

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

LETICIA COLON DE MEJIAS)	3:18CV817 (JCH)
ET AL,)	
PLAINTIFFS)	10:35 a.m.
vs.)	May 25, 2018
DANNEL P. MALLOY, ET AL)	
DEFENDANTS.)	
_____)	141 Church Street
	New Haven, Connecticut

HEARING

B E F O R E:

THE HONORABLE JANET C. HALL, U.S.D.J.

A P P E A R A N C E S:

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For the Defendant : Philip Miller
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1 THE COURT: We're here this morning in the case
2 entitled Colon de Mejias, et al versus Malloy, et al,
3 318CV817. If I can have appearances please.

4 MR. WOLFSON: John Wolfson from Feiner Wolfson
5 LLC for the plaintiffs.

6 MR. SWEENEY: Patrick Sweeney for Holland and
7 Knight for the plaintiffs.

8 MR. HUMES: Steve Humes of Holland and Knight
9 for the plaintiffs.

10 MR. REYNOLDS: Roger Reynolds for the plaintiff
11 Connecticut Fund for the Environment.

12 THE COURT: Good morning to all of you.

13 MR. MILLER: Assistant Attorney General Philip
14 Miller for the State defendants.

15 MR. WRIGHT: John Wright on behalf of the State
16 as well.

17 THE COURT: Good morning. Can everybody be sure
18 they have one of those sticks in front and the green
19 light is on? Everyone be seated.

20 I want to disclose and probably has already been
21 disclosed that one of the attorneys for the plaintiff
22 clerked for me. I'm getting old so I can't remember how
23 many years ago, but it was a while ago. Attorney
24 Sweeney.

25 We have a policy I guess I will call it in the

1 district that presumes that after two years it's
2 appropriate that a clerk can appear. I don't often have
3 clerk's appearing so I never thought of it. I think
4 Attorney Sweeney's tenure was long enough ago that I
5 don't see any issue with him representing a party. He
6 did represent someone in another matter a couple of years
7 ago. It was a real estate matter. I guess if the State
8 feels there's a conflict.

9 MR. MILLER: No, Your Honor.

10 THE COURT: You should have the time to consider
11 it and discuss it with your client. I don't think it is,
12 so I don't intend to take any steps, but I wanted you to
13 know that.

14 MR. MILLER: Thank you, Your Honor.

15 THE COURT: Another preliminary matter somebody
16 could tell me how you to pronounce the plaintiff's name.

17 MR. HUMES: Leticia Colon.

18 THE COURT: Colon. She doesn't use the de
19 Mejias.

20 MR. WOLFSON: It is part of her full name but
21 she goes by Leticia Colon.

22 THE COURT: That's a lot easier for me. All
23 right. I think the parties had requested that we have a
24 conference. Obviously I saw the case when it came in.
25 But I didn't see a request for a preliminary injunction,

1 so I figured I would let it take its own course. I'm
2 happy to confer with the parties and figure out the best
3 way to get the case to a position that we address the
4 issues, so I will hear first from the plaintiff.

5 MR. HUMES: Thank you very much, Your Honor.
6 Again this is Steve Humes from Holland and Knight. Your
7 Honor, we appreciate you're seeing us on such short
8 notice. The plaintiffs are very sensitive to the Court's
9 time and the burdens of judicial economy, and we asked
10 for this early status conference because we thought it
11 could be helpful.

12 The plaintiffs have serious concerns about
13 maintaining the status quo of the funds at issue. The
14 funds that are about to be swept are described in the
15 Complaint, but basically the plaintiffs had a very narrow
16 window between the end of the session on May 9 and the
17 time of sweeping in which to take this action. And there
18 was plenty of discussion during the legislative session
19 along the lines of the potential for the State to change
20 its mind about the sweeps.

21 In fact, the State did revise the sweeps by
22 \$10 million so the amount being swept is roughly 77.5
23 million this year and 67.5 million next year. This
24 sweeping covers three calendar years but two fiscal years
25 between the --

1 THE COURT: Remind me when the state's fiscal
2 year begins.

3 MR. HUMES: The State's fiscal year begins on
4 July 1 and ends on June 30.

5 THE COURT: That's what I thought. I want to be
6 sure. When do you understand this first sweep will
7 occur?

8 MR. HUMES: First of all, I would like to say
9 that we have been having very cooperative
10 discussions with Attorney Miller. We appreciate that. We
11 have been talking to him daily since the case was
12 assigned to him. He's represented to us that the sweeps
13 will not occur before June 25 but will occur on June 25.

14 THE COURT: I guess I have more questions for
15 the State for background.

16 MR. HUMES: If I can go through a few details
17 before we get to the State. This case challenges the
18 State's attempt to invade these funds which are ratepayer
19 funds, paid by ratepayers pursuant to the tariffs. The
20 tariffs are contracts between the utility and each
21 customer and the funds are not held in state bank
22 accounts. They are held in the utility's bank accounts
23 so each utility ratepayer has a contract that's governed
24 by the tariff and there's plenty of law on the fact that
25 these tariffs are contracts including the terms of the

1 service itself which states that these are contracts.

