

Missouri in support of implementation of the challenged laws and policies. See Petition, ¶21. Plaintiffs further allege, on information and belief, as a result of the Executive Order, 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. Finally, Plaintiffs allege at ¶5, that,

[as Missouri taxpayers, Plaintiffs] “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.”

Paragraphs 22 and 23 of Plaintiffs’ First Amended Petition state:

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.

In their Answer, at paragraph 21, State Defendants:

“admit that, assuming Plaintiffs and others paid income taxes to the State of Missouri, such funds go to the State Treasury as general revenue, and that part of the general revenue is expended by the State of Missouri to process combined income tax returns—which will include processing combined returns from same-sex couples married in other states.”

State Defendants also admit, at paragraph 41:

“that the Director of Revenue expends public funds to plan, prepare, and train employees for, to communicate, publish, mail, and post regarding, and to implement the acceptance and processing of combined Missouri state income tax returns, including returns filed by same sex couples married in other states.”

See State’s Answer, ¶¶ 21, 41.

In support of their motion for TRO, plaintiffs attached the affidavit of Don Hinkle, who attests that he and other plaintiffs have paid and will pay Missouri income tax in the past, and have filed and will file combined returns as married persons within the meaning of Article I, Section 33 of the Constitution.

The allegations in the petition, combined with the affidavit of Mr. Hinkle, along with the admissions of State Defendants concerning the direct expenditure of state funds and the likely pecuniary loss to the treasury by reduced revenue are sufficient to confer taxpayer standing to Plaintiffs. The court need not wait for specific evidence of the exact amount of the direct expenditures or the pecuniary loss before granting temporary injunctive relief.

The issue of taxpayer standing first arose in *Newmeyer v. Missouri & Mississippi Railroad*, 52 Mo. 81 (1873). There, the court held that taxpayers had standing to bring a suit to challenge the county's subscription to capital stock of a railroad. *Id.* at 89. The court reasoned that the county's taxpayers suffered a peculiar injury—the burden of paying for the subscription. *Id.* After *Newmeyer*, Missouri courts have held that when a public interest is involved and public monies are being expended for an illegal purpose, taxpayers have the right to enjoin the action. See, e.g., *Civic League of St. Louis v. City of St. Louis*, 223 S.W. 891 (Mo.1920); *Berghorn v. Reorganized Sch. Dist. No. 8, Franklin Cnty.*, 364 Mo. 121, 260 S.W.2d 573 (1953).

“Even though a net gain from the multi-state lottery is expected and no money will be taken from the state treasury, we believe that the funds of the lottery commission are "state funds" in the broad sense, and that the plaintiff as a citizen and taxpayer of Missouri

has standing to challenge the legality of these expenditures in court.” *Tichenor v. Missouri State Lottery Com'n*, 742 S.W.2d 170 (Mo., 1988).

Taxpayer standing is available “so that ordinary citizens have the ability to make their government officials conform to the dictates of the law when spending public money.” *Ste. Genevieve Sch. Dist. R-II v. Bd. of Aldermen of the City of Ste. Genevieve*, 66 S.W.3d 6, 11 (Mo. banc 2002). Public policy demands a system of checks and balances whereby taxpayers can hold public officials accountable for their acts.... Taxpayers must have some mechanism of enforcing the law. *E. Mo. Laborers*, 781 S.W.2d at 47.

II. **Plaintiffs satisfy four elements required for declaratory judgment action.**

A. **Justiciable Controversy**

1. **Executive Order 13-14 is legally actionable.**

Plaintiffs seek a declaratory judgment that two sections of the Missouri Tax Code are unconstitutional as applied by Executive Order 13-14, or, in the alternative, that the Executive Order is unconstitutional.

Some executive orders are not legally actionable under Missouri law. Some are. Executive Order 13-14 is in the category of orders which are legally actionable.

