

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

MARK BOLES, individually and on)	
behalf of all others similarly situated, <i>et al.</i>)	
)	
Plaintiffs,)	
v.)	4:21-CV-378-CDP
)	
CITY OF ST. LOUIS, MISSOURI, <i>et al.</i>)	
)	
Defendants.)	

**PLAINTIFFS’ MEMORANDUM IN SUPPORT OF PLAINTIFFS’ MOTION
FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION,
WITH NOTICE TO DEFENDANTS**

Plaintiffs Mark Boles, Nicholas Oar and Kos Semonski, individually and on behalf of all others similarly situated, pursuant to Fed. R. Civ. P. 65, state as their Memorandum in Support of their Motion for Temporary Restraining Order and Preliminary Injunction, With Notice to Defendants, as follows:

INTRODUCTION

Plaintiffs’ Motion for Temporary Restraining Order and Preliminary Injunction addresses Defendants’ procedures regarding applications for refunds of earnings tax by nonresidents who work in the City of St. Louis, and particularly whether the language on Defendants’ forms and website related to such applications comply with the law.

Parties

Plaintiffs are nonresidents of the City of St. Louis, Missouri (“the City”), who pay earnings tax in the City because their employers are based in the City. Plaintiffs seek to be certified as class representatives of all others similarly situated. For the sake of judicial economy, Plaintiffs will refer to themselves herein as “Plaintiffs,” but in all cases, mean “Plaintiffs and all

others similarly situated,” that is, the potential class.

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

Procedural History

On Monday, March 29, 2021, Plaintiffs filed their complaint seeking damages and equitable relief. Doc. 1. On Tuesday, March 30, 2020, Defendants were served with the Complaint and Summonses. Docs. 8 and 9. Plaintiffs now file for Temporary Restraining Order and Preliminary Injunction. Counsel for Defendants have entered their appearances, Doc. #'s 10 and 11.

With Notice

Upon this filing, in addition to the CM/ECF process, Plaintiffs are sending this pleading by email to counsel for Defendants. Undersigned counsel W. Bevis Schock has already left a voice mail with Mr. Luce regarding the need for scheduling of this Motion. Presumably, counsel for the parties and the court will work out a mutually convenient date for a hearing.

Status Quo

Nonresidents of the City are subject to a 1% earnings tax on salaries, wages, commissions, other compensation and/or net profits “for work done or services performed or rendered *in the City*.” City Code § 5.22.020 (“the Ordinance”). The tax has historically been collected by city-based employers withholding 1% from 100% of their nonresident employees’ pay during the entire year. Before tax year 2020, nonresidents who did not work all the days in the year in the City would file for a refund for such days worked outside the City (based on a non-disputed 260 workday year), and Defendants would then pay the refunds based on the pro-rated amount of pay for time spent working outside the City.

The refund request form requires a signed certification by the employer to assure honest filings regarding the number of days worked outside the City.

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 website, 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.

Plaintiffs' assert in the Complaint that Defendants' conduct in refusing to pay refunds violates the Fourteenth Amendment's guarantees of substantive due process and equal protection and also violates the Fourth Amendment's prohibition on unreasonable seizures, and thus Plaintiffs are entitled to a judgment for damages in the amount of the refunds they were and/or are entitled to receive. Plaintiffs will discuss in detail below their likelihood of success on the merits. 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 on the refund forms and associated website.

Plaintiffs note while the purpose of preliminary relief is to maintain the status quo as of the date of filing, the status quo in this case should be defined not as the situation on the forms and website existing on March 29, 2021, when Plaintiffs filed their case, but instead as the status quo for tax year 2019.

As to security (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 in a secure position.

Urgency and Irreparable Harm

Preliminary relief is necessary because according to the Collector, the deadline for submitting application for refunds is May 17, 2021 (the deadline may be later because the statute of limitations for seeking a refund is one year, but that issue is for another day).

The court may examine the forms on the Plaintiffs' attached exhibits, the 2020 version of Form E-1R and the new Form E-1RV, and will see that employers strictly following the directions on Defendants' current forms will not certify days worked remotely except days spent traveling.

If the forms and directions are not changed forthwith, there will be confusion within the public, possible submission of multiple forms, and due to the impending deadline some taxpayers may not receive refunds of their pay withheld as estimated payments for earnings tax but not owed. That would cause irreparable harm.

Relief Requested

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 non-City of St. Louis resident taxpayers may not apply for refunds of earnings tax for days in which the taxpayer was not physically present in the City for such day, regardless of the reason.
- B. Requiring the submission of the 2020 version of Form E-1R and the new

Form E-1RV (as they exist now), as a precondition for nonresidents to seek a refund of estimated 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 on 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.

FACTS

Plaintiffs believe the outline of the facts in this matter is generally undisputed, although the ultimate facts of whether Defendants' refusing to pay refunds shocks the conscience, and/or is an unreasonable seizure and/or violated the equal protection clause will be for the jury.

The St. Louis City Earnings Tax

The 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)

This language is plain and unambiguous and shows 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 one percent earnings tax is collected from all:

- a. City residents regardless of where they work,¹ and
- b. Non-city residents **who work within city limits.**²

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.