2 In this case, the people involved are ratepayers
3 not taxpayers and here the State is trying to do
4 something that would be no different than the State
5 sweeping into your bank account and mine and taking money
6 just to solve a budget deficit. That's the essence of
7 what the State is trying to do.

8 The funds were paid for specific purposes for
9 services to be rendered with regard to energy efficiency
10 and clean energy. The State has a long standing
11 commitment to greening the state's economy, reducing
12 greenhouse gases, reducing global warning impacts and
13 energy efficiency is a hallmark of the State's policy.
14 So impairing these funds actually sweeps more than
15 50 percent of the funds available for the next two years
16 for those services. It is a substantial impairment.

17 Some of the ratepayers own their own businesses
18 or are businesses themselves which are both ratepayers
19 and also beneficiaries of the Energy Efficiency Funds,
20 and they have responded to the call of the State for
21 development of clean energy and growth of green jobs.

22 These companies had substantial business
23 operations that were underway and significant growth of
24 jobs anticipated for this year. As a result of the
25 legislation passed in late October, the State imposed a

1 directive to curtail the funds using accrual accounting
2 such that even though the funds have not yet been swept,
3 the impact of the sweeping started being felt in about
4 January so significant layoffs have occurred.

5 The plaintiffs are suffering harm on a daily
6 basis as a result and while we're not asking that the
7 Court issue an order that would allow the funds in
8 dispute to be spent immediately, we are seeking to
9 maintain the status quo.

10 We're concerned that if the funds are swept,
11 that they won't be easy to return. I will get into a
12 little more detail on that in a second.

13 Connecticut Fund for the Environment is another
14 one of our plaintiffs. They are a charitable
15 organization. They are not a taxpayer. They are tax
16 exempt under federal law. State statute says that an
17 entity that's tax exempt under federal law is also exempt
18 under state law.

19 The impact of the sweeps also makes them a
20 taxpayer. It also means that the donors to the charity
21 have now had their charitable donation expectations
22 impaired by virtue of taking funds paid by CFE,
23 Connecticut Fund for the Environment, as a ratepayer and
24 turning them into tax dollars.

25 THE COURT: Can I interrupt you for a second?

1 MR. HUMES: Yes.

2 THE COURT: What do you want me to accomplish
3 today?

4 MR. HUMES: What we would like to talk about is
5 our concern about trying to protect the funds.

6 THE COURT: You understand that there will be a
7 physical sweep taking of the money from some account into
8 another account no later than June 25?

9 MR. HUMES: That's right. We have not yet filed
10 for a TRO or injunction, preliminary injunction. We have
11 been preparing for that possibility but --

12 THE COURT: Can I ask. I don't know whether I
13 should ask. The State is probably a better source of
14 this. But this money I presume was paid by utility
15 customers as part of their billing pursuant to an
16 approved rate from PURA. Have I got that right?

17 MR. HUMES: That's exactly right, Your Honor.

18 THE COURT: That money then went where?

19 MR. HUMES: To the utility.

20 THE COURT: UI or Southern Connecticut Gas is
21 holding the money that -- obviously I'm a ratepayer. I
22 don't know if anybody thinks that's a problem unless I
23 lived in Wallingford. I don't know any judge who
24 wouldn't be a ratepayer here.

25 Again I would note that because if the State

1 thinks that's problematic, I would have to I guess we
2 would have to get somebody from outside the state. I
3 don't know any judge. I know Bozrah is not in this.
4 Wallingford has their own. I would be shocked if any one
5 of my 13 colleagues isn't at least in the electrical pot,
6 if not the gas pot.

7 MR. HUMES: With respect to the electric versus
8 gas we're talking primarily about the electric utilities.
9 The gas utility. While ratepayers pay a conservation
10 adjustment mechanism charge on their gas bill to the gas
11 companies and those contribute to the same kind of
12 services, the sweeps do not cover those programs so what
13 we're talking about is the electric utilities. They hold
14 the money and they engage the contractors to perform the
15 energy efficiency services and then they use the money to
16 pay the contractors for those services.

17 THE COURT: All of that conservation programming
18 is actually the utility subsidizes or pays for it using
19 these funds historically I'm saying.

20 MR. HUMES: It is paid for by the customers of
21 the utilities. There's a three mil charge that's
22 essentially --

23 THE COURT: If I were to call up my electrical
24 company last June and say I would like an energy audit.
25 My brother-in-law says it is a great thing to do. They

1 send some person out to my house and they measure the
2 leaking windows and old refrigerator, whatever else they
3 do. They charge me \$40, but it costs more than that.
4 The utility I subscribe to would fund the difference out
5 of these monies.

6 MR. HUMES: Correct. You would start with a
7 home energy audit. The contractor would come to your
8 home and perform a service that would include a blower
9 door test. They would determine how much energy is lost
10 from your house. They would also do a safety check of
11 your emissions systems to make sure there's not any
12 carbon monoxide leaking from your heater or something
13 like that. Then they would render the services that
14 would include caulking, insulation and other
15 optimizations.