In *Stein v. James*, 651 S.W.2d 624 (Mo App. 1983), the Western District applied the analysis of a Pennsylvania case, *Shapp v. Butera*, 348 A.2d 910 (1975), which analyzed executive orders in three categories. The first category consisted of formal, ceremonial, and political orders, which have no legal effect. *Shapp*, 348 A.2d at 913. The second category included communications to subordinate executive branch officials regarding the execution of their executive branch duties, which also are not legally actionable or enforceable. *Shapp*, 348 A.2d at 913. The third category consisted of orders which implement or supplement the state's constitution or statutes, and thus have the force of law. *Shapp*, 348 A.2d at 913. The three category analysis was also applied in *Kinder v. Holden*, 92 S.W.3d 793 (Mo. App., 2002).

Executive Order 13-14 is clearly within the third category, finding its basis in the Constitution and the statutes authorizing the Governor's executive power to faithfully execute the laws including tax laws. Article IV, §§ 1 and 2. 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." Article IV, Section 12 creates the Executive branch, consisting of the Governor and all state elective and appointive officials and employees except officials and employees of the legislative and judicial departments. The Department of Revenue is headed by a director who is appointed by the governor, with the consent of the Senate. The director "shall have administrative responsibility and authority for the department created by law." RSMo. Section 136.030 (2) provides that the Director of Revenue shall "Make provisions for the collection of the state income tax, ... and all other taxes." The several constitutional provisions that are set out in the First Amended Petition, paragraphs 27-33, set clear boundaries for the legislative branch and for the executive branch in enactment and the administration of the tax code. Where the Executive overreaches or misinterprets the tax code in an executive order, and violates clear constitutional guarantees, taxpayers may properly turn to the judicial branch and state a cause of action challenging the order.

2. Unconstitutional tax code provisions are actionable.

In addition, Plaintiffs state a valid cause of action regarding the unconstitutional tax code provisions and their implementation in violation of Article 1, Section 33.

The Missouri Legislature enacted §143.031.1 and §143.091 at a time when both federal and state definitions of husband, wife, spouse, and marriage were consistent with Article I, Section 33. When the Legislature tied the Missouri tax code to the federal definitions, no one dreamed that the federal code would one day define these terms to include same-sex couples. No one believes that the Missouri Legislature intended that, in the event the federal government chose to recognize same sex marriages, Missouri law would just incorporate such recognition, allowing the federal government to control

marriage law. Such a notion is especially nonsensical in light of the Missouri DOMA and the Missouri Marriage Amendment.

The *Windsor* case¹ produced a seismic shift in federal marriage law, but it did not change state laws. The justices did not wholly disregard the importance of the states and the political process in this national debate about marriage. The majority opinion did not purport to void all state constitutions or laws that recognized only one man-one woman marriages, but left intact Section 2 of the federal DOMA that reserved to each State the right to define marriage, without giving full faith and credit to marriage contracts between same sex couples from other states.² In Rev. Rul. 2013-17, the IRS switched to the new “same sex” definitions across the federal tax code, but it did not seek to impose any of these definitions on state tax codes.

The Missouri Governor has, in effect, by-passed the legislature and the voters, who have spoken clearly about what shall be recognized as a legal marriage in Missouri. The Governor did not look for an exception in the Missouri tax code which would have avoided the adoption of federal definitions which conflicted with the Marriage Amendment. The Governor did not look for a way to guide federally eligible couples to file individual returns in Missouri rather than combined returns on which one of the parties will be designated as the spouse. The Governor did not wait for legislature to fix the apparent conflict between the Missouri Tax Code and the IRS definitions. The Governor would not wait for the people to reconsider the marriage amendment, which the Governor has said he hopes we will do. The Governor acted now, by executive decree, to “fix” the problem in a way that is consistent with his evolving views of marriage, but which is not consistent with our current Constitution, Article I, Section 33.

¹ *U.S. v. Windsor*, 133 S.Ct. 2675 (2013)

² 28 U.S.C. §1738C: No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

Plainly, the Executive Order is contrary to the Constitution. Clearly, the interpretation of the tax code which the Governor is implementing is a recognition of what the federal IRS is recognizing – same sex marriages. But that is precisely what Missouri law says the State shall not recognize.

B. **Legally protected interest subject to immediate relief**

Standing required plaintiffs to have “a legally cognizable interest” and “a threatened or real injury.” *E. Mo. Laborers District Council, supra*, at 46. Taxpayer standing satisfies that requirement. The second element for a declaratory judgment is that plaintiff “must demonstrate a legally protected interest consisting of a pecuniary or personal interest directly at issue and subject to immediate or prospective consequential relief.”