¹ The collection of earnings tax from persons who live in the City is not in dispute in this case.

² “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).

At all relevant times, pursuant to that language, Plaintiffs' employers, who are located within or are doing business 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

Pursuant to custom and policy over many years prior to tax year 2020, nonresidents employed by City employers who had had their 1% earnings tax withheld and who worked a certain number of days outside the City filed for an earnings tax refund based on the number of days worked outside the City. Claims for refunds have always been made on a proportionate basis, assuming 260 workdays per year (Plaintiffs do not dispute the 260 days per year proportionality issue). Defendants would then refund the amounts withheld for days worked outside the City. Prior to tax year 2020, 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 remained materially unchanged from at least tax year 2015 through tax year 2019.³

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.

³ See Semonksi Declaration, ¶ 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>.

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).

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 Declaration and accompanying Exhibits, which are the records of his recent years' and current year applications for refunds and the outcome of each.

Plaintiff Boles submitted tax refund claims for the 2019 tax year and for some prior years. See Boles Declaration, ¶ 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. *See* Boles Declaration, ¶ 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. *Id.* 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.*, ¶ 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 Declaration and accompanying Exhibits, which are the records of his recent years' and current year applications for refunds and the outcome of each.

Plaintiff Oar's 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* Oar Declaration, ¶ 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. *See* Oar Declaration, ¶ 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. *Id.* at ¶ 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

Plaintiffs Semonski herewith submits his Declaration and accompanying Exhibits, which are the records of his recent years' and current year applications for refunds and the outcome of each.

Plaintiff Semonski's 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* Semonski Declaration, ¶ 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. *See* Semonski Declaration, ¶ 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 orally denied Plaintiff Semonski's refund request. *Id.* at ¶ 9.

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 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 filing deadline to May 17, 2021, consistent with the extended federal filing deadline.⁴ 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.”⁵

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

Perhaps Plaintiffs will ask the Court to extend the deadline for a number of days equal the number of days during which the incorrect forms were posted.

ARGUMENT

I. STANDARD FOR GRANTING PRELIMINARY RELIEF

The Eighth Circuit Court of Appeals has stated that the standard to determine whether a preliminary injunction is properly granted depends on the proper weight a district court assigns to the following four factors: (1) whether there is a substantial probability movant will succeed at trial; (2) whether the moving party will suffer irreparable injury absent the injunction; (3) the harm to other interested parties if relief is granted, and (4) the effect on the public interests. *See Dataphase Sys, Inc. v. C L Sys Inc.*, 640 F.2d 109, 112 (8th Cir. 1981) (citing *Minnesota Bearing Co. v. White Motor Corp.*, 470 F.2d 1323, 1326 (8th Cir. 1973)). The four-factor test enumerated above has been known as the traditional test. *See Dataphase*, 640 F.2d at 112.

⁴ See Press Release, available at <https://www.stlouis-mo.gov/collector/docs/EarningsTaxReliefImmediateRelease.pdf>.

⁵ The City Collector’s Website (FAQ for earnings tax), available at <https://www.stlouis-mo.gov/collector/earnings-faq.cfm#refundTimeLimit>.

The Eighth Circuit has also restated the four-factor traditional test and explained that a district court could issue a preliminary injunction if the Court determined upon a clear showing of either: (1) probable success and possible irreparable injury, or (2) sufficient serious questions going to the merits to make them a fair ground for litigation and balance of hardships tipping decidedly toward the party requesting preliminary relief. See *Dataphase*, 640 F.2d at 112 (citing *Fennell v. Butler*, 570 F.2d 263, 264 (8th Cir. 1978), *cert. denied*, 437 US 906, (1978)). However, the Eighth Circuit has clarified that the restated test in *Fennell* is not an alternative test but that the relevant factors remain the same, namely: (1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest. *Dataphase*, 640 F.2d at 113.

Plaintiffs have argued 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.” *Blankenship v. Chamberlain*, 2008 WL 4862717, at *2 (E.D.Mo. Nov. 7, 2008) (quoting *Kikumura v. Hurley*, 242 F.3d 950, 955 (10th Cir.2001)); *Grasso Enterprises, LLC v. Express Scripts, Inc.*, No. 4:14CV1932 HEA, 2015 WL 10781579, at *2 (E.D. Mo. Mar. 4, 2015).

A preliminary injunction is an extraordinary remedy, and the moving party bears the burden of proof. *Watkins, Inc. v. Lewis*, 346 F.3d 841, 844 (8th Cir.2003). At base, the analysis of these four factors is to be flexible and pragmatic, but the question is whether the balance of

equities so favors Plaintiffs that justice requires the Court to intervene to preserve the status quo until the merits are determined, *Dataphase*, 640 F.2d at 113.

