolution be published only if and when “agreed to by a majority of all the members elected to each of the two houses.”

Here, HJR 990 was not adopted by both houses until May 19, 2004, and was not signed by the Speakers until May 25, 2004. In fact, the proposed resolution did not receive a first reading in the House until May 3, 2004—the day after it should have been published to comply with the six-month requirement in Article XI, Section 3. The precise language and content of the proposed resolution was not agreed upon until May 19, 2004, when the Senate took up substantive amendments, rejected them, and ultimately adopted HJR 990. Until May 19, 2004, the General Assembly could not publish the resolution in compliance with Article XI, Section 3, because until the substantive amendments were rejected and the resolution adopted, the language and content of the resolution was subject to change, and did not represent the view of the majority of both houses of the General Assembly.

Because the language and content of the resolution were not agreed upon until May 19, 2004, it was impossible for the state to “publish” the resolution as required by Article XI, Section 3, no matter what method the State employed to “publish” the resolution.

B. The late actions of the Secretary of State also failed to satisfy the publication requirement.

While it is clear that the proposed amendment must be published, and such publication must occur six months prior to the election of the General Assembly, it is arguably less clear precisely what the state must do to accomplish the required publication. The Tennessee Constitution does not specify a means of publication, a state of affairs unique in Tennessee law; state statutes that mandate notice generally specifically state the means of notice and/or publication.² Further, no state entity has formally adopted a specified procedure or means by which the required publication mandated by Article XI, Section 3 is to be accomplished. (Def. Thompson’s Responses to Interr. No. 7, Def. Naifeh’s Responses to Interr. Nos. 7&8, both attached to Statement of Facts at Fact Ex. 3). However, the resolution at issue, HJR 990, specifically delegates the responsibility of publication to the Secretary of State by stating:

BE IT FURTHER RESOLVED, that the foregoing amendment be referred to the One Hundred Fourth General Assembly and that this resolution proposing such amendment be published by the Secretary of State in accordance with Article XI, Section 3, of the Constitution of the State of Tennessee.

Furthermore, the estimated fiscal impact of the resolution on the Secretary of State was \$20,000 – for the purpose of publishing the resolution in newspapers. The fiscal note attached to the

² See, e.g., Tennessee Code, §§ 2-1-110, 2-1-114, 2-3-105, 2-3-109, 2-12-111, 2-14-105, 6-2-101, 6-51-101, 7-84-614, 9-13-208, 11-11-109, 12-2-406, 43-6-407, 45-3-811, 54-18-207, 69-6-102. These statutes uniformly require “publication” to be in a newspaper of general circulation.

resolution stated:

Assumes a one-time cost of \$20,000 to the Secretary of State to print notice of this amendment in certain newspapers as required by this resolution. Publication of this amendment would occur in the Spring of 2004.

Ironically, had the resolution not generated a fiscal impact, it would likely have reached the floor of the House earlier. The resolution was “placed behind the budget” in the Budget Subcommittee, where it sat for twenty days. (Bill Information for HJR 990, attached to Statement of Facts at Fact Ex. 9).

In 1986, the AG opined that the word “published” indicates some action by the state to inform the public of the proposed amendment, and noted that the traditional practice has been for the Secretary of State to have the particular resolution printed in a number of newspapers across the state. Op. Tenn. Atty Gen. 86-84 (April 7, 1986). The Secretary of State also acknowledges that the accepted practice has been to place legal notices in several newspapers across the state. (Def. Thompson’s Responses to Interr. No. 7, attached to Statement of Facts at Fact Ex. 3; Kathy Summers Aff. ¶ 2, attached to Statement of Facts at Fact Ex. 4).

Presumably members of the General Assembly were aware of the traditional practice because state legislators have obtained opinions from the Attorney General on at least five separate occasions since 1981 regarding the meaning and details of the publication requirement. See Tenn. Op. Atty. Gen. No. 81-290 (May 6, 1981); Tenn. Op. Atty. Gen. No. 84-184 (June 21, 1984); Tenn. Op. Atty. Gen. No. 86-84 (April 7, 1986); Tenn. Op. Atty. Gen. No. 96-113 (September 5, 1996); and, Tenn. Op. Atty. Gen. No. 97-040 (April 7, 1997). In fact, one of these opinions was requested by Intervenor Senator Jeff Miller – who sponsored HJR 990 in the Senate. See Tenn. Op. Atty. Gen. No. 96-113 (September 5, 1996). The Speaker of the House