On the issue of what interest the plaintiff must have for a declaratory judgment, the Western District has held:

It follows logically that the interest which allows a plaintiff to maintain an action for declaratory judgment that a statute unlawfully dispenses public funds and is invalid also allows a plaintiff to maintain a declaratory judgment that an agency rule unlawfully dispenses public funds and so is invalid.

The plaintiffs allege status and interest to sue as taxpayers. The defendants contend that the status of taxpayer, merely, alleges an interest common to the populace and not that concrete injury indispensable to a justiciable controversy. They disparage the petition as a “religious ideological quibble,” a theoretical grievance not subject to judicial redress. To be sure, to invoke the declaratory judgment remedy, there must be at stake an interest the law will protect. *Wellston Fire Protection Dist. v. State Bank & T. Co.*, 282 S.W.2d 171, 177(12, 13) (Mo.App.1955). The jurisprudence of Missouri establishes that a taxpayer who alleges that public funds are expended for an illegal purpose describes a private injury sufficient to maintain a declaratory judgment and injunction against the illicit action. *Berghorn v. Reorganized School District No. 8*, 364 Mo. 121, 260S.W.2d 573, 581(9-11) (1953). The contentions of the defendants misuse *Berghorn* to mean that a direct pecuniary interest More than mere taxpayer Only will support a plaintiff to adjudicate the legality of the outlay of public funds.

Missourians for Separation of Church and State v. Robertson, 592 S.W.2d 825 (Mo. App.W.D., 1979):

In the *Missourians* case, *id.*, defendants argued that the legal interest for standing was not sufficient for the right to bring a declaratory judgment. The Court disagreed:

"In (taxpayer cases) it is not the damage suffered by each taxpayer or by all taxpayers as a class that opens the door to equity for relief, but it is The public interests which are involved in preventing the unlawful expenditure of money raised or to be raised by taxation." (Emphasis added.) *Clark v. Crown Drug Co.*, 348 Mo. 91, 152 S.W.2d 145, 147(4) (1941). "We are of opinion that, where Public interests are involved, and public funds are about to be dissipated for an illegal purpose, a single taxpayer may maintain an action for itself, and all other taxpayers in said city, to restrain the illegal actions complained of" (Emphasis added.) *Civic League v. City of St. Louis*, 223 S.W. 891 (Mo.1920). And so, also, in *Berghorn*, a declaratory judgment action brought to enjoin the illegal disbursement of public funds in violation of the First Amendment (260 S.W.2d 1.c. 581(9-11)): "As such taxpayers, there can be no question as to their right and legal capacity to bring and maintain this action for themselves and on behalf of all others similarly situated to enjoin the unlawful expenditure of public funds. In such case Proof of illegal and unconstitutional expenditure of such public funds is sufficient to show private pecuniary injury" (Emphasis added.)

Missourians, id., p. 839.

C. **Issue is ripe for judicial determination.**

"A court cannot render a declaratory judgment unless the petition presents a controversy ripe for judicial determination." *Mo. Health Care Ass'n. v. Attorney General of the State of Mo.*, 953 S.W.2d 617, 621 (Mo. banc 1997). A controversy is ripe if the parties' dispute is developed sufficiently to allow the court to make an accurate determination of the facts, to resolve a conflict that presently exists, and to grant specific relief of a conclusive character. *Id. Lebeau v. Comm'rs of Franklin Cnty.* (Mo., 2014)

When a taxpayer brings a declaratory judgment action challenging the constitutionality of a statute under which the taxpayer is being required to pay taxes, the case is ripe for adjudication. *Akin v. Director of Revenue*, 934 S.W.2d 295, 298 (Mo., 1996) Plaintiffs and other taxpayers are required to pay taxes for income in 2013, with a filing deadline of April 15, 2014, under the Executive Order and the statutes which are being challenged as unconstitutional.

Plaintiffs alleged that they seek to vindicate more than their own personal interests. This principle was recently affirmed by the Missouri Supreme Court.

