

STATE OF MISSOURI)
) ss
COUNTY OF COLE)

AFFIDAVIT OF DON HINKLE

BEFORE ME, the undersigned authority, personally appeared **DON HINKLE**, who by me being duly sworn, deposed as follows:

1. My name is Don Hinkle. I am over 21 years old, of sound mind, competent to testify regarding the matter set forth herein, and personally acquainted with the facts herein stated.

2. I am a resident of Cole County, Missouri and a taxpayer in the State of Missouri.

3. I am a Plaintiff in the case *Messer, et al., v. Nixon, et al.*, Case No. 14AC-CC00009, Cole County, Missouri Circuit Court. I am employed by the Executive Board of the Missouri Baptist Convention.

4. I am a lawfully married person under Missouri law who has Missouri income and who has filed or will file a federal joint return and a combined Missouri return for tax years before and after 2013.

5. The other plaintiffs, Kerry Messer, Justin Mosher and Joe Ortwerth, are personally known to me, and each has affirmed to me that he is a lawfully married person under Missouri law who has Missouri income and who has filed or will file a federal joint return and a combined Missouri return for tax years before and after 2013.

6. In 2004, my employer contributed funds, and I worked in campaigns, went to the polls and voted for Amendment 2, the Missouri Marriage Amendment. I was among over a million other Missouri voters, according to the Secretary of State's reports, who supported this measure on August 3, 2004.

7. Plaintiffs oppose any official recognition of the existence or validity of same-sex marriage, including the implementation of the Executive order 13-14.

8. Plaintiffs further oppose the expenditure or loss of any public funds for such recognition. Such opposition is based on conscience as well as statutory and constitutional rights.

9. It is my understanding that 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.

10. It is my understanding that 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.

11. The amount of such expenditure or loss is unknown to Plaintiffs at this time.

12. Plaintiffs believe we 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.

13. Plaintiffs believe, 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.

14. Plaintiffs believe, 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.

15. Plaintiffs believe, 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.

16. 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.

17. An actual controversy 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.

18. Plaintiffs believe 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.

19. Plaintiffs believe, 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.

20. Plaintiffs believe our constitutional rights are being violated by the actions of the Governor and remaining defendants who insist on implementing 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 the First Amended Petition, described sometimes as “the challenged policy.”

21. Plaintiffs will suffer immediate and irreparable harm if the challenged policy is not enjoined.

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

23. Plaintiffs lack an adequate remedy at law.

24. 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.

25. 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 Mo. Const. Art. X, §4(d).

26. Plaintiffs believe 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.

27. Plaintiffs believe 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.

28. Plaintiffs believe 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).

29. Plaintiffs believe 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.

30. Plaintiffs believe 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.

31. Plaintiffs believe 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.

32. Plaintiffs believe 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.”

33. Plaintiffs believe the challenged policy violates the Missouri Constitution, Article X, §2, to the extent that the Missouri Legislature has surrendered the power to tax to the federal IRS by tying the Missouri Tax Code to definitions issued by the federal IRS, thus surrendering the power to define terms such as husband, wife and spouse to the IRS.

34. Plaintiffs believe 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.

35. Professor Jonathan Turley, George Washington Law School, recently testified before a U.S. House Judiciary Committee panel on "Enforcing the President's Constitutional Duty to Faithfully Execute the Laws" He warned of the dangers to our constitutional order of increasing abuse of executive power by the president, and increasing docility by the legislative and judicial branches. While I disagree with many political policies espoused by Professor Turley, I could not agree more with his concern about executive power, and I believe the principles apply with equal force to state governments, including Governor Nixon in Missouri. I attach as Attachment 1 a true and correct copy of his remarks to this affidavit, and incorporate it by this reference. The document may be viewed online at this site:

<http://jonathanturley.files.wordpress.com/2014/02/turley-enforcement-testimony.pdf>.

In a later interview on National Public Radio, Professor Turley extended on his comments.

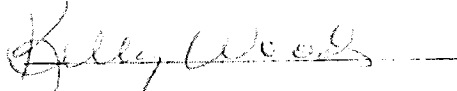
An excerpt of his comments is here:

<http://hereandnow.wbur.org/2014/02/27/power-presidency-turley>, and is attached hereto as Attachment 2.

FURTHER AFFIANT SAITH NOT.


DON HINKLE

Subscribed and sworn to before me this 25 day of March, 2014.


NOTARY PUBLIC

My Commission Expires: 12-4-16

KELLY WOODS
Notary Public - Notary Seal
STATE OF MISSOURI
County of Cole
My Commission Expires 12/04/2016
Commission # 12408076