acknowledges that this is the accepted practice. (Def. Naifeh's Responses to Interr. Nos. 7&8, attached to Statement of Facts at Fact Ex. 3). Tellingly, during a Senate debate on April 9, 1998 on this very issue, Intervenor Senator Jeff Miller and Intervenor Senator David Fowler both specifically stated that publication under Article XI, Section 3 requires that the full text of the proposed amendment be published in newspapers six months before the election of the next legislature. (Senate April 9, 1998 transcript, attached to Statement of Facts at Fact Ex. 8). This leaves little doubt that the resolution's sponsors were aware of the requirement and the means by which the requirement was to be accomplished.

In compliance with the resolution itself, and in keeping with past practice, the Secretary of State published HJR 990 in its entirety by securing legal notices in newspapers across the state on June 20, 2004 at the cost of \$18,049.60. This effort, however, fails to meet the mandate of Article XI, Section 3 as it came 49 days after the deadline.

VI. The "Substantial Compliance" Defense

Despite the clear language of the Constitution, and without guidance from any Tennessee court, the Tennessee Attorney General has opined that in appropriate circumstances, a substantial compliance argument may be available to satisfy the publication requirement even when the literal requirements have not been met. However, application of the "substantial compliance rule" in the circumstances presented here would be at odds with long-standing principles of constitutional interpretation in Tennessee, and at odds with nearly every state that has addressed this issue. A substantial compliance argument is not appropriate in a procedural challenge *prior* to ratification by the electorate. Further, even if a substantial compliance argument were appropriate, the publication requirement was not substantially complied with.

A. A “substantial compliance” argument is not appropriate in a procedural challenge made *before* ratification by the people.

The “substantial compliance rule” is that action is in conformity with the law where there is “compliance with the essential requirements” of that law. Black’s Law Dictionary (6th ed., 1990). The rule is closely allied with the contracts doctrine of substantial performance, which holds that “if a good faith attempt to perform does not precisely meet the terms of an agreement or statutory requirements, the performance will still be considered complete if the essential purpose is accomplished ...” Black’s Law Dictionary (8th ed., 2004). In Tennessee, the concept of substantial compliance is usually raised in the context of criminal law and is generally used as a defense by the State to assert that while there may have been deviations from the letter of the law in treatment of a defendant, such deviations constituted “harmless error,” and therefore should not nullify a conviction or sentencing. *See, e.g., State v. Newsome*, 778 S.W.2d 34 (Tenn. 1989); *State v. Frazier*, S.W. 2d 927 (Tenn. 1990).

Only rarely have Tennessee courts applied the doctrine outside the criminal realm. *See, e.g., Lanier v. Revell*, 605 S.W.2d 821, 822 (Tenn. 1980) (stating, without discussion, that generally “substantial compliance, rather than a strictly literal compliance, with the election laws is required”). To date, Tennessee courts have never applied the doctrine in a procedural challenge to a constitutional amendment.

The Tennessee Supreme Court has held that “[t]he courts must indulge every reasonable presumption of law and fact in favor of the validity of a constitutional amendment, *after it has been ratified by the people.*” *Southern Ry. Co. v. Fowler*, 497 S.W.2d 891, 895 (Tenn. 1973) (emphasis added). *See also, Snow v. City of Memphis*, 527 S.W.2d 55, 64 (Tenn. 1975). In compliance with this principle, the Attorney General has several times stated: where a proposed

amendment had not yet been ratified by the people, failure to meet the six-month publication requirement renders the amendment process invalid. *See* Op. Tenn. Atty Gen. 81-290 (May 6, 1981); Op. Tenn. Atty Gen. 84-184 (June 21, 1984) (the Attorney General also refused to adopt the view that ratification would cure non-compliance with clear constitutional requirements, as this would encourage non-compliance).

