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: 19
CITY OF ST. LOUIS, MISSOURI, *et al.*	)	
Defendants.	)	

PLAINTIFFS' SUGGESTIONS IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED PETITION

Come now Plaintiffs, by counsel W. Bevis Schock and Mark Milton, and state for their Suggestions in Opposition to Defendants' Motion to Dismiss Plaintiffs' Second Amended Petition as follows:

Introduction

The first paragraph of Defendants' Introduction to their Motion to Dismiss reads:

> Although Plaintiffs complain that they have had to pay a tax they do not owe, instead of presenting a straight-forward and properly pleaded refund action, they cast their claims as violations of various federal and state constitutional provisions. The Collector and City believe that the earnings tax applies to services rendered virtually or remotely. But after literally making a federal case of the issue, Plaintiffs appear to want to avoid that core issue and turn this case into something akin to a mass tort action for violation of their constitutional right.

Defendants' assertion that Plaintiffs should have presented their arguments in a "straightforward manner" understates the complexity of the issues involved in this case and seeks to minimize Defendants' alleged conduct of brazenly keeping money that does not

lawfully belong to the City.[1] This case is about much more than Plaintiffs and those similarly situated receiving their earnings tax money for teleworking days. Plaintiffs seek redress for Defendants' blatant violation of the earnings tax laws and the extraordinary measures they have taken to thwart otherwise lawful refund claims, which underlies the due process and equal protection violations for Plaintiffs and the proposed classes.

Defendants, perhaps with a mere innocent smile, suggest that if named Plaintiffs Messrs. Boles, Oar, Semonski and Stein, bring "straightforward" claims under the "refund statute" (RSMo. § 139.031) that has been applied in other cases involving local tax assessments, and get their few hundred dollars back, all will be well. But if that is all that happens, all will not be well, for the number of non-resident teleworkers whose money the City is holding (and will continue to hold) unlawfully against their will is vast, and each taxpayer has a constitutional interest in his or her wages, *Snaidach v. Family Fin. Corp. of Bay View*, 395 U.S. 337, 342 (1969). This case is thus about far more than the four named Plaintiffs claiming a few hundred dollars in refunds via a "refund suit." This case is also far different than any previous case applying and/or interpreting the state tax refund statute (RSMo. 139.031), in that it involves allegations of intentional wrongdoing by government officials, not a good-faith disagreement with the City over the interpretation and/or application of the earnings tax.

The nature of Defendants' unlawful conduct, as alleged in Plaintiffs' Second Amended Petition, should "shock the conscience" and support a finding of constitutional violations if adequate relief is not available through a "straightforward" refund action. Whether the "refund

[1] Plaintiffs pled their claims in the alternative, which is well within the ambit of Rule 55.10 ("A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal or equitable grounds.").

statute" provides adequate relief to Plaintiffs involves questions of fact that should be explored through discovery, rendering a motion to dismiss premature.

Standard

In *Missouri Dep't. of Soc. Servs. v. Agi-Bloomfield Convalescent Ctr., Inc.*, 682 S.W.2d 166, 168 (Mo. App. 1984), the court stated the standard by which a motion to dismiss shall be reviewed in this context:

> In reviewing the sufficiency of plaintiffs' petition to state a claim for declaratory relief, this court must construe it favorably to plaintiffs, accept as true all facts alleged therein, and accord it the benefit of every reasonable and favorable inference the facts pleaded will permit. Concomitantly, a petition invoking declaratory relief, in order to survive a motion to dismiss for failure to state a claim upon which relief can be granted, must allege a state of facts demonstrating the existence of certain obtaining principles which have evolved from cases addressing actions for declaratory judgments. One, facts must be alleged showing a subsisting justiciable controversy between the parties admitting of specific relief by way of a decree of a conclusive character, as opposed to a mere advisory decree upon a hypothetical state of facts. Two, facts must be alleged showing that the party or parties seeking declaratory relief have a "legally protectable interest at stake." Three, facts must be alleged showing that the question or subject posed for declaratory relief is appropriate and ripe for judicial resolution. (Citations omitted).

The "Refund Statute" Does Not Afford Plaintiffs Adequate Relief

Defendants seeks dismissal of 8 out of 9 counts of Plaintiffs' second amended petition. They argue RSMo. 139.031 ("the refund statute") provides the exclusive remedy for Plaintiffs and others similarly situated. Given the unique circumstances in this case, Plaintiffs assert that the refund statute may not provide a "plain, adequate and complete remedy at law," and therefore, the well-pleaded counts seeking declaratory relief and alleging constitutional (federal and state) violations should survive a motion to dismiss at this early stage.

