IN THE CIRCUIT COURT FOR THE CITY OF ST. LOUIS
STATE OF MISSOURI

MARK BOLES, individually and on behalf of all others similarly situated, *et al.*	)	
Plaintiffs,	)	Case No.: 2122-CC00713
v.	)	Division
CITY OF ST. LOUIS, MISSOURI, *et al.*	)	
Defendants.	)	

PLAINTIFFS' SUGGESTIONS IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION, AND IMMEDIATE DECLARATORY JUDGMENT, ALL WITH NOTICE TO DEFENDANTS

Plaintiffs Mark Boles, Nicholas Oar, Kos Semonski and Christian Edward Stein III, individually, pursuant to Rules 92 and 87, state as their Suggestions in Support of their Motion for Temporary Restraining Order and Preliminary Injunction, and for Immediate Declaratory Judgment, all with Notice to Defendants, as follows:

INTRODUCTION AND PRELIMINARY MATTERS

This case relates to the 1% earnings tax imposed on nonresidents of the city of St. Louis, Missouri ("the City"). Historically, employers based in the City and/or with locations in the City have withheld the 1% earnings tax from the total wages paid to nonresidents assigned to work locations in the City. Then each tax season, generally January-April 15, nonresidents who spent time working outside the City during the prior tax year applied for and received a refund for a pro-rated amount of their withholdings based on the number of days they worked outside the City. Defendants' forms have always required the employee's employer to certify the number of days worked out the City, presumably to protect against fraud.

For tax year 2020, Defendants changed their policy to eliminate earnings tax refunds for nonresidents who spent days teleworking, defined as days working from a location outside the City for a city-based employer, but not while traveling for that employer for a business purpose. Defendants have done this is by changing their forms such that employees and employers are directed not to certify teleworking days. Defendants have then sent rejection letters to those who apply for refunds including those days anyway.

Plaintiffs assert that Defendants' changes to their policy and forms are unlawful. Some nonresidents have not filed for refunds for teleworking days precisely because the forms, which are unlawful, direct them and their employers not to.

This motion seeks immediate declaratory relief asking the Court to declare the new policy and forms unlawful. This motion further seeks preliminary injunctive relief asking the Court to order the City and Collector to revert to the refund forms as they existed prior to tax year 2020.

Parties

Plaintiffs are nonresidents of the City who are subject to the earnings tax because their employers are based and/or have locations in the City. Plaintiffs seek to be certified as class representatives of all others similarly situated, for two separate classes, one for those who have already submitted refund request forms seeking all days worked outside the City including teleworking days, and the other for those who have not yet submitted their forms or who need to amend their forms to add a request for teleworking days.

For the sake of judicial economy, Plaintiffs will refer to themselves herein as "Plaintiffs," but in all cases, pursuant to context, Plaintiffs mean "Plaintiffs and all others similarly situated," that is, the potential classes.

Plaintiffs do not seek class status in connection with their Declaratory Judgment claims, for those claims are under the Hancock Amendment, for which no class is required.

Defendants are the City and its elected Collector of Revenue, Gregory F.X. Daly, whom Plaintiffs sue in his official capacity only.

Procedural History

On Tuesday, April 14, 2021, Plaintiffs filed their Petition seeking damages, equitable relief, and declaratory relief. Defendants, through counsel, agreed to waive service. As of this filing Plaintiffs have moved for leave to file a First Amended Petition by right, and for substitution of Christian Edward Stein III for Ross Henry as potential class representative for Class 2. This motion presumes those motions will be granted.

Plaintiffs now move for immediate relief.

On March 29, 2021, Plaintiffs filed similar claims in federal court, 4:21-CV-378-CDP (E.D. Mo.), and sought a TRO and Preliminary Injunction, with notice. Defendants asserted lack of federal subject matter jurisdiction due to the Tax Injunction Act (28 U.S.C. § 1341), among other defenses. The Honorable Catherine D. Perry, U.S. District Court Judge, denied the TRO after hearing oral arguments on the motion. No judgment was issued and the order was thus interlocutory and without *res judicata* effect. See *Cornerstone Mortg., Inc. v. Ponzar*, No. ED 108758, 2021 WL 865275, at *8 (Mo. Ct. App. Mar. 9, 2021) (quoting *State ex rel. Koster v. Didion Land Project Assoc. LLC*, 469 S.W.3d 914, 918 (Mo. App. E.D. 2015):

> Res judicata and collateral estoppel apply to final judgments and preclude re-litigation of the claims or issues decided therein in subsequent causes of action. Thus, they have no application here to the interlocutory rulings of a trial court in an ongoing cause of action.

On Tuesday, April 14, 2021, before the filing of this case, Plaintiffs dismissed the federal case without prejudice.

The claims here are materially different from the claims in the federal case as follows: (1) there is no subject matter jurisdiction issue; (2) Plaintiffs make a Hancock claim, over which the Circuit Court clearly has jurisdiction; (3) Plaintiffs have proposed two classes instead of just one; and (4) Plaintiffs have a new proposed class representative, Mr. Stein, who has not submitted a claim for refund because he does not wish to submit a claim which would be incorrect under the current language on the Collector's forms.

This Motion is With Notice

Upon this filing Plaintiffs are sending this pleading by email to counsel for Defendants. Counsel for the Collector has already entered their appearance and counsel for the City have agreed to do so. Presumably, the Court and counsel for the parties will work out a mutually convenient date for a hearing.

