

IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

Kerry Messer, et al.,)
)
 Plaintiffs,)
)
 v.)
) No. 14AC-CC00009
 Jeremiah W. Nixon, in his official)
 capacity as Governor of the)
 State of Missouri, et al.,)
)
 Defendants.)

**SUGGESTIONS IN SUPPORT OF MOTION OF SCOTT EMANUEL
AND ED REGGI TO INTERVENE AS PARTY-DEFENDANTS**

Unlike any of the existing parties to this case, Scott Emanuel and Ed Reggi are a legally married couple that must file their federal income tax return as married but would be forbidden, if Plaintiffs' requested relief is granted, from filing a combined state income tax return. This is despite the fact that Missouri law requires all married couples who file a joint federal income tax return to file a combined state income tax return. The have move to intervene as Party-Defendants to protect their concrete interests as lawfully married Missouri taxpayers that are shared by no current party to the case.

**I. EMANUEL AND REGGI SHOULD BE PERMITTED TO INTERVENE AS
A MATTER OF RIGHT**

A party has the right to intervene in an existing action under Mo. R. Civ. P. 52.12(a) if three elements are met: (1) the applicant has an interest relating to the property or transaction that is the subject of the action; (2) the applicant's ability to protect the interest is impaired or impeded; and (3) the existing parties are inadequately representing the applicant's interest. *Allred v. Carnahan*, 372 S.W.3d 477, 481 (Mo. App. W.D. 2012). "[T]he Rule should be liberally

construed to permit broad intervention[.]” *Id.* at 482 (quotation and citation omitted). “When an applicant satisfies the elements, the right to intervene is absolute, and the motion to intervene may not be denied.” *McMahon v. Geldersma*, 317 S.W.3d 700, 705-06 (Mo. App. W.D. 2010)

A. EMANUEL AND REGGI HAVE AN INTEREST IN THE SUBJECT OF THIS ACTION

“An ‘interest,’ for purposes of intervention as of right, means a concern, more than mere curiosity, or academic or sentimental desire; one interested in an action is one who is concerned in the outcome or result thereof because he has a legal right which will be directly affected thereby.” *Prentzler v. Carnahan*, 366 S.W.3d 557 (Mo. App. W.D. 2012). “[T]he ‘interest’ must be such an immediate and direct claim upon the very subject matter of the action that intervener will either gain or lose by the direct operation of the judgment that may be rendered therein.” *State ex rel. Farmers Mutuals Auto. Ins. Co. v. Weber*, 273 S.W.2d 318, 321 (Mo. banc 1954).

Because a declaration that, despite the presumption of constitutionality, Sections 143.031.1 and 143.091 of the Missouri Revised Statutes are unconstitutional and that Executive Order 13-14 is unlawful would prohibit lawfully married couples like Emanuel and Reggi from filing a combined state income tax return, they have a protectable legal right that would be directly and irreparably harmed by direct operation of the judgment. *See Gray v. Orr*, 13 C 8449, 2013 WL 6355918, at *4 (N.D. Ill. Dec. 5, 2013) (recognizing the deprivation of right to file a joint income tax return as a harm). What is more, Plaintiffs’ requested relief would impose a real burden on the proposed intervenors. Federal law requires proposed intervenors to file their income tax return as married, and Missouri law requires couple who file a joint federal income tax return to file a combined state income tax return. Plaintiffs would require a deviation from

the statutes and insist that legally married couples like Emanuel and Reggi file something else—though it is unclear what they would file or what Missouri law would allow them to file.

Because this case will decide whether Emanuel and Reggi must, may, or may not file a combined state income tax return, they have an interest sufficient to support intervention.

B. THIS LITIGATION WOULD IMPAIR EMANUEL’S AND REGGI’S ABILITY TO PROTECT THEIR INTEREST

Once it is established that the intervening defendants have an interest at stake in this action, they must prove that without intervention, their ability to protect that interest will be impaired. “The second element of intervention requires a showing that, absent intervention, the proposed intervenors’ ‘ability to protect his interest will be impaired or impeded as a practical matter’ by the disposition of the action.” *Allred*, 372 S.W.3d at 485.