Defendants begin their first paragraph by saying they "believe that the earnings tax applies to services rendered remotely or virtually." The exact date of when the City and/or the

Collector devised this novel reinterpretation is currently unknown to Plaintiffs, but all indications are that it happened around halfway through tax year 2020, and without question not until after mid-March 2020, when governments sent workers home in response to the COVID-19 pandemic. Either way, this change occurred after Plaintiffs, as nonresidents, had already paid to the City earnings tax they expected would be refunded based on teleworking days, as was done in the past. Plaintiffs have alleged that the new "interpretation" contradicts Defendants' own past application of the law and ignores the well-established law stated in paragraph 75 of the Second Amended Petition that:

> If there is any ambiguity the Ordinance must be construed in favor of the taxpayer. "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)).

In *Lett v. City of St. Louis*, 948 S.W.2d 614, 619 (Mo. Ct. App. 1996), the court discussed how the City had enacted a change to the earnings tax ordinance regarding whether deferred compensation (at issue in that case) was subject to the earnings tax. The court noted, "If there existed any prior ambiguity [in the earnings tax ordinance], the City removed the ambiguity [through legislation]." Here, the City did nothing legislatively to alleviate any ambiguity, if one existed, which Plaintiffs assert does not exist.

Plaintiffs have alleged that prior to tax year 2020, Defendants issued refunds to Plaintiffs and others for days spent working "remotely" or "virtually" for city-based employers, acknowledging that nonresidents are not liable for earnings tax for days physically worked outside the City under the plain and unambiguous language of the ordinance. And in fact, as alleged in the Petition, representative Plaintiffs Boles, Oar, Semonski and Stein did exactly that.

Then in June 2020, the Collector acknowledged that the City had issued refunds for teleworking in the past, but said in response to the COVID-19 pandemic:

> This is a whole different set of circumstances. The way we view it, you and your company have agreed (to have you) work at home. You're still utilizing all the computer software that your company provides [from its base in the city].[2]

The Collector's job as an executive official is to enforce the law as it is written, not to change the law in reaction to changed circumstances. The responsibility to *change the law* lies not with executive officials like the Collector, but with the legislative bodies of both the state and the City. This Court must accept as true Plaintiffs' allegation that no changes were made to the state or local earnings tax laws during the pandemic. The refund statute does not afford adequate relief here because it arguably requires a protest at the time of payment, and given Defendants' alleged prior practice of issuing refunds for teleworking without requiring protests at the time of payment, there was no reason to protest at the time the tax was paid (i.e. withheld from their pay by their employers and turned over to the Collector). Given that the Collector did not announce until approximately halfway through the year that the City was no longer going to issue refunds for teleworking days, Plaintiffs and those similarly situated may not, through a strict reading of

[2] *Lawsuit seeks earnings tax refunds for those who worked outside St. Louis during pandemic*, Jacob Barker, ST. LOUIS POST-DISPATCH, Mar. 30, 2021, online version available at https://www.stltoday.com/business/local/lawsuit-seeks-earnings-tax-refunds-for-those-who-worked-outside-st-louis-during-pandemic/article_469f9f4d-0465-5db7-8538-aee51d404775.html. Plaintiffs' equal protection claims are based on Defendants' treatment of nonresidents who work remotely while traveling versus working remotely from home, a completely arbitrary distinction thereby violating the equal protection rights of Plaintiffs and those similarly situated. The Collector's argument that nonresidents are "still utilizing all the computer software that [their] company provides" lacks coherency when you consider people who travel for work often carry their company-issued laptops and phones, equipped with software, to conduct business, but yet they are apparently still entitled to refunds.

the refund statute[3], be able to seek refunds of a portion of the earnings tax paid because they did not protest at the time of payment. Defendants urge the Court to apply the refund statute strictly, but if the Court really did so, Plaintiffs would not be entitled to a refund of the earnings tax unless it was paid over with a contemporaneous protest. This has never been required for Plaintiffs to seek a refund for their teleworking days, nor should it be now. As stated in Plaintiffs' Second Amended Petition, paragraphs 158 and 159, Defendants' request for the Court to strictly apply the refund statute leads to an absurd result and the Court should not construe a statute to cause an "unreasonable, oppressive or absurd results." *Elrod v. Treasurer of Missouri as Custodian of Second Inj. Fund*, 138 S.W.3d 714, 716 (Mo. 2004).