16 If I can say one more thing, Your Honor. The
17 State had a very successful tax collection season on the
18 revenue side. They collected more than 1.5 billion
19 dollars this April than they expected to collect.
20 Because of the handcuffs that the legislation put on
21 themselves during the budget process, the legislature
22 decided that any surplus revenue would go to the Rainy
23 Day Fund.

24 The Rainy Day Fund is now flush with cash,
25 billions of dollars with cash. So what would happen if

1 an injunction were to issue before June 25 is the State
2 already ended the session with a 381 million dollar
3 budget deficit. Rather than plugging the deficit, the
4 law markers decided to do nothing and let the surplus in
5 the Rainy Day Fund cover it.

6 If there were an injunction in this situation,
7 the extra money that's frozen would be added to the
8 deficit and automatically the funds would flow and cover
9 that. The State would suffer no harm if there were an
10 injunction.

11 THE COURT: Okay.

12 MR. HUMES: Thank you, Your Honor.

13 THE COURT: Attorney Miller.

14 MR. MILLER: Yes, Your Honor.

15 THE COURT: Good morning, sir.

16 MR. MILLER: Good morning, Your Honor.

17 THE COURT: The first thing I would ask is I
18 will ask two things. One is whether you disagree
19 factually with any of the information that the plaintiff
20 counsel has given me. Probably more importantly, what's
21 the Government's position about preliminary order or
22 something so there will be a standstill until you all
23 have time to brief the issue for me so I can decide
24 what's going on here.

25 MR. MILLER: First I don't disagree with

1 anything the plaintiff said. We do need to initiate the
2 sweep process by June 25. Because it is our belief
3 reading the state law that governs this that we have to
4 have the money in the possession of the General Fund by
5 the close of fiscal year. It takes a couple of days. We
6 want to do it on the 25th to get in there by the 29th.

7 It is the State's position, Your Honor, we do
8 oppose an injunction. What they are asking for again is
9 there's money in the fund. We intend to put it into the
10 General Fund. It seems like they're concerned we won't
11 put it back and I guess I'll say we're the State of
12 Connecticut. We're going to honor an order of the
13 federal court.

14 THE COURT: One question I guess I have is and I
15 don't follow the financial politics in Hartford very
16 closely. But it struck me, as I was thinking of coming
17 in this morning, you know, when the State -- I did used
18 to do work for the treasurer when I was in private
19 practice. I have a little bit of understanding.

20 What I would like to understand the bonds the
21 State has out right now, for example, either general
22 purpose or specific, do they lien all the assets of the
23 State?

24 The reason I ask the question is, as you say,
25 obviously it is an obvious thought I had, well, it is the

1 State of Connecticut. If they take \$80 million or
2 whatever the number is, and I don't make my decision
3 until July 1 and I say on July 1, State put it back,
4 other than maybe a gap of five or six days, you will put
5 it back I assume, unless you ask my higher up colleagues
6 to look at what I did because you think I'm wrong and
7 that's fine, too.

8 I guess your argument in that regard has to rest
9 on a fact that these plaintiffs won't be behind. I don't
10 know how many billion in debt the State has now. But
11 when they give general obligation bonds, I think that's
12 money that the State has. I don't think they would be
13 behind that. There are special purpose bonds.

14 MR. MILLER: I'm not exactly sure that -- let me
15 explain the process that we would use to put the money
16 back and see if that alleviates your concern and I told
17 the plaintiffs this. We have an Adjudicated Claims Fund
18 in the State. What would happen if an order issued from
19 the Court, final judgment no longer appeal or whatever,
20 that order -- the Attorney General's Office would receive
21 that order. We would notice the office of OPM, Office of
22 Policy and Management. We'll transmit that order with
23 instructions from the Attorney General's Office to pay.

24 THE COURT: No delay to go to the legislature
25 because of the amount?

1 MR. MILLER: No, Your Honor. There's a
2 difference between if we settle a case and if we have a
3 judgment from a court. I understand sometimes we settle
4 cases then we ask the Court for a judgment. That's a
5 different process. That's a different process than just
6 we have litigated fully, no settlement and the Court
7 orders something. That does not have to go to the
8 legislature for approval.

9 THE COURT: What about plaintiffs' counsel and
10 obviously I'm not going to hear the merits today. He
11 mentioned that there's lots of programming that was
12 dependent upon these funds, and it sounds like it's
13 already had the announcement you would sweep these funds
14 has had an impact. Clearly it is going to continue to
15 have an impact.

16 MR. MILLER: Until this case is over, they are
17 not asking for the funds to be released. Whatever impact
18 that is continues because they have not asked to release
19 those funds and then try to claw them back.

20 The only impact here would be on the State. I
21 know they say there is no harm. There is. We have a
22 larger deficit.

23 The State has determined how it intends to spend
24 down its funds, you know, through state action. Now what
25 would happen is we would have now a larger deficit this

1 year. We also would now have -- so right now my
2 understanding is as of two days ago, I know things
3 changed quickly, we have a \$500,000 surplus.

