

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.)	

MOTION OF SCOTT EMANUEL AND ED REGGI TO INTERVENE AS PARTY-DEFENDANTS

Come now movants Scott Emanuel and Ed Reggi, pursuant to Rule 52.12, and request this Court grant them leave to intervene in this case as Party-Defendants either as a matter of right or permissively. In support, they state:

1. This action was filed on January 8, 2014. An amended petition was filed on February 7, 2014. The answer of the named defendants was filed on February 20, 2014.
2. In this case, Plaintiffs seek to prevent lawfully married couples of the same sex who file a joint federal income tax return from filing a combine state income tax return, as would be required under Missouri law.
3. Upon information and belief, no current party to this case is from the class of individuals that will actually be affected by the disposition of this case.
4. Proposed intervenors are a lawfully married couple who must file their federal tax returns as married. If Plaintiffs are successful in this action, then Defendants will be enjoined from allowing the proposed intervenors from filing a combined state income tax return. If Plaintiffs are not successful, then the proposed intervenors will be required to file a combined state income tax return. Because Plaintiffs seek to impose a detriment of the proposed

intervenor, the disposition of this action may impair or impede the proposed intervenors' ability to protect their interests.

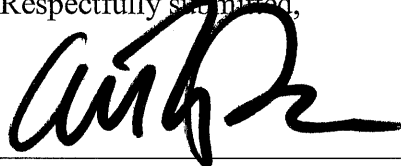
5. Defendants in this action are state officials whose interests in this case are the enforcement of state revenue statutes and the efficient processing of state income tax returns. While Plaintiffs seek to impose burdens on the named defendants, those burdens are distinct from the burdens that Plaintiffs ask this Court to impose on the proposed intervenors. Therefore, the interests of the proposed intervenors are not adequately represented by the existing parties.

6. In the alternate, the proposed intervenors defenses present questions of law and fact in common.

7. The basis for this motion is more fully described in the suggestion in support filed herewith.

8. This motion is accompanied by a pleading as required by Rule 52.12(c).
WHEREFORE Scott Emanuel and Ed Reggi move this Court for entry of an order sustaining his motion to intervene as party-defendants.

Respectfully submitted,



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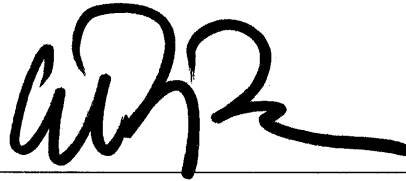
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Certificate of Service

I hereby certify that a true and correct copy of the foregoing was sent by first class mail,
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Answer of Intervenors Scott Emanuel and Ed Reggi to
First Amended Petition for Declaratory Judgment and Injunctive Relief

Intervenors Scott Emanuel and Ed Reggi answer the First Amended Petition for Declaratory Judgment and Injunctive Relief filed against Defendants Jeremiah W. Nixon, John R. Mollenkamp, Department of Revenue, and State of Missouri, by Plaintiffs Kerry Messer, Justin Mosher, Don Hinkle, and Joseph Ortwerth, as follows:

1. Intervenors admit Plaintiffs seek the declaration that they allege they seek in Paragraph 1, but deny they are entitled to such relief.
2. Intervenors admit Plaintiffs seek the injunctive relief they allege they seek in Paragraph 2, but deny they are entitled to such relief.
3. Intervenors are without sufficient knowledge or information regarding the allegations in Paragraph 3 and, therefore, deny those allegations.
4. Intervenors are without sufficient knowledge or information regarding the allegations in Paragraph 4 and, therefore, deny those allegations.
5. Intervenors deny the allegations in Paragraph 5.

6. Intervenors are without sufficient knowledge or information regarding the allegations in Paragraph 6 and, therefore, deny those allegations.
7. Intervenors are without sufficient knowledge or information regarding the allegations in Paragraph 7 and, therefore, deny those allegations.
8. Intervenors are without sufficient knowledge or information regarding the allegations in Paragraph 8 and, therefore, deny those allegations.
9. Intervenors are without sufficient knowledge or information regarding the allegations in Paragraph 9 and, therefore, deny those allegations.
10. Intervenors admit the allegations in Paragraph 10.
11. Intervenors admit the allegations in Paragraph 11.
12. Intervenors admit that Department of Revenue is an Executive Office of the State of Missouri and that it is established by and exists under Article IV, Section 22 of the Constitution of 1945 of the State of Missouri. Intervenors deny the remaining allegations in Paragraph 12.
13. Intervenors admit the allegations in Paragraph 13.
14. Intervenors deny the allegations in Paragraph 14.
15. Intervenors admit the allegations in Paragraph 15.
16. Intervenors admit the allegations in Paragraph 16.
17. Intervenors are without sufficient knowledge or information regarding the allegations in Paragraph 17 and, therefore, deny those allegations.
18. Intervenors are without sufficient knowledge or information regarding the allegations in Paragraph 18 and, therefore, deny those allegations.