Despite earlier opinions, and without guidance from Tennessee courts, in 1996, regarding a proposed amendment that was published two weeks after the constitutional deadline, the Attorney General asserted that since the failure was by only two weeks a substantial compliance argument could be made. Op. Tenn. Atty Gen. 96-113 (Sept. 5, 1996). The opinion states that while the issue has never been litigated in Tennessee, “many states have held that substantial compliance with constitutional amendment publication requirements is sufficient,” citing a 1971 Delaware case as an example. *Id.*

While it is true that many states’ courts have found the substantial compliance doctrine applicable where insignificant deviations from constitutional publication requirements have occurred, virtually all such decisions have involved challenges made to the amendment process *after* the public had already ratified the amendment. In some cases, this fact has expressly influenced the outcome of the decision. Montana Supreme Court has viewed a meritorious challenge prior to ratification as almost automatically justifying injunctive relief. Tipton v. Mitchell, 35 P.2d 110, 114-15 (Mont. 1934) (“had an application been made to this court for an injunction in advance of the election at which the constitutional amendment was submitted, an injunction would unhesitatingly have issued ...”) (internal citation omitted; attached hereto as Memo Ex. 2). The West Virginia Supreme Court seemed indifferent to the timing of the

challenge, focusing instead on whether the violation had in fact misled the public. *See State v. O'Brien*, 60 S.E. 2d 722, 734 (W.Va. 1950) (attached hereto as Memo Ex. 3). Most courts, however, have not addressed directly how a pre-submission challenge would have been handled, instead focusing on the principle that where the people had spoken – that is, where the amendment had already been ratified – there was a presumption of validity. *See, e.g., State v. State Board of Educ.*, 467 So.2d 294 (Fla. 1985) (attached hereto as Memo Ex. 4); *Swanson v. State*, 271 N.W. 264 (Neb. 1937) (attached hereto as Memo Ex. 5); *Duggan v. Beermann*, 515 N.W. 2d 788 (Neb. 1994) (attached hereto as Memo Ex. 6); *Manos v. State*, 263 S.W. 310 (Tex.Crim.App. 1924) (attached hereto as Memo Ex. 7); *Herold v. Townsend*, 169 S.E. 74 (W.Va. 1933) (attached hereto as Memo Ex. 8); *State ex rel. Cooper v. Caperton*, 470 S.E. 2d 162 (W.Va. 1996) (attached hereto as Memo Ex. 9).

Those states that have recognized substantial compliance arguments have often done so with serious caveats – even after the amendment was ratified. In *Opinion of the Justices*, 275 A.2d 558 (Del. 1971), the case cited by the Tennessee Attorney General, the Delaware Supreme Court cautioned:

[A] determination of substantial compliance depends upon the circumstances of each case. Any extension of the substantial compliance principle must be carefully guarded and limited in order that mandatory provisions of the constitution may not be unduly subverted. The line of substantial compliance, therefore, must be carefully drawn and observed. *Id.* at 562 (attached hereto as Memo Ex. 10).

Finally, recognition of substantial compliance arguments in procedural challenges is in no way universal. For example, Kentucky's highest court has flatly rejected a substantial compliance defense in a procedural challenge, finding that such a concept may be appropriate in statutory interpretation, but is inappropriate when assessing mandates in the state constitution.

Arnett v. Sullivan, 132 S.W.2d 76, 79 (Ky.App. 1939)³ (attached hereto as Memo Ex. 11).

The constitution of the state was adopted by the people of the state as the fundamental law of the state. This fundamental law was designed by the people adopting it to be restrictive upon the powers of the several departments of government created by it. It was intended by the people that all departments of the state government should shape their conduct by this fundamental law. Its every section was, doubtless, regarded by the people adopting it as of vital importance, and worthy to become a part and parcel of a constitutional form of government, by which the governors as well as the governed were to be governed. Its every mandate was intended to be paramount authority to all persons holding official trusts, in whatever department of government, and to the sovereign people themselves. No mere unessential matters were intended to be ingrafted in it; but each section and each article was solemnly weighed and considered, and found to be essential to the form of constitutional government adopted. Wherever the language used is prohibitory it was intended to be a positive and unequivocal negation. *Id.*

This language, and the policy it represents, is remarkably similar to that used by the Tennessee Supreme Court in State v. Burrow, 104 S.W. 526, 527-28 (1907).

This challenge is made prior to ratification by the electorate so there can be no presumption of validity or constitutionality. As the Attorney General has stated, the strong presumption of constitutionality, described in its 1981 opinion, does not attach until ratification. Op. Tenn. Atty Gen. 84-184 (June 21, 1984). *See also*, Snow v. City of Memphis, 527 S.W.2d 55, 64 (Tenn. 1975). Further, like Kentucky, Tennessee jurisprudence has long recognized that procedural mandates in the state constitution are essential, not merely advisory. As such, a substantial compliance argument in these circumstances is wholly inappropriate.