4 THE COURT: That's a fallout of the Federal Tax
5 Act, right?

6 MR. MILLER: Yes, your Honor. All of it. So we
7 have --

8 THE COURT: It is only going to happen once.

9 MR. MILLER: Yes, Your Honor. We have a
10 \$500,000 surplus. What will happen now, just an example,
11 we'll now add \$63 million to that deficit. Once we hit
12 like one percent, for example, then the Governor is
13 required to issue a deficit mitigation plan. There's
14 many things that will happen here on the State side that
15 they will have to change now and adjust because that
16 money that the General Assembly has budgeted to go into
17 the General Fund to pay for other programs would not be
18 there.

19 THE COURT: Again I'm not going to decide the
20 case this morning. Tell me how it is the State's money?
21 If I understand correctly, I'm a UI customer, for
22 example, and somewhere in my bill imbedded in the rate or
23 some sort of extra dollar. I can give a dollar to help
24 pay the energy bill of a poor person or someone who is
25 behind. I don't know how this money is collected.

1 Somewhere in what I paid for my electric bill was this
2 money, right?

3 MR. MILLER: Yes, Your Honor. What happened was
4 the legislature passed an act. In that act, they said,
5 PURA, you will charge ratepayers a certain amount of
6 money that will be included in your tariff that will go
7 into this program. It is a program I understand operated
8 by the utilities, but it is highly regulated by the
9 State. The State is one -- so what happens is the State
10 will know about how much money is going into that fund.

11 They have an EEB, Electric Efficiency Board.
12 They will make recommendations to DEEP and eventually
13 DEEP will tell the company exactly how much money you can
14 spend on what programs. This fund has been swept before.
15 It has been swept before in the past.

16 This is another way that the General Assembly is
17 raising for purposes like the Tax Injunction Act, this is
18 a tax. I'm not sure I'm going to raise that argument,
19 but I'm saying for the purpose of the Tax Injunction Act,
20 that's a tax now. This is now a tax that we have put on
21 the ratepayers to go into the General Fund by virtue of
22 Public Act, the Public Act that we're litigating here,
23 Your Honor.

24 THE COURT: Obviously that will be a question I
25 guess I have to decide which I would be -- I don't want

1 to say anxious, summer is coming but I guess I need to
2 know. I don't think you answered my question. Although
3 I think I know the answer, but you answered by saying
4 that if a judgment enters, you would, the State will
5 promptly respond absent an appeal.

6 MR. MILLER: That money in the adjudicated
7 claims account draws on the General Fund. At any one
8 time we have at least usually a billion dollars in the
9 General Fund. Money comes in and out. We're over a
10 billion now. At some point it gets up to three billion.
11 It varies because there's different times of the year
12 where we have to make payments out and stuff like that.

13 I have represented to the plaintiffs I have
14 talked to the director of OPM, Benjamin Barnes. He's
15 made it clear to me, yes, this is exactly the process and
16 if there's an order of the Court, it will be paid out of
17 the adjudicated claims account. Eventually that draws
18 from the General Fund and if that went low, then we have
19 to bond or something like that, whatever we have to do,
20 the money is there. We're the State of Connecticut.

21 THE COURT: You are talking about 68 million by
22 the end of June?

23 MR. MILLER: Yes, Your Honor.

24 THE COURT: I'm not grasping everything right
25 now, but why is it that if your revenues were higher than

1 expected, what prevents the State from not using these
2 funds?

3 MR. MILLER: There was -- I apologize. I'm not
4 sure I understand the details. There was an act passed
5 last year during the budget crisis that said if the
6 legislature gained over 3.15 billion dollars. I apologize
7 if I'm off on the numbers from income tax receipts, that
8 money can't go into the General Fund. It has to go into
9 the Rainy Day Fund for future budgeting purposes.

10 I think starting for fiscal year '20 and '21,
11 we're projecting over four and a half billion dollar
12 deficit so there's reasons that they want to grow this
13 Rainy Day Fund which was basically almost at nothing.

14 So they chose certain physical restraint
15 mechanisms to keep some money set aside for bad times
16 that might be ahead. The legislature has chosen in their
17 legislative prerogative this is how we're going to plug
18 holes in our budget to take it from this fund and take it
19 from the Rainy Day Fund, Your Honor.

20 We do have some jurisdictional issues. I don't
21 know how we're going to proceed here.

22 THE COURT: I need to have it briefed I guess.
23 The question is whether the plaintiff is going to press
24 under the preliminary injunction standard for a
25 preliminary ruling.

1 What comes to my mind, Attorney Humes, is the
2 irreparable harm. If all you are looking for is status
3 quo, I don't know that you have harm with the status quo
4 argument.

5 It is not the State of Connecticut per se, but
6 it is in the governor in his official capacity. If he's
7 in fact the authority of the State of Connecticut will
8 honor a judgment and has the capacity to honor that
9 judgment, I'm not sure how you will prove the irreparable
10 harm standard for a preliminary injunction.