“LeBeau and Reichert are not necessarily proceeding on their individual interests. Instead, they challenge the law based on the public interests implicated by the unlawful expenditure of money generated through taxation. LeBeau and Reichert alleged that the legislature passed a bill in violation of constitutionally required procedure and that the bill requires expenditure of funds generated through taxation. Furthermore, LeBeau and Reichert alleged that the commissioners already have expended funds to establish a municipal court by a commission order issued pursuant to the authority granted by HB 1171. Because the allegedly unlawful expenditures currently are authorized by an allegedly unlawful bill and commission order, the controversy is sufficiently ripe for review.”

Lebeau v. Comm'rs of Franklin Cnty. (Mo., 2014)

Similarly, the instant controversy is ripe for judicial review because the unconstitutional statute and government action is presently being implemented by direct expenditure of public funds.

D. Plaintiffs lack an adequate remedy at law.

Plaintiffs allege and prove an inadequate remedy at law. Defendants admit this is true. See State Defendants’ Answer, ¶50.

III. Plaintiffs satisfy standard for issuing a Temporary Restraining Order

A court may issue a temporary restraining order pursuant to Rule 92.02, Mo.R.Civ.Pro., “where there is a need to protect an applicant from immediate and irreparable injury which may result to the applicant before a formal contested hearing can be scheduled.” *Furniture Mfg Corp. v. Joseph*, 900 S.W.2d 642, 646 (Mo.App. W.D. 1995). Section 526.050, RSMo 1994, authorizes a temporary restraining order when the failure to grant temporary relief it would have the effect of rendering a final judgment for injunctive relief ineffectual. The court should weigh (1) the movant’s probability of success on the merits; (2) the threat of irreparable harm to the movant absent the injunction; (3) the harm the injunction’s issuance might inflict on other interested parties; and (4) the public interest.

State ex rel. Director of Revenue, State of Missouri v. Gabbert, 925 S.W.2d 838, 839 (Mo. banc 1996).

Plaintiffs are entitled to a temporary restraining order and preliminary injunction against Defendants because there is a strong likelihood that Plaintiffs will prevail on the merits of their claims and strong potential for immediate and irreparable damage to the Plaintiffs if Defendants are permitted to continue to implement the challenged policy. The conduct of Defendants as outlined above is unlawful; a restraining order or injunction will not harm any legitimate interest of Defendants. Third persons who may file combined returns in reliance upon Defendants' mistake of law or fact may not justly retain the improper benefit, under normal equitable principles. The fact that third persons will be required to comply with the state filing requirements in the same manner that they did before the Executive Order was issued does not constitute legal harm. They may file the federal joint return and yet file a state individual return, separately identifying state income and deductions allowed to a person in their filing status.

Finally, the public interest, as expressed in the Constitution and statutes of Missouri, will be protected during the pendency of this claim by the issuance of a restraining order and preliminary injunction.

A. **Plaintiffs are likely to prevail on the merits**

1. **Art. 1, §33 should be construed to achieve the voters' purpose.**

The Supreme Court reads constitutional amendments passed by voters so as to carry out the plain meaning of the words. "We suggest that the words should be read in accordance with their plain meaning, so as to carry out the purpose manifested by the voters of the state in approving the amendment referred to them by the general assembly... . We should not construe the constitutional provision in such a way as to thwart the voters' purpose, and should impose only such restrictions as are clearly required by the statute. The intent we look to, furthermore, is that of the voters. *Tichenor v. Missouri State Lottery Com'n*, 742 S.W.2d 170, 173. (Mo., 1988)

2. State recognition of the federal recognition of same sex marriage is unlawful.

Rev. Rul. 2013-17 plainly recognizes same sex marriages for couples who were wed in states permitting such. Executive Order 13-14 plainly accepts and applies the federal definitions to the Missouri tax code, at least so far as requiring filing a combined return by federally recognized same sex couples.

The Governor has made public statements to the effect that his order did not recognize any same sex marriages in Missouri, but dealt only with filing status. He claims his interpretation was required by the statutes.

If the Governor is correct, then his order and the statutes are unconstitutional, in plain violation of Article I, Section 33. His order is therefore unlawful.