FACTS

The St. Louis City Earnings Tax - Procedures and Instructions Regarding Refunds

The City's Earnings Tax Law, City Code § 5.22.020 ("the Ordinance"), which was enacted in 1954, states in relevant part:

> A tax for general revenue purposes of one percent is imposed on:
>
> . . .
>
> B. Salaries, wages, commissions and other compensation earned after July 31, 1959, by nonresident individuals of the City for **work done or services performed or rendered in the City** . . . (Emphasis added)

The "in the City" language in the Ordinance mirrors the language found in RSMo. § 92.111, which authorizes the City to impose the earnings tax at all. Moreover, the city of Kansas City, Missouri, which also imposes a 1% earnings tax on nonresidents, as authorized by the same

state statute, is abiding by the plain language of the local and state laws and still issuing refunds to nonresidents based on the number of days they worked outside the city in 2020.[1]

The primary object of statutory interpretation is to ascertain the intent of the legislature from the language used, and to give effect to that intent. In doing so we consider the words used in their plain and ordinary meaning. *Butler v. Mitchell–Hugeback, Inc.,* 895 S.W.2d 15, 19 (Mo.banc 1995). Plaintiffs suggest the Ordinance language is plain and unambiguous and shows the Ordinance, and the Missouri statute authorizing the Ordinance, creates tax liability for nonresidents only for work done when the taxpayer is physically present in the City, for otherwise, the taxpayer would not be doing the work or performing the service in the City.

The City has accepted this interpretation in the past by in prior years issuing refunds to nonresidents based on the number of days they worked out of the city, without any qualification, (discussed further below). The Collector's website has echoed this language, stating that the 1% earnings tax is collected from all:

a. City residents regardless of where they work,[2] and

b. Non-city residents **who work within city limits**.[3]

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[1] See Kansas City Code of Ordinances, Section 68-382(a)(2): "A tax for general revenue purposes of 1.0 percent per year is hereby imposed on: All earnings of nonresident individuals for services performed or rendered in the city." A recent news article in the *Kansas City Star* discussed Kansas City's issuance of refunds to nonresidents for teleworking days: "Remote workers: Expect to wait months for your Kansas City earnings tax refunds," April 1, 2021, available at https://www.kansascity.com/news/politics-government/article250335116.html#:~:text=Some%20%2417%20million%20was%20set,to%208%2C791%20taxpayers%20for%202019.

[2] The collection of earnings tax from persons who live in the City is not in dispute in this case.

[3] "Non-residents are required to pay the Earnings Tax on work or services performed within the City of St. Louis." Earnings Tax FAQs, available at https://www.stlouis-mo.gov/collector/earnings-faq.cfm#whoFiles. The City of St. Louis government website also states: "The earning tax is a one percent earnings tax collected from all city residents regardless of where they work, and non-city residents who work ***within city limits***." *Available at* https://www.stlouis-mo.gov/government/departments/collector/earnings-tax/index.cfm#:~:text=The%20earning%20tax%20is%20a,who%20work%20within%20city%20limits (emphasis added).

Section 5.22.060(A) of the Code requires "[e]very employer within or doing business in the City who employs one or more persons" to withhold and pay to the Collector 1% of an employee's compensation on a quarterly basis, regardless of whether the employee is a resident or nonresident of the City. That section reads:

> Every employer within or doing business within the City who employs one or more persons on salary, wage, commission, or other compensation basis, shall deduct at the time when earned irrespective of when paid, the tax of 1% of salaries, wages, commissions, or other compensation due by the employer to the employee and subject to tax, and shall quarterly make his return and pay to the collector, on or before the last day of July, October, January and April of each year, the amount of taxes so deducted for the three calendar months next preceding the month in which the return is required to be filed. Said return shall be on a form or forms obtainable from the collector and shall be subject to the rules and regulations prescribed therefor by the collector. Every such employer shall furnish each employee with a statement of the amount of the tax withheld. The failure of any employer to deduct or withhold at the source the amount of tax due from the employees shall not relieve the employee from the duty of making a return and paying the tax.

At all relevant times, pursuant to that language, Plaintiffs' employers, who are based in and/or have locations within the City, have withheld the 1% from Plaintiffs' pay and then remitted those amounts to the Collector.

The Refund Process: 2019 Tax Year and Prior Tax Years

As Plaintiffs state above in the introduction, pursuant to custom and policy over many years, including tax year 2019, nonresidents employed by City employers who had 1% earnings tax withheld from their pay, and who have worked a certain number of days outside the City, have filed for an earnings tax refund based on the number of days worked outside the City. Defendants have then refunded a proportionate share of amounts withheld for days worked outside the City. Up to and including tax year 2019, such persons have requested their refunds

by using a Form E-1R. Other than updating the "Calendar Year" at the top of the document, the form has remained materially unchanged from at least tax year 2015 through tax year 2019.[4]

On inference, the Collector promulgated Form E-1R pursuant to his authority under City Code 5.22.100, which states in relevant part:

> The Collector is charged with the enforcement of the provisions of this chapter and is empowered to adopt and promulgate and to enforce rules and regulations relating to any matter or thing pertaining to the administration and enforcement of the provisions of this chapter, including provisions for the reexamination and correction of returns and payments alleged or found to be incorrect or as to which an overpayment or underpayment is claimed or found to have occurred.

At all relevant times, the Form E-1R has contained a section requiring the nonresident's employer to sign a part of the form certifying the number of days he or she worked outside the City limits. Prior to tax year 2020, the Form E-1R did not require the taxpayer or the employer to provide a reason as to why the taxpayer worked the stated number of days outside the City. The form at that time, in relevant part, required only completing the following:

> This is to certify the below mentioned employee, a non-resident of the City of St. Louis, worked ***outside the City of St. Louis*** a total of _____ whole days
>
> Address of work location must be provided for days worked ***outside the City of St. Louis***. Please provide address on the line below.
>
> _____
>
> (emphasis added).