11 MR. HUMES: Your Honor, we have an affidavit
12 from Brendan Sharkey, the former speaker of the House,
13 who is acting as an expert witness on behalf of the
14 plaintiffs. I've disclosed him to Attorney Miller.

15 The affidavit includes a description of how this
16 sweep process took place but also explains that it is not
17 so simple to just put money back into an account when it
18 has been swept. And so I understand that while the State
19 has cash flow of maybe a billion dollars or more and has
20 four billion dollars plus in the Rainy Day Fund at this
21 point, the fact is that the Adjusted Claims Account has
22 \$37 million that counsel represented to us and I'm
23 also -- our plaintiffs are concerned that with an
24 election coming up in November, all of the named
25 defendants in this case are going to be out of office

1 very soon.

2 There will be a change over and we have no idea
3 how the future government will respond to this situation.
4 The legislature itself had the opportunity.

5 THE COURT: There's a nice piece of property in
6 I think it is Madison, Connecticut. It is about two
7 miles of shore line on the Long Island Sound. I think
8 that probably would make up your 68 million. I would be
9 shocked if it didn't. That's why I asked the question.
10 I'm 20 years out of date knowledge of funding by the
11 State. I mean they have special obligation bonds. They
12 have general obligation bonds. I don't know whether on
13 the general obligation bonds how much the debt of the
14 State is right now. And where you would be in line if
15 you were to get a judgement that a new governor, I would
16 be shocked if they did this, but a new govern said we are
17 not paying this back to this fund. We don't want the
18 fund anymore. We don't like clean energy, for example.

19 MR. HUMES: That would be shocking.

20 THE COURT: It would be shocking, but I mean,
21 you know, I don't want to get into a federalism tangle
22 but, you know, assuming it doesn't violate the
23 Anti-Injunction Act and assuming that I have
24 jurisdiction, assuming I have the power to enter an order
25 here, but if those assumptions are wrong, you are not

1 entitled to a preliminary injunction.

2 So I'm happy to schedule briefing and have you
3 folks tell me, but I wonder whether at the end of that, I
4 will get to the fourth prong of the preliminary
5 injunction standard, and I'm going to say there's no
6 irreparable harm at least now. There will be at a final
7 judgment stage, but in the interim, I'm struggling with
8 the harm.

9 MR. HUMES: The plaintiffs are suffering harm on
10 an ongoing basis. It is continuing.

11 THE COURT: I asked that but counsel reminded me
12 that when you stood up you asked me for -- you were
13 concerned about maintaining the status quo. And I
14 appreciate that if I were to somehow order that they not
15 use these monies for budget balancing purposes, that I
16 suspect that would put pressure on them and who knows
17 what would result from that.

18 If they don't have that pressure and they get to
19 sweep the funds, I understand why you might want a status
20 quo agreement. I can't make the government agree to a
21 status quo. I can order a freeze on the fund if I find
22 you can carry your burden at a preliminary injunction
23 stage. I don't know whether you can or not, Attorney
24 Humes. Please understand I'm not prejudging this. It
25 jumps out at me. If this were Wells Fargo Bank, I might

1 say maybe we'll need a surety bond here to be sure you
2 are still around to pay a judgment of \$70 million but I
3 don't know.

4 I guess my feeling is that if you have a
5 judgment and they don't pay it back, you could go lien
6 whatever the name of that park is I just mentioned. You
7 could go lien the governor's mansion. You can have the
8 sheriff kick the governor out of his mansion. Those are
9 all enforcement powers that you would have with a federal
10 judgement, assuming it's not set aside by an appellate
11 court but so I don't know. You know, then of course,
12 there's the element in the preliminary injunction
13 standard of the public interest. I'm not sure where we
14 come down on that here. Obviously a prior legislature
15 made a judgment that this was a good program, right? Get
16 the ratepayers to pay a little bit, a few cents and look
17 at the money we can gather and put to greening
18 Connecticut.

19 Obviously another legislature made a different
20 decision but so, you know, there's that element of the
21 public interest.

22 MR. HUMES: You Honor, if I may, I think you
23 asked the right question how exactly is this the State's
24 money. This is a situation where if anybody else tried
25 to do this, it would be theft. In the energy sector, the

1 State would come down hard on a utility or third party
2 supplier that tried to charge rates then not deliver
3 services. So this is a supreme example of duplicity
4 where the State is trying to do something that would
5 otherwise be completely unlawful.

6 THE COURT: Who is the owner of the Clean Energy
7 Fund?

8 MR. HUMES: The Clean Energy Fund is similar to
9 the Energy Efficiency Fund, only smaller. It is funded
10 with one mil instead of three mils. But the funds are
11 used by the Green Bank, the Connecticut Green Bank.

12 THE COURT: What's the Connecticut Green Bank?

13 MR. HUMES: The Green Bank is a quasi-state
14 agency that engages in investments in renewable energy.
15 That's the program that enables solar panels on people's
16 homes all over the state. They have a number of programs
17 involving investments in clean energy. This sweep
18 actually impairs the Green Bank and the Green Bank's
19 obligations. We have talked to --

20 THE COURT: Is it the plaintiff's position that
21 the act passed by the General Assembly last fall is,
22 well, I was going to say without authority, but I guess
23 you characterize it as theft. That in fact the State has
24 no claim to the monies in this account of a quasi-state
25 agency?

