

IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI

KERRY MESSER, JUSTIN MOSHER, )  
DON HINKLE and JOSEPH ORTWERTH, )  
Individually and as representatives of the )  
Missouri Baptist Convention )  
Christian Life Commission, )  
and/or the Missouri Family Policy Council, )

Plaintiffs, )

v. )

Case No.

JEREMIAH W. NIXON, in his official capacity )  
as GOVERNOR OF MISSOURI, )  
100 Madison Street )  
Jefferson City, Missouri 65101, and )

Division: \_\_

JOHN R. MOLLENKAMP, in his official )  
capacity as ACTING DIRECTOR, )  
DEPARTMENT OF REVENUE )  
Truman State Office Building, Room 670 )  
301 W. High Street )  
Jefferson City, Missouri 65102, and )

STATE OF MISSOURI )  
Chris Koster, Attorney General )  
207 W. High Street )  
Jefferson City, Mo 65102, and )

DEPARTMENT OF REVENUE )  
301 W. High Street, Room 670 )  
Jefferson City, Mo 65102, )

Defendants. )

PETITION FOR DECLARATORY JUDGMENT  
AND INJUNCTIVE RELIEF

Plaintiffs Kerry Messer, Don Hinkle, Justin Mosher, and Joseph Ortwerth, for their petition  
against defendants, respectfully state as follows:

## Introduction

1. In this case, Plaintiffs seek a declaration that Sections 143.031.1 and 143.091 RSMo of the Missouri Tax Code are unconstitutional, as applied by Executive Order 13-14, which orders the Missouri Department of Revenue to recognize a same-sex couple as validly married, for purposes of accepting a combined income tax return in Missouri, if the couple wedded in another state allowing same-sex unions; if the couple filed a joint federal income tax return; and if the couple seeks to file a combined income tax return in Missouri as husband and wife.

2. Plaintiffs further seek a permanent injunction to stop Defendants from implementing the Missouri Tax Code in the manner required by Executive Order 13-14 in flagrant disregard of Article I, Section 33 of the Missouri Constitution, (hereinafter, “the Missouri Marriage Amendment”) and RSMo Section 451.022, (hereinafter, the Missouri Defense of Marriage Act”).

3. The Missouri Constitution, Article 1, Section 33, Missouri Constitution, states “That to be valid and recognized in this state, a marriage shall exist only between a man and a woman.” This provision, commonly known as “the Marriage Amendment,” was added to the Constitution by amendment via public referendum on August 3, 2004, by a popular vote of 71% to 29%.

4. RS Mo. Section 451.022, commonly known as the Missouri Defense of Marriage Act, duly enacted in 1996, provides:

- (1.) It is the public policy of this State to recognize marriage only between a man and a woman.
- (2.) Any purported marriage not between a man and a woman is invalid.
- (3.) No recorder shall issue a marriage license, except to a man and a woman.
- (4.) A marriage between persons of the same sex will not be recognized for any purpose in this State even when valid where contracted.

5. By issuing Executive Order 13-14 on November 14, 2013, Governor Nixon has attempted to circumvent the clear public policy of this State mandating the historical legal definition of marriage, and to thwart the will of the People of the State of Missouri expressed in a recent Constitutional amendment as well as in State statutes.

6. By implementing the Governor's edict, the Director and the Department of Revenue are violating and will continue to violate the Constitutional rights of the plaintiffs and thousands of other Missouri citizens who supported and voted for Amendment 2 in 2004.

7. Plaintiffs, as Missouri taxpayers and on behalf of organizations including Missouri taxpayers, will suffer harm if taxpayer funds are expended to implement the Missouri tax code as directed by Executive Order 13-14 and the affected tax code sections on and after January 1, 2014.

8. Despite his constitutional duty to uphold the laws of Missouri, the Governor has stated his intention to implement and have other defendants implement the Missouri tax code as directed in the Executive Order 13-14.

### **Parties**

9. Plaintiff Kerry Messer is a Missouri resident and taxpayer, and founder of Missouri Family Network, with offices in Jefferson City, Missouri.

10. Plaintiff Justin Mosher is a Missouri resident and taxpayer and is Chairman of the Christian Life Commission of the Missouri Baptist Convention, with offices in Jefferson City, Missouri.

11. Plaintiff Don Hinkle is a Missouri resident and taxpayer and is Director of Public Policy for the Executive Board of the Missouri Baptist Convention, with offices in Jefferson City, Missouri.

12. Plaintiff Joseph Ortwerth is a Missouri resident and taxpayer and is Executive Director of Missouri Family Policy Council, with offices in St. Charles, Missouri.

13. Defendant Jeremiah W. (Jay) Nixon is the duly elected Governor of the State of Missouri (“Governor”) and is sued in his capacity as such.