Through this litigation, Defendants have conceded that a "protest" is valid if submitted after the end of the tax year when taxpayers typically file their returns, but Defendants appear poised to challenge whether any such "protest" by Plaintiffs was timely under the refund statute:

> If Plaintiffs are able to show under Count III that they *timely submitted* a protest of the earnings tax and that the earnings tax should not apply to teleworking, then they will be entitled to a refund. (Defendants' Motion to Dismiss, pg. 4, emphasis added)

Because of this possibility, Defendants have not shown that the refund statute provides adequate relief to Plaintiffs under the circumstances, rendering dismissal of any counts on that basis premature.

Plaintiffs will now address the other arguments in the Defendants' Motion to Dismiss in the order of Plaintiffs' Counts.

---

[3] It is ironic that Defendants are now requesting the Court to strictly apply the Refund Statute (RSMo. §130.031), when the crux of this case involves Defendants' loose interpretation of an unambiguous City of St. Louis earnings tax ordinance which has never applied to preclude nonresidents from obtaining refunds for teleworking or "remote work without travel."

Count I, Declaratory Judgment that Defendants Owe Refunds for Teleworking Days

Defendants ask the Court to dismiss Plaintiffs' Count I, which seeks a declaratory judgment on the question of "whether under the Ordinance the City may tax nonresidents and/or refuse to pay refunds for days spent teleworking." Defendants say declaratory relief is not available on this issue because Plaintiffs have an adequate remedy through filing a refund suit. Yet, Defendants assert that there can be no class relief. Perhaps Defendants' imagine that each putative member of Plaintiffs' two proposed classes will file his or her own lawsuit. But as explained above, a suit by each aggrieved non-resident taxpayer under the refund statute is unworkable under the circumstances and still may not afford adequate relief due to the potential protest timing issue and Defendants changing policy halfway through the year (Plaintiffs will further discuss their class action arguments below). If Plaintiffs may not maintain a class action under the "refund statute," then the proposed class members truly have no real and complete remedy at law, and thus the declaratory relief requested in Count I is appropriately pled.

Also, the stand-alone request for declaratory relief in Count I is needed to determine not only whether Plaintiffs and those similarly situated are entitled to refunds of the earnings tax not just for teleworking days for 2020, but also going forward. Defendants have not stated whether their new interpretation and/or change in policy is permanent, so declaratory relief is necessary on the critical issue of whether the earnings tax ordinance, as written, allows the City to tax nonresidents for whole days they work outside the City. The declaratory relief is warranted to determine Plaintiffs' rights to refunds for future tax years, including 2021, where they continue to have their earnings tax withheld, based on directives made by the Collector to city-based employers, despite still working much of the year from locations outside the City. Under Defendants' interpretation, and absent declaratory relief, Plaintiffs and all other similarly situated

nonresidents will have to bring new suits every year challenging the Defendants' actions in denying their refunds.

It is also possible the Court will deny Plaintiffs their refunds based on as yet undetermined grounds. For example, the Court could theoretically rule against Plaintiffs on their refund claims on some factual ground without issuing a legal opinion as to whether the City has the authority to tax nonresidents on days spent teleworking. There would then be no remedy at law. It is too early to dismiss this count based on supposition or hypotheticals. The court should therefore deny the Motion to Dismiss on Count I.

Count II, Declaratory Judgment That the Deadline for Claims is May 17, 2022

Paragraphs 229 and 230 of the Second Amended Petition define the issue before the Court in this Count II:

> 229. Plaintiffs and others similarly situated are filing applications for refunds for teleworking but there is ambiguity as to the deadline for such applications because the Collector has previously stated that the applications are due May 17, 2021, but the relevant statute of limitations for submitting such claims is May 17, 2022.
>
> 230. A controversy exists between the parties as to the deadline for submission of applications for refunds of earnings taxes.

During the hearing on Plaintiffs' Motion for Temporary Restraining Order, counsel for the Collector told the Court: "They (nonresidents) have a year after the tax year is over to bring claims of this nature." (See pgs. 29-30 of Transcript). That statement was a concession that the deadline for submitting a claim for 2020 tax year would be at least December 31, 2021. But the Collector's refund form for tax year 2020 (Form E-1R) states it is due by April 15, 2021 (which the Collector extended to May 17, 2021, based on the federal extended filing date being extended by the IRS). The Collector's website says, "The Statute of Limitations for a refund request is one year from the original date when the return and taxes were due. City Code 5.54.060."