If Plaintiffs’ request for Declaratory Judgment and Injunctive Relief is granted, Emanuel and Reggi will lose a legal right or obligation that they currently have. Whether their right is preserved, or not, will be determined in this litigation; thus, without being afforded the opportunity to intervene, their ability to protect their legal interest will be impaired.

C. THE EXISTING PARTIES DO NOT ADEQUATELY REPRESENT THE INTEREST OF EMANUEL AND REGGI

Unlike the other parties to this litigation, Emanuel and Reggi will directly experience the effects of this Court’s resolution. Currently, Missouri law requires them to file a combined state income tax return. If Plaintiffs prevail, they may not file a combined state income tax return. The amount of tax they pay this year and indefinitely in future years will differ based on the result of this case. No other party will have a similar experience.

While the named defendants' primary interest in defending the laws of Missouri, including Executive Order 13-14, is to facilitate the processing of state income tax returns, this interest is different than proposed intervenors. Requiring the state to investigate the marriages of each couple that files a combined income tax return to assess whether the marriage would have been performed in Missouri and, if not, for what reason, would no doubt impose a significant burden upon Defendants. However, the burden is distinct from the detriment that Plaintiffs seek to impose on Emanuel, Reggi, and similarly situated individuals.

"[T]he fact that two parties are on the same side of the dispute is not enough, in and of itself, to preclude intervention." *Allred*, 372 S.W.3d at 486. "The determination of whether a proposed intervenor's interest is adequately represented by an original party to an action usually turns on whether there is an identity or divergence of interest between the proposed intervenor and the party." *Alsbach v. Bader*, 616 S.W.2d 147, 151 (Mo. App. E.D. 1981).

The prospective intervening defendants might reasonably argue that a Missouri constitutional amendment construed as prohibiting the Governor from issuing Executive Order 13-14, has the primary effect of imposing a financial disadvantage and separate status upon intervening defendants and all same-sex couples in similar positions.

II. IN THE ALTERNATIVE, EMANUEL AND REGGI SHOULD BE PERMITTED TO INTERVENE PERMISSIBLY

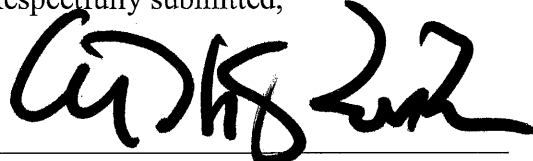
In addition to intervention as a matter of right, upon timely motion anyone may be permitted to intervene in an action when an intervenor's defense and the main action have a question of law or fact in common. As individuals upon whom Plaintiffs seek to impose a harm, Emanuel and Reggi can present questions of law and fact that the named parties cannot. In addition, because Emanuel and Reggi are caught between Missouri's requirement that they file a

combined income tax return if they file a joint income tax return and Plaintiffs' contention that Defendants must prohibit them from filing a combined state income tax return, they have a personal stake in the outcome of this litigation share questions of law and fact with this case. Plaintiffs' main contention is that R.S. Mo. §§ 143.031.1 and 143.091 of the Missouri Tax Code are unconstitutional because Art. I, § 33 of the Missouri Constitution explicitly states that marriage must consist of one man and one woman. "[I]ntervention can be appropriate when the intervenors can show 'interest unique to themselves.' Moreover, '[p]ermissive intervention may be permitted when the intervenor has an economic interest in the outcome of the suit.'" *Johnson v. State*, 366 S.W.3d 11, 21 (Mo. banc 2012) (citations omitted). Here, both of these issues are relevant as the constitutional claim is unique to intervening defendants and the elimination of joint tax benefits constitutes an economic interest.

III. CONCLUSION

For the foregoing reasons, the Court should permit the applicants to intervene in this action as Party- Defendants.

Respectfully submitted,



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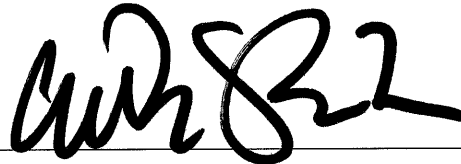
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Certificate of Service

I hereby certify that a true and correct copy of the foregoing was sent by first class mail,
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A handwritten signature in black ink, appearing to read "M. Whitehead", is written over a horizontal line.