[4] See Semonksi Affidavit, ¶ 5. The Collector's website currently has versions of the Form E-1R dating back to tax year 2015, which remained consistent until tax year 2020, available at https://www.stlouis-mo.gov/government/departments/collector/documents/e-1r-form.cfm.

The New Refund Process: 2020 Tax Year

In December 2020, the Collector promulgated a new E-1R refund request form for tax year 2020 ("2020 E-1R") and required a new attachment, the Form E-1RV.

The new 2020 Form E-1R states as follows:

> Employees who work remotely from home should be treated as working at their original principal place of work. ***These days may not be included in the Non-Residency Deduction formula on Form E-1R when claiming a refund.***
>
> (emphasis added)

The 2020 Form E-1R also requires taxpayers to provide the following:

> Address of work location along with substantiating documentation (travel and mileage logs, airline or train tickets, hotel receipts, etc.) must be provided for days worked outside the City of St. Louis. **Please complete Form E-1RV and submit with this return.**
>
> (emphasis added)

The Form E-1RV contains a new and separate verification statement requiring employees and employers to attest to the following statement:

> During the period of _____ to _____ I worked outside the city limits of St. Louis, Missouri on the following regular whole workdays.
>
> I understand that a regular workday does not include holidays, vacation, working remotely from home or other work absences (attach a separate sheet if additional space is needed).
>
> Substantiating documentation such as travel and mileage logs, airline or train tickets, lodging receipts, etc., must be included when filing this form.

The Form E-1RV also requires nonresidents to provide the number of whole days each month the taxpayers worked outside the City and to provide the address for such work locations.

Plaintiff Boles' Refund Claims: 2019 Tax Year and Prior Tax Years

Plaintiff Boles herewith submits his Affidavit and accompanying Exhibits, which are the records of his applications for refunds for recent years and 2020 and the outcome of each.

Plaintiff Boles submitted tax refund claims for the 2019 tax year and for some prior years. See Affidavit of Mark Boles, ¶ 5. The City always paid his refund as requested. *Id*. at ¶ 5.

Plaintiff Boles' Refund Claim: 2020 Tax Year

On or about January 22, 2021, as he had done in previous years, Plaintiff Boles submitted the 2020 Form E-1R to the Collector. *Id*. at ¶ 6. On February 9, 2021, the Collector's Office advised Plaintiff Boles it had received his completed Form E-1R and that it was submitted to the refund department. *Id.* at ¶ 9. On or about February 17, 2021, the Collector's Office advised Plaintiff Boles that he needed to submit a new form, Form E-1RV, an attachment to Form E-1R. *Id.* at ¶ 10. Thereafter, Plaintiff Boles submitted the completed Form E-1RV to the Collector. Boles Affidavit, at ¶ 11. On February 23, 2021, a representative from the Collector's Office e-mailed Plaintiff Boles as follows:

> Effective January of 2020 working remotely from home will know [sic] longer be allowed as a deduction for refund claims. Please review our website www.stlouiscollector.com for further information regarding this change.
>
> *Id.* at ¶ 12.

Plaintiff Boles responded to the representative immediately, stating, "I've been teleworking from home for several years. I expect my City Earnings tax refund as has been refunded in the past." *Id.* at ¶ 13. In response, the representative directed Plaintiff Boles to the Assistant Collector for further assistance. *Id.* at ¶ 13. On February 23, 2021, in response to Plaintiff Boles' follow-up email, the Assistant Collector stated as follows:

> Starting tax year 2020 our refund policy changed. I understand you work from home but your employer location is in the city. I know you are frustrated because you have received refunds in the past years. The E-1VR, completed by your employer, gives the [redacted] address as your working location. I do suggest you go to our website which gives a clear explanation of who qualifies for a refund. I can not approve for you to get a refund.
>
> *Id.* at ¶ 14.

Plaintiff Oar's Refund Claim: 2019 Tax Year

Plaintiff Oar herewith submits his Affidavit and accompanying Exhibits, which are the records of his applications for refunds for recent years and 2020 and the outcome of each.

Plaintiff Oar submitted a tax refund claim for the 2019 tax year on Form E-1, reporting his home address as his work location outside the City. See Affidavit of Nicholas Oar, ¶ 5. Plaintiff Oar received his requested refund based on the number of days he teleworked from his home. *Id*.

Plaintiff Oar's Refund Claim, 2020 Tax Year

On or about February 8, 2021, Plaintiff Oar submitted the 2020 Form E-1R and the Form E-1RV to the Collector seeking a refund of estimated earnings taxes withheld from his pay based on the number of whole days he worked outside the City during 2020. *Id.* at ¶ 6. On February 10, 2021, the Collector's office advised Plaintiff Oar it was auditing the claim. *Id.* at ¶ 7. The auditor asked for a letter on his company stationery stating that his virtual private network ("VPN"), that is, his business computer network, was in Minneapolis, Minnesota, and where his permanent work assignment was located. *Id.* at ¶ 8. On that same day, February 10, 2021, Plaintiff Oar's employer's human resources department messaged the Collector's Office, confirming that Plaintiff Oar's VPN was in Minneapolis, Minnesota, and provided the address for his permanent work assignment in the City of St. Louis. Oar Affidavit, ¶ 9. On February 11, 2021, the

Collector's Office denied Plaintiff Oar's refund claim stating that regardless of his VPN location, Plaintiff's refund request would be denied. *Id.* at ¶ 10. In an e-mail dated February 11, 2021, the Assistant Collector told Plaintiff Oar as follows:

> The rules for working remotely were changed for this tax year. Your Human Resource person verified that your VPN location is for [City office] location. With this information you are not eligible for a refund even through you work from home in St. [Charles] county.
>
> *Id.* at ¶ 11.