Plaintiffs argue this means that any refund requests for tax year 2020 submitted on or before May 17, 2022 (one year from the original date the return was due), would be considered timely. The deadline is thus, at this point, unclear.

The deadline for submission of claims is highly relevant to this litigation because that is the last day nonresidents seeking refunds for their teleworking days must file their papers for a refund or hold their peace. One can easily see where this might go without a ruling from the Court as to the day the window shuts. Plaintiffs will win their case, more refund claims will come in, and then Defendants will wag their fingers and say, "No, no, too late!" Resolution of the deadline issue is thus critical to the delivery of justice in this matter.

More particularly, first, a true justiciable controversy exists over the deadline and the specific relief of stating a deadline will not be a mere advisory decree upon a hypothetical state of facts. Second, the Plaintiffs' putative class members have a real interest at stake, that is, whether their claim for a refund will be considered timely and thus whether they will get their money if classes are certified. Third, the question of the deadline is ripe in that it is critical to the disposition of justice in this matter. The tests are thus met and the Court should therefore deny the Motion to Dismiss on Count II.

Counts IV-VIII, Federal Claims

In Counts IV-VIII, Plaintiffs assert federal claims in the alternative. In the body of the Second Amended Petition, Plaintiffs state as to the viability of federal claims:

> 172. Particularly, the court in *Stufflebaum v. Panethiere*, 691 S.W.2d 271, 272 (Mo. 1985), stated that "the teaching of *Fair Assessment in Real Estate Association, Inc. v. McNary*, 454 U.S. 100, 102 (1981) is that, given a plain, adequate and complete remedy at law (§ 139.031, supra), taxpayers may not seek relief under § 1983."
>
> 173. The implication is that where relief is not available under RSMo. § 139.031, relief must be available under 42 U.S.C. § 1983.

Plaintiffs thus assert that if there is not adequate relief available under the refund statute, RSMo. § 139.031, then federal relief is available if they can show deprivations of constitutional rights. As explained above, a "plain, adequate and complete remedy" may not exist for Plaintiffs or the proposed classes of nonresidents even if the Court finds that Defendants have violated the earnings tax ordinance with respect to teleworking days. Defendants urge the Court to "strictly follow" the refund statute. However, a strict reading of the refund statute would mean that nonresidents should have protested the second the earnings tax was withheld from their pay back in January or February of 2020, prior to the government-ordered shutdowns. As such, the refund statute would not allow nonresidents, including Plaintiffs, to seek a full refund under the "refund statute" because they did not protest at the time the tax was paid.

In their Motion (page 5), Defendants state: "Of course, whether Plaintiffs are successful in their refund claim is not the issue." Plaintiffs assert to the contrary that for these Counts seeking relief under 1983 that is *exactly* the issue, and if Plaintiffs individually and on behalf of the classes lose on their RSMo. § 139.031 claims, then the 42 U.S.C. § 1983 claims will be viable to provide "complete" relief for all those harmed by Defendants' unlawful actions. Thus, the claims under 42 U.S.C. § 1983 should not be dismissed at this stage, before discovery has even begun. The constitutional claims must be explored and verified through discovery so Plaintiffs may have the opportunity to prove their allegations that Defendants' conduct "shocks the conscience" and violates the equal protection clause, so as to implicate the constitutional rights of Plaintiffs and those similarly situated. Such evidence might show Defendants and their agents plotting their decision to refuse refunds to nonresidents, knowing that doing so would violate state and local law, or in the creation of new forms they knew they would thwart non-resident taxpayers from seeking lawful refunds. Perhaps Defendants did all this knowing how

difficult and/or unlikely it will be for the large body of affected taxpayers to challenge such action given the burden of litigation balanced against the amount at stake. Such a finding would shock the conscience and provide a stand-alone basis for class relief for damages when the refund statute does not afford adequate relief.

Accordingly, the Court should deny Defendants' Motion to Dismiss regarding Counts IV-VIII, the constitutional claims.

Class Action Status

Ay, there's the rub. One can imagine a scenario in which Plaintiffs will achieve a final ruling that they are entitled to refunds, perhaps under RSMo. § 139.031, perhaps under 42 U.S.C. § 1983, or perhaps on another theory, but the Defendants will still thumb their noses at the citizenry and say: "You may be right on the law and we took your money unlawfully, but you don't get your money back on a technicality and there is not a darn thing you can do about it." This, of course, could have the effect of the City having more money in the short term but less money in the long term because the members of the citizenry with relatively higher earnings would then likely conclude that the City government has such disdain for those choosing to base their business in the City, that it would be best just to abandon both their investment and the City's future, and get out.