14. Defendant John R. Mollenkamp is Acting Director of Revenue of the State of Missouri (“Director of Revenue”) and is sued in his capacity as such.

15. Defendant Department of Revenue (“DOR”) is an Executive Office of the State of Missouri established and existing under the Missouri Constitution Art. IV, Section 22. The executive order and statutes at issue in this petition purport to impose, directly or indirectly, duties upon the Director of Revenue and the Department of Revenue.

16. Defendant State of Missouri (the “State”) is a body politic organized and existing under the Missouri Constitution and the United States Constitution.

**Plaintiffs’ Standing as Taxpayers on Behalf of Organizations**

17. The Missouri Baptist Convention (MBC) is an unincorporated association of over 400,000 persons, many of whom are Missouri residents and taxpayers, who are members of nearly 2000 local churches affiliated with the Southern Baptist Convention, America’s largest Protestant denomination. Messengers from affiliated churches assemble for an annual convention to elect, among others, the members of the Christian Life Commission (MBC CLC). The MBC CLC is the public policy and religious liberty committee of the MBC.

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18. The Missouri Family Policy Council is a non-profit, non-partisan organization dedicated to promoting Biblical principles in government and Judeo-Christian values in culture that support and strengthen the traditional family. The Missouri FPC is one of more than 30 such state organizations formally associated with Focus on the Family, the family support ministry founded by Dr. James Dobson.

19. Plaintiff Kerry Messer has standing as a Missouri resident and taxpayer. He is legislative liaison for the MBC CLC, and is also founder of Missouri Family Network (MFN) which is an unincorporated organization representing the traditionally conservative pro-family community in the Missouri Legislature, with offices in Jefferson City, Missouri.

20. Plaintiff Don Hinkle has standing as a Missouri resident and taxpayer. He is Director of Public Policy for the Executive Board of the Missouri Baptist Convention, with offices in Jefferson City, Missouri; and is liaison to the MBC CLC.

21. Plaintiff Justin Mosher has standing as a Missouri resident and taxpayer. He is an MBC-elected officer of the Christian Life Commission of the Missouri Baptist Convention.

22. Plaintiff Joseph Ortwerth has standing as a Missouri resident and taxpayer. He is Executive Director of the Missouri Family Policy Council.

23. Plaintiffs Messer, Hinkle, and Mosher adequately represent the Missouri Baptist Convention Christian Life Commission and its members, pursuant to Missouri Civil Rule 52.10. Plaintiff Joseph Ortwerth adequately represents Missouri Family Policy Council. Neither the asserted claims nor the requested relief require the participation of other individual members or officers of said association or corporation.

### General Allegations

24. Plaintiffs' rights, status or other legal relations are affected by Sections 143.031.1, and 143.091, RSMo of the Missouri Tax Code, and by the actions of the Governor and remaining defendants to implement the laws pursuant to Executive Order 13-14, as more fully set forth in this petition.

25. An actual controversy, ripe for adjudication, currently exists between Plaintiffs and Defendants as to whether Executive Order 13-14 is unconstitutional on its face, and whether Sections 143.031.1, and 143.091, RSMo of the Missouri Tax Code are unconstitutional, as applied by Executive Order 13-14. Plaintiffs lack an adequate remedy at law.

26. Plaintiffs therefore seek declaratory judgment under Rule 87 of the Missouri Rules of Civil Procedure and Mo. Rev. Stat. §527.101, et seq., to terminate this controversy and remove uncertainty.

27. On November 14, 2013, Governor Jay Nixon issued Executive Order 13-14, ("EO") an accurate copy of which is attached hereto as Exhibit 1, and incorporated by this reference.

28. In his Executive Order, Governor Nixon referred to IRS Revenue Ruling 2013-17, ("IRS Rev. Rul.") which announced that "[f]or Federal tax purposes, the terms 'spouse,' 'husband and wife,' 'husband,' and 'wife' include an individual married to a person of the same sex if the individuals are lawfully married under state law, and the term 'marriage' includes such a marriage between individuals of the same sex." A copy of this Revenue Ruling is attached hereto as Exhibit 2, and is incorporated by this reference.

29. According to the EO, the IRS Rev. Rul. 2013-17 provides that same-sex couples legally married in a state that authorizes such marriages, regardless of their place of domicile,

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may file a joint federal individual income tax return with the IRS. Hereinafter, such couples may be referred to as “federally eligible same-sex couples.”

30. According to the EO, Section 143.091, RSMo, requires that “[a]ny term used in sections 143.011 to 143.996 shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes....”. The EO omits the last clause in the cited sentence, which is: “unless a different meaning is clearly required by the provisions of sections 143.011 to 143.996.” An accurate copy of this statute, Section 143.091, RSMo, is attached hereto as Exhibit 3, and incorporated by this reference.