Plaintiff Semonski's Refund Claims: 2019 Tax Year and Prior Tax Years

Plaintiff Semonski herewith submits his Affidavit and accompanying Exhibits, which are the records of his applications for refunds for recent years and 2020 and the outcome of each.

Plaintiff Semonski submitted tax refund claims for tax years 2014-2019 on Form E-1R, reporting his home address as his work location outside the City. See Affidavit of Kos Semonski, ¶ 5. For each year, Plaintiff Semonski received his requested refunds based on the number of days he teleworked from his home. *Id*.

Plaintiff Semonski's Refund Claim, 2020 Tax Year

On or about February 18, 2021, as he had done for the prior six years, Plaintiff Semonski submitted the Form E-1R to the Collector. *Id.* at ¶ 6. On or about March 3, 2021, Plaintiff Semonski received a written request from the Collector to submit additional information contained in the Form E-1RV, stating that the refund request could not be processed without the Form E-1RV. *Id.* at ¶ 7. On or about March 22, 2021, Plaintiff Semonski submitted a new Form E-1R with the Form E-1RV attached, along with all requested documentation. *Id.* at ¶ 8. On March 29, 2021, the Collector denied Plaintiff Semonski's refund request. *Id.* at ¶ 9.

Plaintiff Stein's Refund Claims: 2019 Tax Year and Prior Tax Years

Plaintiff Stein works as a Senior Vice President for a bank with his primary office location in downtown St. Louis. See Affidavit of Christian Edward Stein III, ¶ 4. Plaintiff Stein resides in Crestwood, Missouri, outside the City, and has teleworked from his home many days throughout the year, even before the COVID-19 pandemic. *Id*. at ¶ 3-5.

Since at least tax year 2015 and through tax year 2019, using the pre-2021 Form E-1R, Plaintiff Stein requested and received earnings tax refunds based on the number of days he worked outside the City. *Id*. at ¶ 7. These days included both teleworking days and days spent traveling out of town for business. *Id*. Plaintiff Stein was never required to specify the number of days he spent teleworking as opposed to traveling for business. *Id*.

For these prior years, Plaintiff Stein received refunds as follows:

2015 - $883

2016 - $915

2017 - $550

2018 - $457

2019 - $1,733

Stein Affidavit, ¶ 8.

Plaintiff Stein's Refund Claim, 2020 Tax Year

For tax year 2020 Plaintiff Stein worked:

42 days in the City

4 days traveling for a business purpose

214 days teleworking

Id. at ¶ 9.

For tax year 2020, Plaintiff Stein began working on the paperwork to obtain his 2020 earnings tax refund and he learned the Collector had changed the Form E-1R, limiting days worked outside the City for purposes of the non-residency deduction formula to only those days spent traveling for business. *Id*. at ¶ 10. Plaintiff Stein concluded that it would be improper for him to submit a form seeking his 214 teleworking days, and he has not submitted a refund form for that tax year. *Id*. at ¶ 11. He has chosen to join this suit to litigate the issue. *Id*.

Plaintiff Stein has been harmed by not being able to claim a refund in the amount he is owed. Stein Affidavit, ¶ 13. Plaintiff Stein is entitled to a refund of 83.85% of the earnings tax withheld from his pay, which based on his earnings, would be a refund of $2,389. *Id*. at ¶ 14.

Defendants' Continued Refusal to Pay Refunds

The City continues to refuse to refund Plaintiffs' estimated earnings taxes withheld from their pay for periods when they performed or rendered services outside the City. To this day, the Collector continues to require submission of the 2020 E-1R and E-1RV, which unlawfully limit earnings tax refunds to only nonresidents who travel for work but not those who telework from locations outside the City. Unless the Court grants a temporary restraining order and orders preliminary injunctive relief, Plaintiffs have no opportunity to claim the refunds they are entitled to under the Ordinance. Moreover, the Collector will be free to thwart, deter, and intimidate otherwise valid refund claims from nonresidents who spent days working outside the City not limited to "traveling." The Court may take judicial notice regarding how little business travel occurred during 2020 due to the COVID-19 pandemic. As such, by limiting nonresidents' refund claims to days spent "traveling" for tax year 2020, the Collector is significantly diminishing the number of potential refund claims.

Deadline for Refund Claims

On the E-1R Forms (for all years available), the Collector states that the "Form E-1R must be filed on or before April 15th [each year]." On March 18, 2021, however, the Collector extended the 2020 earnings tax return filing deadline to May 17, 2021, consistent with the extended federal filing deadline.[5] Pursuant to City Code § 5.54.060, "the Statute of Limitation for a refund request is [actually] one year from the original date when the return and taxes were due."[6]

Plaintiffs reserve for another day issues related to the deadline, but Plaintiffs do not waive such issues.

Class Definitions

In this case Plaintiffs ask the court to create two classes, defined as follows:

Class 1:

> All nonresidents of the City of St. Louis whose work was done or whose services were performed outside the City of St. Louis ("worked outside the City"), during the period January 1, 2020, until class certification:
>
> (1) Either whose employers withheld earnings tax and paid it to the City of St. Louis Collector of Revenue, or who paid earnings tax themselves to the City of St. Louis Collector of Revenue, and
>
> (2) who have submitted an earnings tax refund request form for days worked outside the City during the class period,
>
> (3) either inclusive of days spent only teleworking, defined as "working outside the City but not while traveling for a business purpose" or inclusive of days teleworking and days traveling for a business purpose, and

[5] *See* Press Release, available at https://www.stlouis-mo.gov/collector/docs/EarningsTaxReliefImmediateRelease.pdf.
[6] The City Collector's Website (FAQ for earnings tax), available at https://www.stlouis-mo.gov/collector/earnings-faq.cfm#refundTimeLimit.

