

IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI
NINETEENTH JUDICIAL CIRCUIT

KERRY MESSER, JUSTIN MOSHER,)
DON HINKLE and JOSEPH ORTWERTH,)
as Individuals,)

Plaintiffs,)

v.)

JEREMIAH W. NIXON, in his official capacity)
as GOVERNOR OF MISSOURI,)
and)

JOHN R. MOLLENKAMP, in his official)
capacity as ACTING DIRECTOR,)
DEPARTMENT OF REVENUE,)
and)

DEPARTMENT OF REVENUE,)
and)

STATE OF MISSOURI,)

Defendants.)

Case No. 14AC-CC00009

Division: I

Hon. Jon E. Beetem

**FIRST AMENDED PETITION
FOR DECLARATORY JUDGMENT
AND INJUNCTIVE RELIEF**

Plaintiffs Kerry Messer, Don Hinkle, Justin Mosher, and Joseph Ortwerth, for their First Amended Petition against all Defendants for Declaratory Judgment and Injunctive Relief, respectfully state as follows:

INTRODUCTION

1. In this case, Plaintiffs seek a declaration that R.S. Mo. §§ 143.031.1 and 143.091 of the Missouri Tax Code, as applied by Executive Order 13-14, are unconstitutional because they, in effect, cause the Missouri Department of Revenue to give official recognition to the existence or validity of some same-sex marriages, in flagrant disregard of the Marriage Amendment to the Missouri Constitution and the “Missouri Defense of Marriage Act” or “DOMA.”

2. Plaintiffs further seek injunctive relief to stop Defendants from expending public funds to take official action to implement the Missouri Tax Code in the manner required by Executive Order 13-14.

3. At a news conference in his office on November 14, 2013, announcing Executive Order 13-14, Governor Jay Nixon stated that some “legally married” same-sex couples would be permitted to file combined income tax returns and would also 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.

4. At the same press conference, the Governor also stated his support for “same-sex marriage,” and said he would like to see Missouri voters take another look at recognizing same-sex marriage.

5. Plaintiffs, as Missouri taxpayers, seek to vindicate the public interest in supporting the public policy expressed in the Missouri Marriage Amendment and the Missouri DOMA, and oppose official actions contrary to that policy, and the expenditure or loss of public funds caused by the implementation of the Missouri Tax Code as directed by Executive Order 13-14.

PARTIES

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

7. 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.

8. 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.

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

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

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

12. 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.

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

JURISDICTION AND VENUE

14. The Court has subject matter jurisdiction over this civil case under R.S. Mo. §478.070. This action arises under the Missouri Declaratory Judgment Act, R.S. Mo. §527.010, which authorizes the circuit courts to declare the rights, status and legal relations of the parties.

15. This Court has personal jurisdiction over each government defendant, who resides or has an official office in Cole County, Missouri.

16. Venue in this Court is proper pursuant to R.S. Mo. §508.010(2), because Cole County, Missouri, is deemed to be the seat of government for the State, for these state departments, and for the named state officials, each of whom maintains his principal office in Cole County, Missouri.

PLAINTIFFS' STANDING AS TAXPAYERS

17. Plaintiffs Messer, Hinkle, Mosher and Ortwerth are individuals, residents of Missouri and taxpayers who have paid or will pay taxes to the State of Missouri for 2012 and 2013.

18. Plaintiffs are lawfully married persons under Missouri law who have Missouri income and who have filed or will file a federal joint return and a combined Missouri return for tax years before and after 2013.

19. In 2004, Plaintiffs contributed funds, worked in campaigns, went to the polls and voted for Amendment 2, the Missouri Marriage Amendment. Plaintiffs were among over a million other Missouri voters who supported this measure on August 3, 2004.

20. Plaintiffs oppose any official recognition of the existence or validity of same-sex marriage, including the implementation of the EO. Plaintiffs further oppose the expenditure or

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loss of any public funds for such recognition. Such opposition is based on conscience as well as statutory and constitutional rights.

21. On information and belief, taxes paid by Plaintiffs and others went or will go to public funds, part of which have or will be directly expended by the State of Missouri in support or implementation of the challenged laws and policies.

22. On information and belief, the challenged policy, by recognizing the purported existence and validity of same-sex marriages; by conferring the status of spouse upon them; and by accepting combined returns from them, will result in the expenditure or loss of tax revenue due to excessive and unlawful payments by the State to third-persons who – at the urging of the Governor – file combined returns as “spouses” and/or claim privileges, deductions, credits or other benefits accorded to persons who file combined returns. The amount of such expenditure or loss is unknown to Plaintiffs at this time and will be determined during discovery.