Perhaps Defendants' concern about this potential scenario will cause them to rethink this issue and make a public statement that if the Court rules on one ground or another that refusing refunds to non-resident teleworkers is unlawful, the City will waive all issues regarding the right not to refund the money and pay everybody back. Should that occur, the question of the availability of class action status will likely become moot. But pending such a public statement

(i.e. "we intend to do the right thing if the Court rules against us on the merits"), the class action issue goes to the very heart of the matter.

Let us turn to the exact language of the refund statute, RSMo. § 139.031, and Plaintiffs' allegations thereto. The statute states in § 2:

> Every taxpayer protesting the payment of current taxes under subsection 1 of this section 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.

At para. 169 of their Second Amended Petition, Plaintiffs state:

> In the alternative, nothing in the Refund Statute prohibits class action suits and thus the concern that the refund statute does not explicitly allow class action suits is irrelevant, particularly because Rule 52.08 specifically allows class action suits when its requirements are met, as is explained elsewhere herein. See *Ritchie v. Gordon*, 615 S.W.3d 103, 108 (Mo. Ct. App. 2020) (when "authorized by the Missouri constitution and statutes, Missouri Supreme Court Rules are to be given the same effect as statutes so long as they are not in conflict with other law").

In *Ins. Co. of State of Pa. v. Dir. of Revenue & Dir. of Ins.*, 269 S.W.3d 32, 35–36 (Mo. 2008) the court wrote:

> Construction of refund provisions against the taxpayer is consistent with the general rule that the state's sovereign immunity shields it from refunding taxes voluntarily paid, even if illegally collected, and refund statutes are limited waivers of sovereign immunity to allow the recovery of money wrongly collected. As a consequence of this rule, statutory provisions waiving sovereign immunity are strictly construed, and when the state consents to be sued, it may prescribe the manner, extent, procedure to be followed, and any other terms and conditions as it sees fit. (Citations omitted and cleaned up).

Thus, while Plaintiffs acknowledge, as they must, that cases, particularly most recently *Blankenship v. Franklin Cty. Collector*, 619 S.W.3d 491, 512 (Mo. Ct. App. 2021), state that class action relief is unavailable under the refund statute, RSMo. § 139.031, Plaintiffs now argue in good faith for a change in the law based on first, that "every taxpayer" may "commence an

action" by being part of the class and the statue does not prohibit class actions, and second that this scenario, not one in which there is some sort of dispute over whether retirement benefits are subject to earnings tax, is one in which the Defendants are just brazenly keeping money they are not entitled to, which should lead to an exception to the general rule.

But let us suppose that the Court rejects those arguments. That is precisely why Plaintiffs have made their federal claims. The federal civil rights claims are meritorious on these facts and under the supremacy clause civil rights claims trump sovereign immunity:

> Our cases have established that a State cannot employ a jurisdictional rule to dissociate itself from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source. In other words, although States retain substantial leeway to establish the contours of their judicial systems, they lack authority to nullify a federal right or cause of action they believe is inconsistent with their local policies. *Haywood v. Drown*, 556 U.S. 729, 736 (2009), (Citations omitted, cleaned up).

If Plaintiffs' argument is successful, Plaintiffs will appropriately defeat Defendants' strategy, which seems to be, "We can deny refunds for teleworking days and there is no way each person affected will bring separate, individual suits, or at least not enough to inflict real financial harm, so let's just do it anyway." Such conduct does indeed shock the conscience.

Just a few weeks ago in *Hootselle v. Missouri Dep't. of Corr.*, No. SC 98252, 2021 WL 2211675, at *5 (Mo. June 1, 2021), the court stated:

> Class certification is governed by Rule 52.08. In addition to the numerosity, commonality, typicality, and adequacy requirements of Rule 52.08(a), plaintiffs seeking class certification must also satisfy one of the three requirements of Rule 52.08(b). *Green v. Fred Weber, Inc.*, 254 S.W.3d 874, 877 (Mo. banc 2008). In the case at hand, the corrections officers were certified as a class under Rule 52.08(b)(3), which requires that common questions of law or fact "predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

Plaintiffs suggest that their pleadings encompass the numerosity, commonality, typicality, and adequacy requirements of Rule 52.08(a), as well as the need for common questions of law or fact, all as stated in the Second Amended Petition at paras. 209-220. Defendants do not quarrel with the pleading on that basis.