(4) for whom the City has not yet refunded to such persons an amount equal to the proportion of days worked outside the city to the year's total workdays during the class period.

Class 2:

All nonresidents of the City of St. Louis whose work was done or whose services were performed outside the City of St. Louis ("worked outside the city"), during the period January 1, 2020, until class certification:

(1) Either whose employers withheld earnings tax and paid it to the City of St. Louis Collector of Revenue, or who paid earnings tax themselves to the City of St. Louis Collector of Revenue, and

(2) who have either not yet submitted an earnings tax refund request form at all for tax year 2020 or who have submitted a refund form for tax year 2020 which has not sought a refund for days teleworking during that tax year, and

(3) for whom the City has not yet refunded to such persons an amount equal to the proportion of days worked outside the city to the year's total workdays during the class period.

ARGUMENT

I. DECLARATORY RELIEF, RULE 87, DECLARE FORMS UNLAWFUL

Standard

In *Bailey v. Bd. of Prob. & Parole*, 36 S.W.3d 13, 15 (Mo. Ct. App. 2000), the court stated regarding Petitions for Declaratory Judgment:

> If the allegations in the petition invoke principles of substantive law which, if proved, entitle the pleader to a declaration of rights or status, the pleading is sufficient and must not be dismissed. The petition must, however, contain facts to support its allegations, and not merely conclusions. If the facts demonstrate any justiciable controversy, the trial court should declare the rights of the parties. (Citation and internal quotation marks omitted).

Discussion - Hancock Amendment

Plaintiffs ask the Court to declare the City's new policy and forms, directing employers not to certify teleworking days for refunds and directing employees not to seek such refunds for

such days, as unlawful under what is commonly called the "Hancock Amendment." The Hancock Amendment appears in the Missouri Constitution, at Art. X §§ 16-23. Art. X § 23 gives Plaintiffs standing to bring challenges to municipal conduct which violates the Hancock Amendment. Article X, section 23, states:

> Notwithstanding other provisions of this constitution or other law, any taxpayer of the state, county, or other political subdivision shall have standing to bring suit in a circuit court of proper venue and additionally, when the state is involved, in the Missouri supreme court, to enforce the provisions of sections 16 through 22, inclusive, of this article and, if the suit is sustained, shall receive from the applicable unit of government his costs, including reasonable attorneys' fees incurred in maintaining such suit.

A class is not required in connection with this claim. Plaintiffs therefore bring these claims in their individual capacity.

The Missouri Constitution, Art X, § 22(a) states in relevant part:

> Counties and other political subdivisions are hereby prohibited from levying any tax, license or fees, not authorized by law, charter or self-enforcing provisions of the constitution when this section is adopted or from increasing the current levy of an existing tax, license or fees, above that current levy authorized by law or charter when this section is adopted without the approval of the required majority of the qualified voters of that county or other political subdivision voting thereon. If the definition of the base of an existing tax, license or fees, is broadened, the maximum authorized current levy of taxation on the new base in each county or other political subdivision shall be reduced to yield the same estimated gross revenue as on the prior base.

The Court may examine the forms on the Plaintiffs' attached exhibits: Ex. 1, the 2020 version of Form E-1R; Ex. 2, the new Form E-1RV. They direct employers to not certify days on which their nonresident employees were teleworking and direct nonresident employees not to even apply for refunds for those days.

By so directing employers and employees not to seek refunds for earnings tax paid for teleworking outside the City, and by denying refunds to those who do, Defendants have imposed or levied a new tax, license or fee, and/or have increased the tax base.

The requirement is a new tax because, before the change in policy, the City did not tax earnings on telework for city employers by non-city residents. Now it does. Previously untaxed work is now taxed.

The tax base is being increased because whereas in the past the tax base did not include such days, now it does. That is a larger base. See *Tannenbaum v. City of Richmond Heights*, 704 S.W.2d 227, 229 (Mo. 1986):

> The phrase "base of an existing tax" is not defined in our Constitution. Accordingly, its meaning must be found from the plain, ordinary and natural meaning as found in the dictionary. *Buechner v. Bond,* 650 S.W.2d 611 (Mo. banc 1983). "Base" is defined as "the bottom of something considered as its support—that on which something rests or stands...." Webster's Third New International Dictionary, 180 (1964). The "base of an existing tax" is, therefore, that property against which the law allows a government to levy a tax. A broadening of the *definition* of the base of an existing tax, thus, would necessarily involve the inclusion of new *types* of property, not previously taxed, within the tax base and against which a tax could be levied. Appellant's petition does not aver that the definition of the base of an existing tax has been broadened.

Plaintiffs suggest that while *Tannenbaum* was a real estate tax case, the same principle applies, for in Defendants' forms and interpretation of the Ordinance, a "new" type of day is being taxed, that is, a day spent teleworking.

The Court may take judicial notice of the following: (a) that the voters of the City have never voted to approve the imposition of tax on such days, and (b) that taxes have not been proportionately reduced to compensate for taxation of such days.

Defendants' taxing of teleworking days outside the City thus violates the Hancock Amendment.

The Hancock Amendment is a future oriented law, such that, in general, the taxpayer bringing suit may only seek declaratory relief in regard to future taxes. In *Taylor v. State*, 247 S.W.3d 546, 548 (Mo. 2008), the court stated that the limited nature of the declaratory or

interpretive remedy does not authorize a court to enter a judgment for damages or injunctive relief. Thus at this time Plaintiffs only seek Declaratory Judgment that Defendants forms and website are unlawful and violate the Hancock Amendment.