23. Plaintiffs have standing in order to ensure that government officials conform to the law, to serve the indispensable need to keep public corporations, their officers, agents and servants strictly within the limits of their obligations and faithful to the service of the citizens and taxpayers. Public policy demands a system of checks and balances whereby taxpayers can hold public officials accountable for their acts.

GENERAL ALLEGATIONS

24. R.S. Mo. §451.022, commonly known as the Missouri Defense of Marriage Act, or “DOMA,” 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.

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(4.) A marriage between persons of the same sex will not be recognized for any purpose in this State even when valid where contracted.”

25. The Missouri Constitution, Art. I, §33, commonly known as the “Missouri Marriage Amendment,” duly adopted in 2004, states “That to be valid and recognized in this state, a marriage shall exist only between a man and a woman.”

26. Article I, §33, was added to the Constitution by amendment *via* public referendum on August 3, 2004, by a popular vote of 71% to 29%, with over one million voters voting in favor of the Amendment.

27. Further, the Missouri Constitution, Article II, §1, regarding separation of powers, prohibits the governor from exercising legislative powers. Mo. Const. Art II, §1.

28. Further, Article IV, §2, of the Missouri Constitution states that the Governor shall “take care that the laws are distributed and faithfully executed.” Mo. Const. Art IV, §2.

29. Further, Article IV, §22, of the Missouri Constitution states that the Director of Revenue “shall collect all taxes and fees payable to the state as provided by law.” Mo. Const. Art IV, §22.

30. Further, Article X of the Missouri Constitution states that “The taxing power may be exercised by the general assembly for state purposes,” Mo. Const. Art. X, §2, and that “[t]he power to tax shall not be surrendered, suspended or contracted away, except as authorized by this constitution.” Mo. Const. Art. X, §2.

31. Further, Article X of the Missouri Constitution states that “Taxes may be levied and collected for public purposes only, and shall be uniform upon the same class or subclass of subjects within the territorial limits of the authority levying the tax. All taxes shall be levied and

collected by general laws and shall be payable during the fiscal or calendar year in which the property is assessed.” Mo. Const. Art. X, § 3.

32. Further, Article X of the Missouri Constitution provides that the general assembly’s ability to incorporate federal law concerning taxation is limited to the definition of income. Mo. Const. Art. X, §4(d).

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

34. In the EO, Governor Nixon accepted the rules in IRS Revenue Ruling 2013-17, (“IRS Rev. Rul.”), and instructed the Department of Revenue to follow them, in which the Internal Revenue Service recognized, for federal tax purposes, the validity of a marriage of same-sex individuals entered into in a state whose laws authorize the marriage, even if the state in which they are domiciled does not recognize the validity of same-sex marriages. A copy of this revenue ruling is attached hereto as Exhibit 2, and is incorporated by this reference.

35. In the EO, Governor Nixon also accepted and instructed the Department of Revenue to follow the definitions in the Rev. Rul. 2013-17 for the terms “spouse,” “husband and wife,” “husband,” “wife,” and “marriage” to include an individual married to a person of the same sex if the individuals are married under a state law recognizing same-sex marriage.

36. Rev. Rul. 2013-17 recognizes same-sex couples wedded in a state that authorizes such weddings and provides that they may file a joint federal income tax return with the IRS, regardless of their place of domicile. Hereinafter, such couples may be referred to as “federally recognized same-sex couples.”

37. R.S. Mo. §143.091 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 unless a different meaning is clearly required by the provisions of sections 143.011 to 143.996." The EO cites this statute but omits the last clause in the cited sentence. An accurate copy of this statute, R.S. Mo. §143.091 is attached hereto as Exhibit 3, and incorporated by this reference.

38. R.S. Mo. §143.031.1 mandates that "[a] husband and wife who file a joint federal income tax return shall file a combined [state] return." An accurate copy of this statute is attached hereto as Exhibit 4, and incorporated by this reference.

39. According to the EO, in order 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."

40. In 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."

41. On information and belief, as a result of the EO, the Director of Revenue has expended and will expend public funds to plan, prepare, train, communicate, publish, mail, post and implement this policy regarding acceptance of combined returns from federally recognized same-sex couples.

42. On information and belief, as a result of the EO, the Department of Revenue will collect less tax from combined filers who file as same-sex spouses, in an amount unknown to plaintiffs at this time.

43. As a result of the EO, the Director now requires federally recognized same-sex couples to list one same-sex partner as “yourself” and the other partner as “spouse” on the Missouri combined return, thus treating the parties the same as if a valid marriage existed between the parties in Missouri.