If the Governor is incorrect, and if the Missouri statute could be interpreted to reject the IRS definitions in Rev. Rul. 2013-17 because of the explicit requirement of Article I, Section 33, then the state statute is being applied unconstitutionally, and the Governor's order is unlawful.

Either way, the implementation of the Governor's order is unlawful; so, Plaintiffs are likely to prevail on the merits.

The case may be ripe for a judgment on the pleadings. See *Mo. Roundtable for Life, Inc. v. State*, 396 S.W.3d 348 (Mo., 2013)³

B. Plaintiffs have no adequate remedy at law and will suffer irreparable harm

³ Missouri Roundtable, et al., ("Roundtable") filed suit in the circuit court of Cole County seeking to enjoin the implementation of Missouri Senate Bill No. 7 ("SB 7") and reverse any actions already taken to execute its provisions. The circuit court granted Roundtable's motion for judgment on the pleadings, concluding that SB 7 violates the single subject rule of article III, section 23 of the Missouri Constitution, cannot be severed under the facts of this case, and, therefore, SB 7 is unconstitutional "in its entirety." The circuit court entered judgment for Roundtable, and the State of Missouri appealed. The Supreme Court agreed with the circuit court and affirmed.

“Irreparable harm is established if monetary remedies cannot provide adequate compensation for improper conduct.” *Walker v. Hanke*, 992 S.W.2d 925, 933 (Mo.App. W.D. 1999). A plaintiff need not “await harm’s fruition before being entitled to seek an inadequate legal remedy of damages.” *A.B. Chance Company v. Schmidt*, 719 S.W.2d 854, 859-60 (Mo.App. 1986); *see also, Sigma Chemical Company v. Harris*, 586 F.Supp. 704, 710 (E.D. Mo. 1984).

Defendants have admitted that Plaintiffs have no adequate remedy at law.

The *status quo* should be preserved while this case is pending. Only the requested injunctive relief can protect the interests of Plaintiffs and prevent irreparable damage to plaintiffs during the pendency of this case.

C. A Temporary Restraining Order and Preliminary Injunction will further the public interest

As outlined above, the clear public policy of Missouri regarding marriage recognition is set out in Missouri’s Constitution and its DOMA statute. The actions of Defendants are in clear violation of both. Enjoining such actions shows respect for the Constitution and the rule of law. Restraining lawless behavior may encourage government officials to respect the Constitution and the will of the people, even when public officials disagree with certain provisions.

IV. “A Constitutional Tipping Point”

Professor Jonathan Turley, George Washington University Law School, testified before a House Judiciary Committee panel on February 26, 2014, regarding an alarming trend in the use of executive power by the U.S. President. See Affidavit of Don Hinkle, Attachment 1. Also see Professor Turley’s comments in an NPR interview, excerpted and attached to the Hinkle affidavit as Attachment 2. The same observations may be made about other chief executives in state government, including Missouri’s Gov. Nixon. Plaintiff Don Hinkle affirms the views expressed by Professor Turley and attaches his recent testimony before a congressional panel.

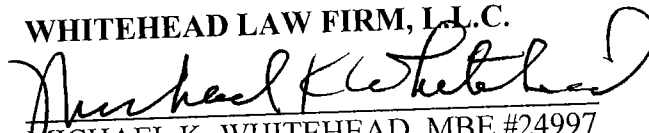
CONCLUSION

Plaintiffs pray the Court for its Temporary Restraining Order and Preliminary Injunction enjoining Defendants from administering the challenged policy, from permitting waste of taxpayer funds therefor, for Plaintiffs' costs and attorneys' fees herein expended, and for such further relief as the Court deems just and equitable in the premises.

Dated: March 25, 2014

Respectfully submitted,

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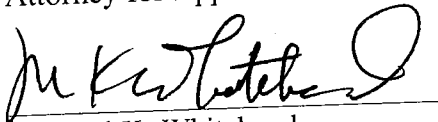
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Certificate of Service

On this 25th day of March, 2014, a copy of the foregoing was served upon all defendants by email to their counsel below, and also upon applicant-intervenors:

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