B. Even if a substantial compliance argument were appropriate in these circumstances, the publication requirement was not substantially complied with.

In nearly every state, success in arguing the substantial compliance doctrine often

³ Until 1976, the designation “Court of Appeals” applied to Kentucky’s highest court.

depends on the magnitude of the deviation from the requirement. Assuming, *arguendo*, that a substantial compliance argument were appropriate under these circumstances, the deviation from the requirement in this case can in no way be viewed as insubstantial or insignificant.

The Delaware case cited by the Tennessee Attorney General for the substantial compliance argument, Opinion of the Justices, 275 A.2d 558 (Del. 1971), was a case in which a proposed amendment was published 81 to 87 days prior to an election rather than three months as required by the constitution. Thus the deviation from the requirement was somewhere between 2 and 11 days.⁴ The Tennessee Attorney General opinion citing Opinion of the Justices states that the deviation of two weeks was of a similar degree to the Delaware case. Op. Tenn. Atty Gen. 96-113 (Sept. 5, 1996). Contrast this to the present case, where (1) compliance was in the first instance impossible, because the resolution wasn't adopted until 17 days after the deadline ran, and (2) subsequent publication by the Secretary of State was six weeks late.⁵

Other states that have recognized a substantial compliance argument have similarly done so when the deviation from the requirement was deemed insignificant or slight. *See e.g.*, State v. State Board of Education, 467 So. 2d 294, 296 (Fla. 1985) (failure to publish a proposed constitutional amendment in two of the state's 67 counties amounted to harmless error, since even if all the registered voters in the affected counties had voted against the amendment, it still would have passed overwhelmingly); State v. Winnett, 110 N.W. 1113, 1113 (Neb. 1907) (holding that publication for one week less than the required time in one county of the state did

⁴ This equates to a range of 2–10% deviation from the three-month requirement.

⁵ Publication six weeks after the deadline amounts to a 23% deviation – far greater than that found in Opinion of the Justices, 275 A.2d 558 (Del. 1971).

not invalidate the amendment) (attached hereto as Memo Ex. 12); Swanson v. State, 271 N.W. 264, 267 (Neb. 1937) (finding substantial compliance with constitutional provisions where in one county publications of the notice were not made on the correct dates and in three others publications were not run the required number of times). Of course, as stated above, all of these challenges came after the amendment was ratified.

In summary, even if a substantial compliance argument were appropriate in a challenge prior to ratification, the constitutional mandate was not substantially complied with in this case. The deviation here was too significant.

VII. Plaintiffs Are Entitled To A Declaratory Judgment And Injunctive Relief

The purpose of the Declaratory Judgment Act, T.C.A., § 29-14-101 *et seq.*, is to settle and afford relief from uncertainty and insecurity with respect to rights, status and other legal relations. Shelby County Bd. of Comm'rs v. Shelby County Quarterly Court, 216 Tenn. 470, 482 (1965); Snow v. Pearman, 222 Tenn. 458, 462 (1968); State v. Brown & Williamson Tobacco Corp., 18 S.W.3d 186, 193 (Tenn. 2000). *See also* specifically T.C.A., § 29-14-113. The Act is remedial, and should be liberally construed and administered. T.C.A., § 29-14-113. *See also* Tennessee Farmers Mut. Ins. Co. v. Hammond, 200 Tenn. 106, 111 (1956) (“the act should be liberally construed in favor of the person seeking relief in a proper case to the end that rights and interests be expeditiously determined”).

Jurisdiction under the Declaratory Judgments Act is not dependent upon any right of the party to immediate consequential relief. Perry v. Elizabethton, 160 Tenn. 102, 22 S.W.2d 359 (1929); Cummings v. Shipp, 156 Tenn. 595, 3 S.W.2d 1062 (1928) (under the declaratory judgments law a decree may be rendered declaring the rights of complainants under a deed,

notwithstanding that no other relief could be claimed); Guy v. Culberson, 164 Tenn. 509, 51 S.W.2d 500 (1932). However, in order to maintain an action, there must be a justiciable controversy between persons with adverse interests. State v. Brown & Williamson Tobacco Corp., 18 S.W.3d 186 (2000). For a controversy to be justiciable, a real question rather than a theoretical one must be presented and a legally protectable interest must be at stake. Cummings v. Beeler, 189 Tenn. 151, 223 S.W.2d 913, 915 (1949). If the controversy depends upon a future or contingent event, or involves a theoretical or hypothetical state of facts, the controversy is not justiciable. Story v. Walker, 218 Tenn. 605, 404 S.W.2d 803, 804 (1966).