31. According to the EO, section 143.031.1, RSMo, mandates that “[a] husband and wife who file a joint federal income tax return shall file a combined [state] return”; and thus, to be consistent with the federal rule, “the Department of Revenue, under section 143.091, RSMo, must apply the same meaning to the phrase ‘husband and wife’ as is applied under federal law pursuant to Revenue Ruling 2013-17.” An accurate copy of this statute, section 143.031.1, RSMo, is attached hereto as Exhibit 4, and incorporated by this reference.

32. According to the EO, the Governor ordered: “NOW, THEREFORE, I, JEREMIAH W. (JAY) NIXON, GOVERNOR OF THE STATE OF MISSOURI, by virtue of the authority vested in me by the Constitution and laws of the State of Missouri, do hereby Order the Missouri Department of Revenue to follow sections 143.031.1 and 143.091, RSMo, and require all taxpayers who properly file a joint federal income tax return to file a combined state income tax return.”

33. As a result of the Executive Order 13-14, the Director of Revenue has and will expend public funds to implement this order by requiring combined returns from federally eligible same-sex couples.

34. As a result of the EO, the Director shall require federally eligible same-sex couples to list one same-sex partner as “husband” and the other partner as “wife” on the Missouri combined return, thus treating the parties the same as if a valid marriage existed between the parties.

35. Notwithstanding his constitutional duty to “take care that the laws are distributed and faithfully executed,” Mo. Const. Art IV, Section 2, on or about November 14, 2013, the Governor made public statements indicating his support for “same-sex ‘marriage,’” while denying that his order violated the Constitution: “This is not about the definition of marriage, this is about the structure of our tax code and Missouri law, which is clear.”

36. While asserting that his executive order dealt only with tax filing status, Governor Nixon said he would like to see State voters take another look at recognizing “same-sex ‘marriage:’” “Many Missourians, including myself, are thinking about these issues of equality in new ways and reflecting on what constitutes discrimination. To me, that process has led to the belief that we shouldn’t treat folks differently just because of who they are. I think if folks want to get married, they should be able to get married.”

37. Governor Nixon said at a news conference in his office on Nov. 14, 2013, that “legally ‘married’” same-sex couples would be able to use any state tax breaks that are reserved for married couples. His office later retracted that statement, saying that while federal exemptions for couples would be reflected in their federal adjusted gross income, state-level exemptions, deductions and credits would not apply. Such statements have resulted in confusion for members



of the public, including plaintiffs, making it impossible to know exactly the potential loss of revenue to the State of Missouri that may result from this EO.

**A Controversy Exists Between Plaintiffs and Defendants as to the  
Validity of the Executive Order, and the Constitutionality of the Tax Code**

38. Under the Missouri Constitution, laws that would result in official recognition of the validity of same sex marriage are unconstitutional.

39. It is the clearly stated public policy of Missouri law that a marriage between persons of the same sex will not be recognized for any purpose in this State even when valid where contracted. §451.022, RSMo. The EO and the Department's expenditure of public funds to implement the EO would flagrantly violate this public policy and legal requirement.

40. Implementation of the EO is not only an *ultra vires* exercise of power by the Defendants but also an unconstitutional and wasteful expenditure of government resources that harms Plaintiffs as taxpayers of the State.

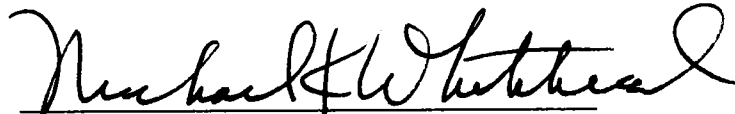
41. Plaintiffs' lack an adequate remedy at law and therefore, under Rule 92 of the Missouri Rules of Civil Procedure and Mo. Rev. Stat. §§ 526.010, et seq., seek to have the Court permanently enjoin Defendants, and each of them, and all those in active concert or participation with them, from taking any action to implement or otherwise effectuate any provisions of the Executive Order, or to otherwise require or accept combined returns from federally eligible same-sex couples.

**WHEREFORE**, Plaintiffs respectfully pray that the Court enter its judgment:

1. Declaring that the Executive Order 13-14 is unconstitutional and void.
2. Declaring that the Director's implementation of the Executive Order 13-14 is unconstitutional and invalid.
3. Permanently enjoining Defendants, and each of them, and those in active concert or participation with them, from taking any action to implement or otherwise effectuate any provision or policy contained in Executive Order 13-14 which would result in requiring or permitting federally eligible couples to file combined returns in Missouri, as if "husband" and "wife."
4. Awarding Plaintiffs their attorneys' fees, expenses, and costs, pursuant to inter alia, Mo. Rev. Stat. §527.100; and
5. Granting Plaintiffs such other relief as the Court deems just and proper.

Respectfully submitted,

**WHITEHEAD LAW FIRM, L.L.C.**



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