19. Intervenor is without sufficient knowledge or information regarding the allegations in Paragraph 19 and, therefore, deny those allegations.
20. Intervenor is without sufficient knowledge or information regarding the allegations in Paragraph 20 and, therefore, deny those allegations.
21. Intervenor is without sufficient knowledge or information regarding the allegations in Paragraph 21 and, therefore, deny those allegations.
22. Intervenor is without sufficient knowledge or information regarding the allegations in Paragraph 22 and, therefore, deny those allegations. Further, Intervenor states that, upon information and belief, the challenged Executive Order will result in an increase in tax revenue and, if anything, processing a combined state income tax return will cost the state less, not more, than processing individual returns of married couples who have filed a joint federal income tax return.
23. Intervenor denies the allegations in Paragraph 23.
24. Intervenor admits that § 451.022, RS Mo. was enacted in 1996 and further admits that the text of the statute is set forth in Paragraph 24. Intervenor denies the remaining allegations in Paragraph 24. Further, Intervenor states that § 451.022 is commonly known as Missouri's Anti-Marriage Statute.
25. Intervenor admits that Article I, Section 33 of the Constitution of 1945 of the State of Missouri is properly quoted in Paragraph 25 and, further, that it was adopted in 2004. Intervenor denies the remaining allegations in Paragraph 25. Further, Intervenor states that Article I, Section 33, is commonly known as Missouri's Anti-Marriage Amendment.

26. Intervenor admits that Missouri's Anti-Marriage Amendment was considered at the August 3, 2004, primary election; that 70.6% of the voters who cast a ballot on the question voted in favor; and that 1,055,771 of Missouri's 6,000,000 residents voted in favor. Intervenor denies the remaining allegations in Paragraph 26.
27. Article II, Section 1 of the Constitution of 1945 of the State of Missouri states, "The powers of government shall be divided into three distinct departments--the legislative, executive and judicial--each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted." Intervenor denies the remaining allegations in Paragraph 27.
28. Intervenor admits the allegations in Paragraph 28.
29. Intervenor admits the allegations in Paragraph 29.
30. Intervenor admits the allegations in Paragraph 30.
31. Intervenor admits the allegations in Paragraph 31. Further, Intervenor asserts that Article X of the Constitution of 1945 of the State of Missouri states that "Taxes ... shall be uniform upon the same class or subclass of subjects within the territorial authority levying the tax."
32. Article X, Section 4(d) of the Constitution of 1945 of the State of Missouri states: "In enacting any law imposing a tax on or measured by income, the general assembly may define income by reference to provisions of the laws of the United States as they may be or become effective at any time or from time to time, whether retrospective or prospective in their operation. The general assembly shall in any such law set the rate

or rates of such tax. The general assembly may in so defining income make exceptions, additions, or modifications to any provisions of the laws of the United States so referred to and for retrospective exceptions or modifications to those provisions which are retrospective.” Intervenor deny the remaining allegations in Paragraph 32.

33. Intervenor are without sufficient knowledge or information regarding the allegations in Paragraph 33 and, therefore, deny those allegations.

34. Intervenor admit that Executive Order 13-14 acknowledges Revenue Ruling 2013-17 from the Internal Revenue Service. Except as otherwise admitted, Intervenor deny the allegations in Paragraph 34.

35. Intervenor admit that Executive Order 13-14 acknowledges that Missouri law requires married individuals who file a joint tax return to file a combined Missouri state income tax return. Except as otherwise admitted, Intervenor deny the allegations in Paragraph 35.

36. Intervenor admit that under Revenue Ruling 2013-17 all couples who were legally married at a place where the marriage is recognized are required to file federal income tax returns as married, regardless of the domicile or sexual orientation. Except as otherwise admitted, Intervenor deny the allegations in Paragraph 36.

37. Missouri Revised Statutes Section 143.091 states: “Any 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. Any reference in sections 143.011 to 143.996 to the laws of the United

States shall mean the provisions of the Internal Revenue Code of 1986, and amendments thereto, and other provisions of the laws of the United States relating to federal income taxes, as the same may be or become effective, at any time or from time to time, for the taxable year.” Intervenor deny the remaining allegations in Paragraph 37.

38. The Amended Petition cites Missouri Revised Statutes Section 143.031.1 but omits a portion. Section 143.031.1 states: “A husband and wife who file a joint federal income tax return shall file a combined return. A husband and wife who do not file a joint federal income tax return shall not file a combined return.” Missouri statutes do not address those not treated as a husband and wife by Missouri who file a joint federal tax return, other than by reference to the laws of the United States. *See* 143.091, RSMo. Intervenor deny the remaining allegations in Paragraph 38.

39. Intervenor deny the allegations in Paragraph 39. Executive Order 13-14 states, in relevant part, “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. Intervenor admit the allegations in Paragraph 40.