Plaintiffs suggest that no facts are in dispute regarding their Hancock Amendment claim and thus this Court may forthwith declare Defendants' actions in violation of that Amendment.

Plaintiffs pray the Court to declare the new forms unlawful under the Hancock Amendment.

II. PRELIMINARY RELIEF, RULE 92, ORDER NEW FORMS CHANGED

Standard

In *State ex rel. Dir. of Revenue, State of Mo. v. Gabbert*, 925 S.W.2d 838, 839 (Mo. 1996), the court stated the standard to determine whether a court should issue preliminary relief:

> When considering a motion for a preliminary injunction, a court should weigh the movant's probability of success on the merits, the threat of irreparable harm to the movant absent the injunction, the balance between this harm and the injury that the injunction's issuance would inflict on other interested parties, and the public interest. A petitioner must make some showing of probability of success on the merits before a preliminary injunction will be issued. (Citations omitted).

In *Cook v. McElwain*, 432 S.W.3d 286, 292 (Mo. Ct. App. 2014), the court further explained:

> The purpose of a temporary restraining order or preliminary injunction is to preserve the status quo until the trial court adjudicates the merits of the claim for a permanent injunction.

Discussion

"Status Quo" for Temporary Restraining Order and Preliminary Injunction

"Temporary restraining orders and preliminary injunctions merely seek to maintain the status quo between the parties and therefore are not final judgments on the merits." *Salau v. Deaton*, 433 S.W.3d 449, 453 (Mo. Ct. App. 2014) (citation omitted). Plaintiffs suggest that in

this case the status quo should be defined not as the situation on the forms existing on March 29, 2021, when Plaintiffs filed their case, but instead as the status quo for tax year 2019. It is Defendants who have altered the status quo. Alternatively, maintenance of the status quo should mean that Plaintiffs and others similarly situated will submit their refund claims for teleworking days and the Court will sort out later whether the City has to pay refunds for that work.

Before tax year 2020, Defendants never distinguished between days spent teleworking from home and days spent traveling. Now this year, for tax year 2020, and without any change to the Ordinance itself, and with Plaintiffs' money already in their hands, Defendants have included such language in their forms and are refusing to pay refunds to nonresidents except for days spent "traveling" outside the City for business. As of this filing the forms publicized on the City's website and the associated instructions specifically state that earnings tax for days worked "remotely" by nonresidents, which during the pandemic has generally meant working from home, may not be refunded.

This Motion, however, as stated above, does not ask for payment of refunds themselves, for that is an issue for the merits of the case, but instead addresses the language and substance of the refund forms.

Plaintiffs argue above that the status quo should be taken by this Court as the situation before tax year 2020. If the Court disagrees, Plaintiffs acknowledge that in seeking an injunction that disrupts the status quo, Plaintiffs "must demonstrate not only that the four requirements for a preliminary injunction are met but also that they weigh heavily and compellingly in their favor." Plaintiffs believe they meet even that test.

As to bond, Defendants are in possession of the disputed funds, and the issue in the case is whether those funds should be returned. Defendants are thus already in a secure position, and Plaintiffs will ask below for a nominal bond of $100.00

A. PROBABILITY OF SUCCESS ON THE MERITS

Defendants have retained Plaintiffs' property by refusing Plaintiffs' demands to pay refunds of earnings tax withheld from their pay for days in 2020 in which Plaintiffs did not perform work or render services in the City, even though under the earnings tax ordinance, Plaintiffs do not owe earnings tax for such days.

Plaintiffs' first argument for refunds is statutory. RSMo. § 139.031.4 gives the Court power in tax assessment cases to make such orders "as may be just and equitable." Plaintiffs suggest the Court will find it just and equitable to order the City to return money to which it has no right.

Plaintiffs acknowledge, however, that by its literal terms, RSMo. § 139.031 requires a protest when taxes were paid:

> Any taxpayer may protest all or any part of any current taxes assessed against the taxpayer….
>
> Any such taxpayer desiring to pay any current taxes under protest shall, at the time of paying such taxes, file with the collector a written statement setting forth the grounds on which the protest is based.
>
> [E]very taxpayer protesting the payment of current taxes shall, within ninety days after filing his protest, commence an action against the collector by filing a petition for the recovery of the amount protested in the circuit court of the county in which the collector maintains his office.

Plaintiffs nevertheless counters that in this case there was nothing to protest when the taxes were paid because at that time the City had not yet refused to pay pursuant to its then status quo procedures. The City's statement to employers to continue withholding during the pandemic

was a notice to employers, but it was not a notice to employee taxpayers. Taxpayers had no reason to know of the City's change in policy and therefore they had no knowledge that they had to protest. It would be absurd to require a protest in such circumstances. A statutory outcome is absurd if it defies rationality. *Landstar Exp. Am., Inc. v. Fed. Mar. Comm'n*, 569 F.3d 493, 498–99 (D.C. Cir. 2009), citing *Corley v. United States*, 556 U.S. 303, 317 (2009) ("these are some of the absurdities of literalism that show that Congress could not have been writing in a literalistic frame of mind.")

This Court should therefore find no protest is required, and that it is just and equitable for the Court to order refunds as in years before 2020. Plaintiffs would therein succeed on the merits.