Finally, this Court should not dismiss class action status for Plaintiffs under any Count in which they seek class action status at this stage of the litigation, because that could lead to piece-meal appeals, all causing a detriment to judicial economy.

Count IX, Hancock Amendment

Plaintiffs' Hancock Amendment argument in Count IX is quite simple: by changing its policy to begin taxing teleworking days, Defendants are expanding the tax base without a corresponding reduction in revenue elsewhere, and without a vote of the people. That is unconstitutional under Hancock, which, of course, the people passed precisely to prevent the sort of chicanery Defendants are undertaking here.

Defendants make four arguments for dismissal of this claim: (1) that Plaintiffs' only remedy is under the refund statute (pg. 7); (2) that the "levy has not been increased" (pg. 8); (3) that the City's misconduct is not the result of legislative action and so is beyond the reach of Hancock (pg. 8); and (4) that taxing teleworking days does not increase the tax base (pgs. 8-9).

As to the first argument, Plaintiffs first return to their right to plead in the alternative, for there can be no argument that a taxpayer may not bring a claim under Hancock for Art X, § 23, and then note that § 23 precisely gives any taxpayer standing to bring such a claim.

As to the second argument, that the "levy" has not been increased, Plaintiffs will start with quoting the business section of Hancock, § 22:

> 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. If the assessed valuation of property as finally equalized, excluding the value of new construction and improvements, increases by a larger percentage than the increase in the general price level from the previous year, the maximum authorized current levy applied thereto in each county or other political subdivision shall be reduced to yield the same gross revenue from existing property, adjusted for changes in the general price level, as could have been collected at the existing authorized levy on the prior assessed value.

Defendants say that their action does not increase the "levy" even if an individual taxpayer's liability is increased. But that ignores the true issue before this court in the Hancock part of the case. The real Hancock issue is whether the City is taxing that which has not been taxed before. That is to "levy" a new tax, and that is exactly what the City is doing by refusing to issue refunds for teleworking days, days which were not taxed before. (This assumes that refusing to refund the withheld earnings tax for teleworking days is the same as taxing teleworking days – a concession which perhaps Defendants will acknowledge). The word "levy" in its plain meaning is to tax something. That is what the City is doing.

As to the third argument, that the levy is beyond challenge under Hancock because it comes from executive not legislative action, Plaintiffs first point to the opening words of the section: "Counties and other political subdivisions are hereby prohibited from levying any tax." The amendment thus applies to the City of St. Louis as a "political subdivision."

Further, while Plaintiffs agree that the Court in *State ex rel. Indus. Servs. Contractors, Inc. v. Cty. Comm'n of Johnson Cty.*, 918 S.W.2d 252, 256 (Mo. 1996), said that to levy a tax is an "official action of a legislative body invested with the power of taxation," one might

reasonably presume that when the Court wrote that sentence it had in mind Federalist 33: "What are the means to execute a legislative power but laws? What is the power of laying and collecting taxes, but a legislative power?" Surely Defendants do not mean to argue that the executive branch, of which the Collector is a member, may increase taxes without involvement of the legislative branch, for a central purpose of a three-branch government is to protect the people's liberty by separating the power of creating the tax from the power of collecting the tax. If Defendants, including the Collector and the appropriate members of City government, who are surely honorable people doing their best, really do think that the executive branch may unilaterally increase taxes, then Plaintiffs commend to them to further reading of the Constitution, the Federalist Papers, and the manifold academic books and papers enunciating the idea of limited government through three competing and co-equal branches, with each branch staying in its own lane.

As to the fourth argument, that the base is not increased, Plaintiffs rely on the facts. Defendants have heretofore not taxed teleworking days. Defendants are now taxing teleworking days. In plain English, what is that other than increasing the "base"?

Prayer

WHEREFORE, Plaintiffs pray the court to deny Defendants' Motion to Dismiss.

Respectfully Submitted,

Attorneys for Plaintiffs

/s/ W. Bevis Schock
W. Bevis Schock, # 32551
7777 Bonhomme Ave., Ste. 1300
St. Louis, Missouri 63105
Phone: (314) 726-2322
Fax: (314) 721-1698
wbschock@schocklaw.com

MILTON LAW GROUP

/s/ Mark C. Milton
Mark C. Milton, #63101
12026 Manchester Road
St. Louis, MO 63131
Tel: 314-394-3370
Fax: 314-394-3371
mark.milton@miltonlawgroup.com

CERTIFICATE OF SERVICE

The undersigned certifies that on July 14, 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