Finally, the legal standards for a temporary restraining order and a preliminary injunction are the same. *See S.B. McLaughlin & Co. v. Tudor Oaks Condo. Project*, 877 F.2d 707, 708 (8th Cir. 1989); *3M Co. v. Nationwide Source Inc.*, No. 20-CV-2694 (WMW/KMM), 2021 WL 141539, at *2 (D. Minn. Jan. 15, 2021)

A. IRREPARABLE HARM TO PLAINTIFFS

Pursuant to RSMo. § 92.111 and § 92.160, the City is not authorized by statute to assess earnings taxes for work unless the work is performed in the city or the services are rendered in the City. Likewise, the City of St. Louis Earning Tax Law, City Code § 5.22.020 (“the Ordinance”) echoes RSMo. § 92.111 and § 92.160. Any ambiguity in the Ordinance, which Plaintiffs maintain does not exist given the plain language,⁶ must be construed in favor of the taxpayer.⁷ The Ordinance thus 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.

Plaintiffs’ Complaint asserts in Count II that Defendants’ Form E-1R and Form E-1RV, and the accompanying instructions and public statements, for tax year 2020, violate Plaintiffs’ constitutional right under the Fourteenth Amendment to substantive due process because

⁶ The Ordinance was enacted in 1954. The Court may take judicial notice of the fact that “teleworking” did not exist at that time, so clearly the legislative intent was to tax nonresidents for only worked performed physically in the City.

⁷ “An ordinance enacted as a taxing measure must be given a strict interpretation and construed against the taxing authority and in favor of the taxpayer.” *Bachman v. City of St. Louis*, 868 S.W.2d 199, 202 (Mo. Ct. App. 1994) (citing *Adams v. City of St. Louis*, 563 S.W.2d 771, 775 (Mo. banc 1978))

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.⁸

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. Family 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.

In Count V of the Complaint, 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 VI

⁸ In para 23 of their complaint Plaintiffs assert color of law, which Plaintiffs believe is not in dispute.

of the Complaint, Plaintiffs pray 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)

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

B. THE BALANCE BETWEEN THE IRREPARABLE HARM AND THE INJURY GRANTING THE INJUNCTION WILL INFLICT ON OTHER PARTIES LITIGANT

As stated by the Eighth Circuit Court of Appeals, the key question for a district court to determine whether to grant injunctive relief is, “whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined....” *Dataphase*, 640 F.2d at 113.

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, which would mean the Collector accepting as valid claims for refund a form that includes days spent working remotely

from home. Failure to provide the limited request for injunctive relief 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 a preliminary injunction ordering the issuance of refunds, but 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 class 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 determined more easily.

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.

C. PROBABILITY THAT MOVANT WILL SUCCEED ON THE MERITS

The Eighth Circuit has stated that the key to deciphering this factor is whether “the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined.” *Dataphase*, 640 F.2d at 113. The Eighth Circuit has also stated that a pure mathematical approach in determining the probability the movant will succeed is the wrong approach, as no single factor is determinative and should not be considered in isolation of the other factors. *See generally, Dataphase*, 640 F.2d at 113.

Plaintiffs refer the court to their discussion above regarding the status quo, and Plaintiffs acknowledge their heavy burden should the Court consider the current forms to be the status quo. Nevertheless, even in the face of the heavy burden, Plaintiffs are likely to succeed on the merits.

Plaintiffs suggest a jury is extremely likely to find Defendants' conduct shocks the conscience, and the equal protection claims are likely to be resolved in Plaintiffs' favor as a matter of law.

The Collector is acting in direct contravention of both the Ordinance and RSMo. § 92.111 and § 92.160, by promulgating rules and procedures which unlawfully tax nonresidents whose work or services are performed outside the City. The Collector's rules and procedures thereby violate Plaintiffs' Fourteenth Amendment equal protection and due process rights.

Accordingly, Plaintiffs have a high probability of success on the merits even if the court interprets the status quo against them. The Court should therefore grant Plaintiffs' preliminary injunction against Defendants.

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).

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 in Complaint). 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.

BOND

Fed.R.Civ.P. 65(c) requires security "in an amount the [C]ourt considers proper to pay the costs of damage sustained by any party found to have been wrongfully enjoined or restrained." 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.

In a National Environmental Policy Act case, the Eighth Circuit approved no bond and discussed a minimal bond in the context of that Act. *Richland/Wilkin Joint Powers Auth. v. United States Army Corps of Engineers*, 826 F.3d 1030, 1043 (8th Cir. 2016).

Plaintiffs are middle class 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 no bond or a minimal bond such as \$100.00.

FOURTEEN DAYS

Fed.R.Civ.P. 65(b)(2) states that, unless extended, a Temporary Restraining Order shall expire in fourteen days. Plaintiffs will ask the Court to enter appropriate preliminary relief within that time.

PRAYER

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 non City of St. Louis resident taxpayers of the earnings tax may not apply for refunds of earnings tax for days in which the tax payer was not physically present in the City for such day, 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,

Attorneys for Plaintiffs

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CERTIFICATE OF SERVICE

The undersigned certifies that on April 2, 2021 he served this document on:

David Luce at: luce@capessokol.com
Zachary McMichael at: mcmichael@capessokol.com

By the court's CM/ECF system and by direct email

/s/ W. Bevis Schock