But, if the Court finds a protest is required, Plaintiffs still have a remedy. *Stufflebaum v. Panethiere*, 691 S.W.2d 271, 272 (Mo. 1985), states that a remedy under 42 U.S.C. § 1983 is not available **if** RSMo. § 139.031 provides "a plain, adequate and complete remedy." Plaintiffs suggest the reciprocal is true. If the Court requires a protest, RSMo. § 139.031 will not provide a "a plain, adequate and complete remedy" and therefore relief under 42 U.S.C. § 1983 is available. Plaintiffs will now explain their constitutional claims under 42 U.S.C. § 1983:

Plaintiffs' First Amended Petition asserts in Count II that for tax year 2020, Defendants' Form E-1R and Form E-1RV, and the accompanying instructions and public statements, violate Plaintiffs' constitutional right under the Fourteenth Amendment to substantive due process because Defendants instruct Employers not to count days worked remotely even though, under

the plain language of the Ordinance, Plaintiffs do not owe earnings tax for such days. In Count III, Plaintiffs pray for injunctive relief related to this issue.[7]

To establish a substantive due process rights violation by an executive official, a plaintiff must show (1) that the official violated one or more fundamental constitutional rights, and (2) that the conduct of the executive official was shocking to the "contemporary conscience." *Flowers v. City of Minneapolis, Minn.*, 478 F.3d 869, 873 (8th Cir. 2007). The Supreme Court stated in *Snaidach v. Familly Fin. Corp. of Bay View*, 395 U.S. 337, 342 (1969), that citizens have a constitutional interest in their wages. The Eighth Circuit stated in *Little Rock Sch. Dist. v. Pulaski Cty. Special Sch. Dist. No. 1*, 839 F.2d 1296, 1303 (8th Cir. 1988) that the right to property is a fundamental right (*see also* Fifth Amendment), "nor shall any person…be deprived of life, liberty or property, without due process of law." Plaintiffs assert that Defendants' conduct shocks the conscience because Defendants are brazenly and unlawfully retaining Plaintiffs' property. Plaintiffs thus establish a violation of their constitutional rights to substantive due process.

Plaintiffs will now turn to their equal protection claim. In Counts VI of the Petition, Plaintiffs assert that the Ordinance makes no distinction between nonresidents working remotely from home and working remotely while traveling, and Defendants conduct thereby subjects Plaintiffs to taxes not imposed on others of the same class in violation of the equal protection clause. *Allegheny Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336, 345 (1989) and *Hillsborough v. Cromwell*, 326 U.S. 620, 623 (1946). In Count VII of the Petition, Plaintiffs pray

[7] In paragraph 49 of their First Amended Petition, Plaintiffs assert color of law, which Plaintiffs believe is not in dispute.

for injunctive relief related to this issue. Plaintiffs thus make out a violation of Plaintiffs' constitutional right to equal protection.

Two and a half years ago, in *M.B. v. Corsi*, No. 2:17-CV-04102-NKL, 2018 WL 5504178, at *5 (W.D. Mo. Oct. 29, 2018), the court made clear that once a violation of a constitutional right is shown, irreparable harm is presumed:

> A threat to a constitutional right is generally presumed to constitute irreparable harm. *See Mich. State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 669 (6th Cir. 2016) (holding, in voting rights case, that "when constitutional rights are threatened or impaired, irreparable injury is presumed" and denying defendant secretary of state's motion for a stay pending appeal, *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary") (quoting Wright & Miller, Federal Practice and Procedure, § 2948 at 440 (1973)); *Hicklin v. Precynthe*, No. 16-01357-NCC, 2018 U.S. Dist. LEXIS 21516 at *32, 2018 WL 806764, *10 (E.D. Mo. Feb. 9, 2018)

Plaintiffs thus believe they will prevail in this matter under RSMo. § 139.031 because either the Court finds that to require a protest would be absurd, or they will prevail because if a protest is required then relief under 42 U.S.C. § 1983 is available.

B. IRREPARABLE HARM

The time to file the forms is passing. While it remains to be seen whether the due date for refund forms shall remain May 17, 2021, or whether the one-year statute of limitations applies, for now May 17, 2021, is Defendants' publicly-stated deadline. If the Court does not change the forms forthwith, there will be too little time left for members of Class 2 to file for refunds. Further, without change, there will be confusion within the public, more submission of multiple forms, and due to the impending deadline, some taxpayers may never receive refunds of their pay withheld but not owed. Those events would cause irreparable harm.

Based on the foregoing, Plaintiffs have shown that Defendants' unlawful actions have caused and continue to cause irreparable harm to Plaintiffs and others similarly situated, and immediate equitable relief is appropriate.

C. THE BALANCE BETWEEN THE IRREPARABLE HARM AND THE INJURY GRANTING THE INJUNCTION WILL INFLICT ON OTHER INTERESTED PARTIES

In this case, the Court should balance the equities in Plaintiffs' favor because justice requires the Court's immediate intervention to preserve the status quo (as Plaintiffs define it above which is the situation before Defendants changed the forms for tax year 2020), which would mean the Collector accepting as valid claims for refund a form that includes days spent teleworking, as in the past.

Failure to provide the limited request for injunctive relief of changing the forms would unduly shift the balance to the Defendants' favor by permitting Defendants to be unjustly enriched for prima facie violating the Ordinance and Plaintiffs' constitutional rights. Plaintiffs do not seek preliminary relief ordering the issuance of refunds, for that involves the final determination of the parties' rights, but now only seek to return the substance of the refund form to reflect the law and prior custom and practice. This will allow the Court and the parties to ascertain what amounts are claimed by Plaintiffs and members of the proposed classes under the refund form and a process that ensures fairness. Then, as this case progresses and if the Court agrees with Plaintiffs' interpretation of the Ordinance, that nonresidents do not owe earnings tax for days working outside the City (*i.e.* teleworking), damages can be easily determined.

Accordingly, the balancing of the equities between the movants (Plaintiffs) and the Defendants requires the Court to grant Plaintiffs' preliminary injunctive relief to minimize the harm to Plaintiffs and the proposed class.