44. The Department of Revenue, in its printed instructions for MO-1040, says on page 6, at the top of the middle column: “Missouri requires the division of income between spouses. Taxpayers filing a combined return pay less tax by dividing the income between spouses and then determining the tax amount for each spouse.” Missouri 2013 Form Mo-1040 Instructions, p. 6.

A JUSTICIABLE CONTROVERSY EXISTS BETWEEN PLAINTIFFS AND DEFENDANTS AS TO THE VALIDITY OF PORTIONS OF THE TAX CODE, AS INTERPRETED AND IMPLEMENTED BY THE EXECUTIVE ORDER

45. An actual justiciable controversy, ripe for adjudication, currently exists between Plaintiffs and Defendants as to whether R.S. Mo. §§ 143.031.1, and 143.091 of the Missouri Tax Code are unconstitutional, as applied by Executive Order 13-14, or whether Executive Order 13-14 is unconstitutional on its face, or as applied.

46. Plaintiffs contend that the Missouri DOMA, and the Missouri Constitution prohibit any official recognition of the existence or validity of same-sex “spouses” for purposes of accepting combined returns in Missouri, or for any other State tax purpose.

47. By the Executive Order, the Governor seeks to implement or supplement the State’s constitution and statutes, as set forth above, in a manner that circumvents the clear public policy

of this State expressed in the Marriage Amendment as well as in state statutes such as R.S. Mo. §451.022.

48. Plaintiffs' constitutional rights are being violated by the actions of the Governor and remaining defendants to implement R.S. Mo. §§143.031.1, and 143.091 of the Missouri Tax Code, pursuant to Executive Order 13-14, as more fully set forth in this petition, hereinafter described sometimes as "the challenged policy."

49. Plaintiffs have a legally protectable interest at stake in the outcome of this dispute.

50. Plaintiffs lack an adequate remedy at law.

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

52. Plaintiffs, under Rule 92 of the Missouri Rules of Civil Procedure and R.S. Mo. §§526.010, et seq., seek to have the Court enjoin Defendants from taking any action to implement or otherwise effectuate any provisions of the Executive Order; to otherwise require or accept combined returns from federally recognized same-sex couples; to take other official action to give legal recognition to same-sex relationships in violation of the Missouri Marriage Amendment and DOMA; or to adopt federal law or regulations as a source of definitions of terms under the State Tax Code, except for the definition of income, as required by

53. The challenged policy violates the clearly stated public policy of Missouri law that a purported marriage between persons of the same sex will not be recognized as a marriage for any purpose in this State even though valid where contracted, R.S. Mo. §451.022.

54. The challenged policy requires the State to accept a combined return by some same-sex spouses, and requires one of the couple to be designated as the “spouse” on the MO-1040 form.

55. The challenged policy violates the Missouri Constitution, Article X, Sec 4(d), because the general assembly’s ability to incorporate federal law concerning taxation is limited to the definition of income. Mo. Const. Art. X, §4(d).

56. The challenged policy violates Article I, §33 because it involves official action, communication, or expenditure of public funds recognizing, promoting or implementing a public policy contrary to that expressed in the Missouri Marriage Amendment and Missouri DOMA.

57. The challenged policy is an *ultra vires* exercise of power by the Defendants, in violation of the separation of powers, in that the taxing power is reserved to the legislative branch, and “[t]he power to tax shall not be surrendered, suspended or contracted away, except as authorized by this constitution.” Mo. Const. Art X, §2. The Governor lacks executive power to re-define the term “spouse” under the tax code, or adopt a re-definition by the IRS as applicable to the State, or to extend the right to file combined returns to persons who cannot be recognized as spouses under Missouri’s DOMA or Marriage Amendment.

58. The challenged policy violates the Missouri Constitution, Article IV, §2, in that the Governor has failed to “take care that the laws are distributed and faithfully executed.”

59. The challenged policy violates the Missouri Constitution, Article X, §2.

60. The challenged policy violates the Missouri Constitution’s mandate that the Director of Revenue “shall collect all taxes and fees payable to the state as provided by law” but rather, by executive order, reduces the taxes collectable by expanding the number of combined return filers

to include same-sex couples, in violation of Missouri's Marriage Amendment and DOMA, and in violation of Mo. Const. Art IV, §22.