1 MR. HUMES: The money is paid by -- that's
2 correct, Your Honor. The money is sitting -- in the case
3 of the Green Bank, the money goes periodically from the
4 utility to the Green Bank.

5 THE COURT: Why isn't it a tax?

6 MR. HUMES: It is not a tax because it is paid
7 by ratepayers, not taxpayers. The State could declare
8 \$100 in each of our bank accounts as needed to fund the
9 deficit because nobody wants to tax anybody anymore.

10 THE COURT: Some taxpayers would say that's what
11 they have done by raising the sales tax, by raising other
12 taxes, by making licenses more expensive. I don't know.

13 MR. WOLFSON: May it please the Court. In the
14 case that it is a tax, we don't believe that Mr. Miller
15 is correct that the Tax Injunction Act would apply. The
16 Supreme Court has carved out an exemption where there
17 would be a multiplicity of suits in order for the
18 taxpayers to enforce their rights.

19 Now granted the State does have an efficient
20 means to resolve our tax differences. However in each of
21 those four cases which have been spelled out by Judge
22 Kravitz and Judge Thompson in other cases, it is clear
23 that the only person that can take advantage of those
24 remedies is the taxpayer himself so there would be
25 thousands and thousands and thousands of refund cases

1 that would be filed and so under that scenario, there's a
2 case the Georgia Railroad and Banking Company versus Red
3 Wine decided by the United States Supreme Court which at
4 342 U.S. 299. I have a copy for the Court, if you would
5 like, which indicates that there's an exemption in these
6 type of cases from the Tax Exempt Injunction Act. Thank
7 you.

8 THE COURT: Attorney Humes, you are entitled to
9 bring a motion for preliminary injunction. I just don't
10 have it in front of me. If you bring it, given that it
11 seems to be 99 percent legal issues, I need it briefed
12 and you have a time limit so I don't know what you
13 suggest I do.

14 As I say, I can suggest to the State that if
15 they don't want to spend most of their June writing a
16 legal brief that maybe the powers that be in the State
17 might recognize that standing still on this might be a
18 good idea, but I can't make them to do.

19 MR. HUMES: Understood, Your Honor.

20 THE COURT: Absent a finding that you are right
21 that they shouldn't have done it and they should be
22 stayed from doing it at least until the case is finally
23 decided.

24 MR. HUMES: Would the Court entertain cross
25 motions for summary judgment on an expedited basis? We

1 believe that we can reach a stipulation between the
2 Attorney General's Office and the plaintiffs. We have
3 discussed the facts in the Complaint and aside from facts
4 that make legal conclusions, we seem to be in agreement
5 that the facts are accurate for that purpose.

6 THE COURT: That sounds reasonable.

7 MR. HUMES: Our only concern is the question of
8 how to protect the funds in the interval. We're thinking
9 of something like 45-day cross motions for summary
10 judgment time frame and in the meantime --

11 THE COURT: That's going to move beyond June 25.

12 MR. HUMES: That's the problem. We may have to
13 file a motion if we can't get the State to agree to a
14 standstill.

15 THE COURT: Attorney Miller, do you want to
16 brief on June 4?

17 MR. MILLER: I prefer not to brief on June 4,
18 but at the same time, I do not have the authority to
19 agree to enjoining the State's funds.

20 THE COURT: Who has the authority to do that?
21 Anybody or only the legislature?

22 MR. MILLER: I mean --

23 THE COURT: That's out of session.

24 MR. MILLER: That's the most difficult question.
25 The legislature is out of session. We have and we talked

1 about this yesterday. They said I'm between a rock and a
2 hard place. We have a validly enacted law, and I can't
3 force the legislature to come into session to change
4 that. My OPM, the treasurer, the comptroller, they have
5 to follow state law as state law is written.

6 If we brief in 45 days, again I can only make my
7 representation the money is going to be there especially
8 if we do this quick. We get it done before the November
9 election.

10 First of all, I don't think these are valid
11 concerns. This is the State of Connecticut. This is the
12 State. We have this money. I represented I have told
13 them we will have this money.

14 When we're doing this quick, I don't see the
15 concern there. It allows the State to carry out its laws
16 as this legislature has chosen to. I don't object to a
17 45 day briefing and try to move along. I would prefer
18 not to brief on June 4.

19 There's no way I can agree to not spend --
20 transferring this money, Your Honor.

21 THE COURT: Even when and again I don't --
22 what's the right word? I want to be judicious. I don't
23 believe everything I read in the newspapers, but I
24 thought I read something about the lead defendant having
25 questions about this legislation.

1 MR. MILLER: Your Honor, I think on a policy
2 matter, many of the politicians in Connecticut are in
3 disagreement on, but they have never stated to me that
4 this is not -- what we're doing is unconstitutional.
5 They may not like it is as a policy matter, but that's
6 what the legislature chose to do, Your Honor.