D. PUBLIC INTEREST

"[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *D.M. by Bao Xiong v. Minnesota State High Sch. League*, 917 F.3d 994, 1004 (8th Cir. 2019). Law officials may always be called on to do justice in the public interest. *Universal Oil Prod. Co. v. Root Ref. Co.*, 328 U.S. 575, 581 (1946)

Further, as noted above, Defendants' actions continue to have a chilling effect on nonresidents filing requests for refunds for work performed outside the City. By requiring nonresidents to complete the new Form E-1R and Form E-1RV for tax year 2020, Defendants are unlawfully limiting earnings tax refunds to only nonresidents who travel for work but not those who telework from locations outside the City. Defendants' actions have amounted to imposing a new tax, license or fee, and/or have increased the tax base (*see* Hancock Amendment argument above). The tax base is being increased because, whereas in the past the tax base did not include days worked by nonresidents outside the City, through its change in policy, Defendants are now taxing such days. The voters of the City have never voted to approve the imposition of tax on such days, and therefore Defendants' actions cannot be rooted in the public's interest.

Additionally, the public interest is not served by allowing Defendants to infringe and trample on nonresidents' rights to equal protection under the Fourteenth Amendment and their rights to be free from tax (pursuant to the Ordinance) for work or services performed outside the City. Defendants' abuse of executive power is an arbitrary act by Defendants and shocks the conscience. *See generally, County of Sacramento v. Lewis*, 523 U.S. 833 (1998).

The Court should therefore grant Plaintiffs' preliminary injunction against Defendants.

NO NEED FOR CLASS CERTIFICATION TO ISSUE PRELIMINARY RELIEF

During the hearing in federal court there was some discussion of whether class certification is required before the court may issue preliminary relief.

Plaintiffs has found no Missouri case on point but did find *Olson v. Wing*, No. 02-CV-5873 NGCLP, 2007 WL 680783, at *1 (E.D.N.Y Mar. 2, 2007), where the court stated: "given the urgency of the need for preliminary relief, [preliminary relief] was granted prior to the conclusion of proceedings on class certification." This Court may consider federal authority in a class action case: "Because Rule 52.08 is identical to Fed.R.Civ.P. 23, we may consider federal interpretations of Rule 23 in applying Rule 52.08." *Frank v. Enviro-Tech Servs.*, 577 S.W.3d 163, 169 (Mo. Ct. App. 2019), citing to *Ressler v. Clay Cnty.,* 375 S.W.3d 132, 136 (Mo. App. W.D. 2012); *State ex rel. Union Planters Bank, N.A. v. Kendrick,* 142 S.W.3d 729, 735 n. 5 (Mo. banc 2004).

Plaintiffs suggest the issues are urgent, and thus this Court should issue preliminary relief before reaching issues of class certification.

BOND

Rule 87 related to Declaratory Judgments does not require a bond, but Rule 92 related to TROs and Preliminary Injunctions does require a bond. See also, *Ruddy v. Corning*, 501 S.W.2d 537, 539 (Mo. App. 1973), where the court stated that a bond be executed prior to issuance of a temporary injunction is jurisdictional, and a temporary injunction issued without a bond is void. *State ex rel. St. Ferdinand Sewer Dist. of St. Louis County v. McElhinney*, 52 S.W.2d 400 (Mo.banc 1932); *Curtis v. Tozar*, 374 S.W.2d 557 (Mo.App.1964).

This portion of Plaintiffs' Motion thus only relates to any TRO or Preliminary Injunction the Court might order in response to this Motion.

Rule 92(d) requires security in "such sum as the court shall deem sufficient to secure the amount or other matter to be enjoined, and all damages that may be occasioned by such injunction or temporary restraining order to the parties enjoined, or to any party interested in the subject matter of the controversy."

At the time of this filing, **Defendants have the money in dispute in this action in their possession**. If Plaintiffs lose, and it turns out the Defendants were "wrongfully enjoined or restrained," Defendants will keep the money and so will not be harmed.

Plaintiffs are normal working citizens and the amount at stake in this action is well into the millions of dollars. If the Court requires a bond in that range, Plaintiffs will be unable to post such an amount.

Therefore, the Court should order a minimal bond of $100.00.

PRAYER

WHEREFORE, Plaintiffs pray the Court find that there are no facts in dispute regarding Plaintiffs' Hancock Amendment claims and declare the new forms unlawful under that Amendment.

WHEREFORE, Plaintiffs move for a Temporary Restraining Order against Defendants, the City of St. Louis and the City's Collector of Revenue, Gregory F.X. Daly, and their representatives, agents, servants, employees, attorneys, and those persons in active concert or participation with them, preventing them from directly or indirectly:

A. Publicizing information through any means, including the providing of sample forms such as Defendant Collector's 2020 E-1R and E-1RV (as they exist now), stating in any manner that nonresidents may not apply for refunds of earnings tax for days in which the taxpayer was teleworking or otherwise not physically present in the City for such days, regardless of the reason.

B. Requiring the submission of the 2020 version of Form E-1R and new Form E-1RV (as they exist now), as a precondition for nonresidents to seek a refund of earnings taxes withheld from their pay for days they spent working outside the City.

Plaintiffs further move for affirmative preliminary injunctive relief ordering Defendants, the City of St. Louis and the City's Collector of Revenue, to:

C. Immediately promulgate a new Form E-1R for tax year 2020 matching in substance and language the Forms E-1R promulgated by the Collector for tax years 2015-2019, and

D. Immediately publicize on the collector's website instructions consistent therewith.

Plaintiffs further pray that the court order no bond or minimal bond such as $100.00.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on April 23, 2021, the foregoing was filed electronically with the Clerk of Court to be served by operation of the Court's electronic filing system to all attorneys of record.

/s/ Mark C. Milton