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

1. Declaring that R.S. Mo. §§ 143.031.1, and 143.091 of the Missouri Tax Code are unconstitutional, as applied by Executive Order 13-14, on one or more of the following grounds:

- a. Because they result in official recognition of the existence or validity of same-sex "spouses" for purposes of accepting combined returns in Missouri, or for any other purpose, contrary to the Missouri Marriage Amendment, Article I, § 33; or
- b. Because they require the incorporation of federal definitions of terms other than "income" to be used in the state tax code, in violation of Mo. Const. Art. X, §4(d).
- c. Because the challenged policy has the purpose and effect of reducing the taxes collected by the Director from federally recognized same sex couples who file combined returns or who take other deductions or credits available to combined filers, in violation of the duty of the Director of Revenue to "collect all taxes and fees payable to the state as provided by law, " as required by Mo. Const. Art IV, §22.
- d. Because the challenged policy has the purpose and effect of usurping the legislative power of the general assembly and giving it to the IRS or the Governor, in violation of Mo. Const. Art. X, §2, which vests the taxing power in the general assembly, which power cannot be "surrendered, suspended or contracted away, except as authorized by this constitution."
- e. Because the challenged policy has the purpose and effect of promoting purposes contrary to the public policy of Missouri, and of collecting taxes in a manner that is

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“non-uniform” upon the same class or subclass of subjects, and not collected according to the general law, in violation of Mo. Const. Art. X, § 3.

2. Declaring that the Executive Order 13-14 is unconstitutional, on one or more of the following grounds:

- a. Because it gives official recognition to the existence or validity of same-sex “spouses” for purposes of accepting combined returns in Missouri, or for any other purpose, in violation of the Missouri Marriage Amendment, Article I, § 33.
- b. Because it exceeds the authority of the Executive Branch by encroaching on the exclusive powers of the general assembly, in violation of the separation of powers required by Missouri Constitution, Article II, §1;
- c. Because it breaches the duty of the Governor and the executive branch to “take care that the laws are distributed and faithfully executed,” in violation of Mo. Const. Art IV, §2; and the duty of the Director of Revenue to “collect all taxes and fees payable to the state as provided by law,” in violation of Mo. Const. Art IV, §22.

3. Declaring that R.S. Mo. §§ 143.031.1, and 143.091 of the Missouri Tax Code, as applied by Executive Order 13-14, violate the Missouri Defense of Marriage Act, to the extent they require official recognition of the existence or validity of same-sex “spouses” when the marriage was valid where contracted, for purposes of accepting combined returns in Missouri, or for any other purpose, contrary to the Missouri Defense of Marriage Act, R.S. Mo. §451.022.

4. Declaring that the Executive Order 13-14 violates the Missouri Defense of Marriage Act, to the extent it gives official recognition to the existence or validity of same-sex “spouses” when the marriage was valid where contracted, for purposes of accepting combined returns in

Missouri, or for any other purpose, contrary to the Missouri Defense of Marriage Act, R.S. Mo. §451.022.

5. Declaring that the Director's implementation of the Executive Order 13-14, and the expenditure of any public funds or resources therefor, is unconstitutional to the extent it confers official recognition of the existence or validity of same-sex "spouses" for purposes of accepting combined returns in Missouri, or for any other purpose, in violation of the Missouri Marriage Amendment, Article I, § 33.

6. Enjoining Defendants, and each of them, and those in active concert or participation with them, from expenditure of any public funds to take any action or make any official statement recognizing the existence or validity of same-sex "spouses" for purposes of accepting combined returns in Missouri, or for any other purpose, in violation of the Missouri Bill of Rights and the Missouri Defense of Marriage Act, R.S. Mo. §451.022.

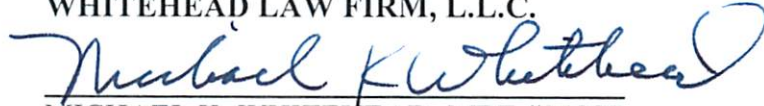
7. Enjoining Defendants from taking any official action or making any official statement which advocates or promotes a public policy in opposition to Article I, § 33 of the Missouri Constitution and the Missouri Defense of Marriage Act, R.S. Mo. §451.022.

8. Awarding Plaintiffs their attorneys' fees, expenses, and costs, pursuant to *inter alia*, R.S. Mo. §527.100; and

9. Granting Plaintiffs such other relief as the Court deems just and proper.

Respectfully submitted,

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ATTORNEY FOR PLAINTIFFS

Certificate of Service

On this 7th day of February, 2014, a copy of the foregoing First Amended Petition was served upon all defendants by email to their counsel below:

Hon. Chris Koster,
Attorney General of Missouri
207 W. High Street
Jefferson City, Mo 65102, and



Michael K. Whitehead
Attorney for Plaintiffs