41. Intervenor are without sufficient knowledge or information regarding the allegations in Paragraph 41 and, therefore, deny those allegations.

42. Intervenor deny the allegations in Paragraph 42. Intervenor further assert that, upon information and belief, in many cases, the Department of Revenue will collect more tax from those married couples who file a combined return.

43. Intervenor are without sufficient knowledge or information regarding the allegations in Paragraph 43 and, therefore, deny those allegations.
44. Intervenor admit that Paragraph 44 correctly quotes from the Missouri 2013 Form MO-1040 Instructions as revised on December 13, 2013.
45. Intervenor deny the allegations in Paragraph 45.
46. Intervenor admit that Paragraph 46 asserts what Plaintiffs contend. Except as otherwise admitted, Intervenor deny the allegations in Paragraph 46.
47. Intervenor deny the allegations in Paragraph 47.
48. Intervenor deny the allegations in Paragraph 48.
49. Intervenor deny the allegations in Paragraph 49.
50. Intervenor deny the allegations in Paragraph 50.
51. Intervenor admit that Plaintiffs seek declaratory judgment. Except as otherwise admitted, Intervenor deny the allegations in Paragraph 51.
52. Intervenor admit that Plaintiffs seek to enjoin Defendants as described. Except as otherwise admitted, Intervenor deny the allegations in Paragraph 52.
53. Intervenor deny the allegations in Paragraph 53.
54. Intervenor are without sufficient knowledge or information regarding the allegations in Paragraph 54 and, therefore, deny those allegations.
55. Intervenor deny the allegations in Paragraph 55.
56. Intervenor deny the allegations in Paragraph 56.
57. Intervenor deny the allegations in Paragraph 57.
58. Intervenor deny the allegations in Paragraph 58.
59. Intervenor deny the allegations in Paragraph 59.

60. Intervenor deny the allegations in Paragraph 60.

Additional Facts and Affirmative Defenses

61. Upon information and belief, no Plaintiff is a party to an out-of-state marriage that is not accorded full recognition in Missouri.

62. Upon information and belief, no Plaintiff has a spouse of the same sex.

63. Intervenor Scott Emanuel and Ed Reggi were married on May 1, 2009, in Iowa City, Iowa.

64. Intervenor are required to file their federal income tax return as married jointly or married filing separately.

65. Intervenor are required to file a Missouri income tax return.

66. Missouri requires taxpayers to include a copy of the federal income tax return with their state income tax return.

67. Missouri requires taxpayers to reference figures from their federal income tax return when completing their state income tax return.

68. Missouri law requires Intervenor to file a combined Missouri income tax return if they file a joint federal income tax return.

69. Missouri makes no inquiry into the validity of the marriages of those Missouri taxpayers who file a joint federal income tax return.

70. Missouri has no mechanism to inquire into the validity of the marriage of those who file a joint federal income tax return.

71. Missouri has always required spouses who file a federal joint income tax return to file a combined Missouri income tax return regardless of whether the marriage of those

spouses would have been valid if performed in Missouri and regardless of whether Missouri recognizes the marriage of those spouses.

72. Currently and historically, Missouri does not inquire into the sex of taxpayers who file a combined state income tax return based on having filed a federal joint income tax return.
73. Plaintiffs' proposed relief would require Defendants to discriminate against certain couples lawfully married in other jurisdictions who file federal joint income tax returns based on the sex of the individuals and based on the sexual orientation of the individuals.

First Affirmative Defense

74. Plaintiffs lack standing in that no statute confers them with standing and the Executive Order they challenge does not adversely affect them.
75. Plaintiffs lack taxpayer standing in that they cannot sufficiently identify a direct expenditure of state funds.

WHEREFORE, Intervenor ask this Court to deny the relief sought by Plaintiffs.

Respectfully submitted,



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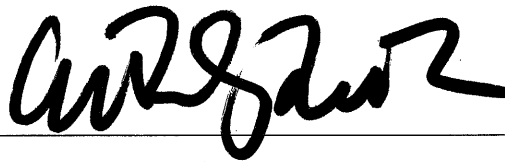
Attorneys for Intervenor

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I hereby certify that a true and correct copy of the foregoing was sent by first class mail,
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**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 intervenor 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

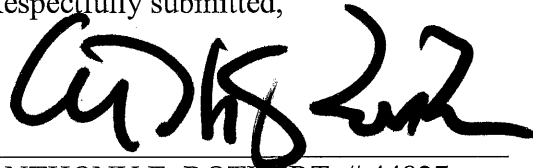
In addition to intervention as a matter of right, upon timely motion anyone may be permitted to intervene in an action when an intervenor's defense and the main action have a question of law or fact in common. As individuals upon whom Plaintiffs seek to impose a harm, Emanuel and Reggi can present questions 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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