7 THE COURT: Did the governor veto the October
8 budget?

9 MR. MILLER: No, I believe technically he did
10 not have the authority to do the line item veto on that
11 because the way it came out.

12 THE COURT: So it was all or nothing.

13 MR. MILLER: It was the entire budget or nothing
14 at all.

15 THE COURT: Okay. All right. Well, I have to
16 say it will be difficult for me to decide by June 25 even
17 if I order you to get your briefs in soon. But I will do
18 that at least on a preliminary injunction basis.

19 I think it would be more sensible if we weren't
20 quite as rushed. I think 45 days makes more sense,
21 Attorney Humes, but you're entitled to ask for a
22 preliminary injunction and for me to decide it. I don't
23 know.

24 I have had many defendants in 20 years tell me
25 oh, Judge, they don't have to worry. We're good for it.

1 And I usually am highly skeptical of that and I generally
2 say if you are so good for it, put it up, but I don't
3 know given the State of Connecticut, maybe I should be
4 equally skeptical, but I'm not.

5 I think unless I misunderstand where you would
6 be, if you were entitled to have this money in your hands
7 and put back to its original purpose, you would I think
8 be a creditor of the State of Connecticut and I would be
9 shocked if you could not collect on that. Collect
10 meaning accomplish what your clients want which is to put
11 the money to the use for which in your view the bill was
12 originally tendered to the ratepayer to pay to have this
13 fund. These funds I should say. The two funds.

14 I think if you do cross move in 45 days, what
15 are we looking at? We're looking at -- I would expect I
16 can get a decision out by the end of July. You are
17 talking about a month if we don't go the preliminary
18 injunction route of, quote, exposure.

19 Your original request of status quo wasn't going
20 to cure the harm that I thought I saw which is none of
21 these programs are being worked on now because the money
22 isn't there, and I understand that that's a harm, but I
23 don't know.

24 Again I think I've said it many times so I don't
25 have to say it again. You are entitled to make a motion

1 for preliminary injunction. I would decide a motion for
2 preliminary injunction if you make it.

3 I think it would make sense if we just briefed
4 this in a more substantive way that resolves the issue
5 one way or another.

6 If there's disagreement about my opinion, take
7 it up to the circuit on an expedited basis. But again I
8 don't mean to tell the plaintiff they can't move for a
9 preliminary injunction.

10 MR. HUMES: Your Honor, may we have five minutes
11 to consult?

12 THE COURT: Absolutely. Sure. I will take a
13 brief recess. I will be back whenever they are ready.
14 Just let me know.

15 (Whereupon, a recess was taken from 11:15 a.m.
16 to 11:34 a.m.)

17 THE COURT: My apologies for keeping you
18 waiting. I got caught up in something else. What are we
19 going to do?

20 MR. HUMES: I thank you, Your Honor, for your
21 patience and assistance. We're inclined to request a
22 cross motion for summary judgment schedule as follows:

23 A filing date of July 6 and a reply due date of
24 July 30. And we would leave the rest to you, Your Honor.

25 THE COURT: But I think that -- I didn't want to

1 give you all my schedule for the summer, but I should
2 be -- I do have a trial in August. But I should have
3 time to turn to it, the briefs, shortly after you join
4 them. So hopefully I can get you a decision -- it is
5 always bad to give you an estimate so I will resist. I'm
6 not going to give it.

7 I think, although I have a reputation on a lot
8 of levels, the one that I do have is that I do tend to my
9 docket. I think if you have it fully briefed by the end
10 of July, I don't think that the plaintiff should be
11 concerned that they are exposed for too much longer.

12 MR. HUMES: Your Honor, our present intention,
13 although we reserve the right to do so, would be to not
14 move forward with the request for injunctive relief. But
15 we're relying on the representation of counsel that the
16 OPM has the authority, the obligation and the intent to
17 return the funds immediately upon the issuance of a final
18 decision.

19 So that is our understanding of the State's
20 position and we accept that representation and have
21 agreed to this schedule.

22 THE COURT: Attorney Miller, you have the
23 authority to make that representation to the Court and to
24 plaintiffs?

25 MR. MILLER: Yes, Your Honor, I do. I will note

1 this could take a week.

2 THE COURT: It is the same thing when you take
3 it out. It takes a week.

4 MR. MILLER: It won't be the next week, give or
5 take a few days.

6 THE COURT: Who does that? The treasurer? The
7 governor? Who effectuates that order?

8 MR. MILLER: The Attorney General's Office will
9 effectuate by letter to Office of Policy and Management.

10 THE COURT: I think that's reasonable. It is a
11 reasonable way to proceed. Hopefully with a little more
12 time to do briefing, I will get some really good briefs
13 that are going to answer all of my questions.

14 I do look forward to addressing the issue.
15 While I'm not sure I have spotted all the issues, the
16 ones I spotted I think will be interesting. And I don't
17 know.

18 Is there a lot of precedent in this area of this
19 nature? I didn't think so unless I missed it in the law
20 school.