The present dispute is neither theoretical nor hypothetical, but rather, directly and particularly affects individuals personally interested in the so-called “Marriage Protection Amendment,” whose lives and families may be affected, and whose ability to seek change in the law in the future will be greatly hindered. The Plaintiffs’ interest in full and adequate participation in the political process is at stake, and their concerns raise questions about whether the election process was tainted by the state’s failure to properly publish the proposed amendment. For instance, one of the Plaintiffs, Renee Sara Kasman, is a female citizen of Tennessee, with a female domestic partner of 20 years whom she wishes to marry. (Complaint, ¶¶ 25-26). Ms. Kasman testified in her deposition that, had she been aware of the proposed amendment sooner than when it was noticed to the public, she would have spent more time and energy determining the positions of candidates to represent her district, and lobbying them with her views. (Kasman Depo., pg. 49, attached hereto at Memo Ex. 13). She, like other lay persons, needed “time just to catch up to speed on how the process works.” (Kasman Depo., pg. 36, Memo Ex. 13). For instance, she was unable to select a candidate for state representative in the

November 2004 elections because she did not know the candidates' position on this issue, which was a major factor for her in deciding who to support. (Kasman Depo., pg. 39-40, 42, Memo Ex. 13).

Another Plaintiff, Scott Michael Hines, was in a similar situation. Mr. Hines, although also a lay person, is highly educated, with two master's degrees, one in public policy and one in organizational management. (Hines Depo., pg. 9, attached hereto at Memo Ex. 14). He, like Ms. Kasman, is in a committed same-sex relationship and is personally affected by the proposed amendment. (Complaint, ¶¶ 22-24). Mr. Hines did not hear about the proposed amendment until the Fall of 2004. (Hines Depo., pg. 22, Memo Ex. 14). The timing of his knowledge prevented him from being involved in lobbying and obtaining information about candidates in the primary, which was held on August 5, 2004, and which would have been important for him. As it was, in the general election, he voted for all Democrats, assuming they better represented his interests than Republicans, but without knowing all of their positions on that issue. (Hines Depo., pg. 40, Memo Ex. 14). Mr. Hines' concerns about the impact of the proposed amendment on him, his partner and their child ranged from implications as to their potential tax status, to health insurance coverage issues to parental rights. (Hines Depo., pg. 50-52, Memo Ex. 14). Mr. Hines articulated extensively, in his deposition, what he would have done differently had he had proper notice of the proposed amendment:

[M]ost of our lobbying efforts have been through organizations that have given us the methods, and the tools, and the training, and the education, and information so that we could lobby. I think most of those organizations got started late in the process because notification did not happen.

So, yes, I think there would've been a variety of other ways that we could have lobbied, from holding up street signs to putting sign markers in yards, whatever it takes to do it.

There are only certain things that informed citizens can do as individuals, and I think we did those things. I called, I e-mailed my representatives and told them I didn't want them to do this. And I did that soon after I found out about this and was notified through some of the grassroot organizations that I belong to. . . You know, I have an educational background in public policy and political science. I have a pretty good grasp of the political process. When I know that something is about to affect me, I – I get involved and I've demonstrated that this year. . . I probably would have given more money.

(Hines Depo., pg. 57-58, Memo Ex. 14).

The Plaintiffs have alleged sufficient grounds to obtain the declaratory relief they seek.

The controversy is not one regarding future or contingent events. They have been able to explain, when questioned, how the lack of notice affected them and what they would have done differently had they received proper notice of the proposed amendment. They testified extensively regarding their confusion about the proposed amendment given other pending legislation – on the state and federal level – in the Summer and Fall of 2004. During this period, in addition to state elections, there was a presidential election in process, which distracted many from what was pending, or potentially being passed, by the Tennessee Legislature. (Kasman Depo., pg. 24-26, 34, 45, Memo Ex. 13; Hines Depo., pg. 19-20, Memo Ex. 14). The Plaintiffs are entitled to summary judgment based upon their complaint and the full record pursuant to the Declaratory Judgment Act, including injunctive relief.

VIII. Conclusion

For the forgoing reasons, and as justice may demand, the Plaintiffs respectfully ask that their motion for Summary Judgment be granted.