21 MR. HUMES: There is a Connecticut Supreme Court
22 decision from two years ago that says a ratepayer is in a
23 contract with the utility so that is law that's the case
24 of Connecticut Light and Power versus Proctor, 324
25 Connecticut 245 so that's one interesting case.

1 We think this is a novel situation where
2 plaintiffs are using the Filed-Rate Doctrine to avoid the
3 budget sweeps of the ratepayer funds.

4 THE COURT: The time that you file your
5 simultaneous briefs, you are going to work on a
6 stipulation of fact that hopefully will mean there are no
7 disputed facts.

8 MR. HUMES: We anticipate a joint statement of
9 facts for all of the joint facts. There will be
10 affidavits of plaintiffs regarding their damages and so
11 that we wouldn't expect that to be a stipulation.

12 We're expecting to do a joint statement of facts
13 supplemented by affidavits.

14 THE COURT: If it becomes apparent as you work
15 through June on this that there are disputed facts that
16 are damage-related facts, I would ask that when you file
17 your joint motions -- obviously I think the Local Rule
18 requires you to do this, but to identify those disputed
19 issues of fact and then to -- I don't know what it would
20 be called Notice To The Court maybe -- identifying if it
21 is necessary to have a hearing at least on the equitable
22 relief. Obviously if it is money damages we're talking
23 about maybe a jury. I'm talking about me getting in a
24 position where I can issue a ruling which adjudicates the
25 dispute between the parties on the sweep, no sweep. And

1 so if there's facts that are in dispute that would go to
2 my decision to that I guess I would ask you to call them
3 out to me. Call it a notice. But that would tell me
4 there's this one disputed issue of fact, Judge or there's
5 five, whatever they are and we would require a hearing
6 with, you know, four witnesses that will take an
7 estimated whatever three hours, six hours, whatever hours
8 it would take that you confer with the other side there's
9 either agreement or disagreement et cetera.

10 If I get that on July 6, I can then schedule
11 that hearing right at or shortly after when the briefs
12 come in. I can do this all as a piece assuming I am the
13 finder of fact. I don't mean to presume anything. I'm
14 talking about -- you should tell me about damages, but
15 again that's a summary judgment. I don't know what the
16 State's position will be on damages. But I at least want
17 to be in a position that I can rule on the request for
18 equitable relief.

19 And I guess even if that doesn't result in a
20 judgment because there's still damage issues left, I
21 would I think unless the Government tells me this would
22 be wrongheaded. If I found for the plaintiff, that is a
23 big if. If I found for the plaintiffs on the summary
24 judgment as to liability, I would think I would at that
25 time enter a preliminary injunction, even if I can enter

1 a final judgment.

2 You can appeal that I believe, a preliminary
3 injunction, so you can get that issue up in front of the
4 circuit substantively without delay.

5 In the meanwhile at minimum, if I concluded the
6 plaintiffs had a claim, I think at that point, they were
7 entitled to some protection. You might want to discuss
8 it. Maybe you can agree on something.

9 MR. HUMES: I understand.

10 THE COURT: What I'm trying to say if the
11 plaintiffs lose, they lose. They go to circuit and we'll
12 find out who is right. If they win on the law that will
13 be briefed in the summary judgment, the case shouldn't
14 sit unresolved because some plaintiff claims they have X
15 dollars of damages. So I don't want that to be where we
16 ended up.

17 MR. MILLER: I didn't understand this to be a
18 claim for damages. I thought declaratory injunctive
19 relief.

20 THE COURT: I'm just picking up the Complaint.
21 I thought I saw something under 19.

22 MR. HUMES: The allegations are harm, not
23 damages. We have a 42 USC 1983 claim with a claim for
24 attorney fees under 1988.

25 THE COURT: Right but that wouldn't hold up the

1 judgment. Is it your view that when I rule on the
2 summary judgment, whether I grant plaintiff's summary
3 judgment or defendant's summary judgment, that would
4 result in the entry of a judgment in case number 18CV817?
5 Because attorney fees are covered by the Local Rules.
6 They come after judgment. I forget the time. You have a
7 couple of weeks or something. So you are not -- you will
8 have affidavits about harm, but you are not seeking
9 monetary damages?

10 MR. HUMES: That's correct, Your Honor.

11 THE COURT: Then what I was worried about isn't
12 a problem. I think one of you is worried about getting
13 somewhere by 1:30 so I should stop talking. I look
14 forward to getting the briefs and you are giving yourself
15 three weeks for the replies. A little bit more than
16 three. As I say, I don't want to tell you when you will
17 get a ruling, but it will be, yeah, it will hopefully be
18 prompt.

19 MR. HUMES: Thank you, Your Honor.

20 THE COURT: Thank you all very much. I
21 appreciate it. We'll stand in recess, Diahann.

22 (Whereupon, the above hearing adjourned at 11:43
23 a.m.)

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COURT REPORTER'S TRANSCRIPT CERTIFICATE

I hereby certify that the within and foregoing is a true and correct transcript taken from the proceedings in the above-entitled matter.

/s/ Terri Fidanza

Terri Fidanza, RPR
Official Court Reporter