No. _____

In the
Supreme Court of the United States

GREAT LAKES MINERALS, LLC,
Petitioner,

v.

STATE OF OHIO, JOSEPH W. TESTA, AND
JEFF MCCLAIN, TAX COMMISSIONER OF OHIO,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Kentucky

PETITION FOR WRIT OF CERTIORARI

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July 10, 2020

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QUESTIONS PRESENTED

I. Whether the Court's decision in *Franchise Tax Board of California v. Hyatt*, 139 S.Ct. 1485 (2019) extends a state's sovereign immunity to declaratory and/or injunctive relief and to individuals sued in their individual capacity.

II. Whether an individual or business that does not have sufficient minimum contacts to be subject to the jurisdiction of a foreign state may seek declaratory or injunctive relief within their home state.

III. Whether a state court can employ principles of comity to dismiss an action properly brought pursuant to 42 U.S.C.A. 1983 against a state official in his individual capacity.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner, Great Lakes Minerals, LLC, pursuant to Rule 29.6 states that it has no parent company and that no publicly held company owns 10% or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

Greenup County, Kentucky Circuit Court action: *Great Lakes Minerals, LLC v. Joseph W. Testa, Tax Commissioner of Ohio, et al.*, Case No. 17-CI-00311;

Kentucky Court of Appeals (which was then transferred to the Kentucky Supreme Court): *State of Ohio, et al. v. Great Lakes Minerals, LLC*, Case No. 2018-CA-000484; and

Kentucky Supreme Court appeal: *State of Ohio and Joseph W. Testa, Tax Commissioner of Ohio v. Great Lakes Minerals, LLC*, Case No. 2018-SC0001610-T.

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The Greenup Circuit Court's Order Denying Respondent's Motion to Dismiss, *Great Lakes Minerals, LLC v. Joseph W. Testa, Tax Commissioner of Ohio, et al.,* Case No. 17-CI-00311 (Feb. 16, 2018) is unreported and is reproduced in the Appendix hereto ("App."), App. 12–13. The Kentucky Supreme Court Order Granting Respondent's Motion to Transfer its Interlocutory Appeal to the Kentucky Supreme Court, *State of Ohio and Joseph W. Testa, Tax Commissioner of Ohio v. Great Lakes Minerals, LLC*, Case No. 2018-SC-0001610-T (June 14, 2018) is unreported and reproduced at App. 16–17. The Kentucky Supreme Court Order Holding Action in Abeyance, *State of Ohio and Joseph W. Testa, Tax Commissioner of Ohio v. Great Lakes Minerals, LLC*, Case No. 2018-SC-0001610-T (Mar. 14, 2019) is unreported and reproduced at App. 18-19. The Kentucky Supreme Court Opinion Reversing the Greenup Circuit Court Order and Remanding for Dismissal is reported at 597 S.W.3d 169 and reproduced at App. 1–11. The Kentucky Supreme Court Order Denying the Petitioner's Motion for Rehearing and/or Modification, *State of Ohio and Joseph W. Testa, Tax Commissioner of Ohio v. Great Lakes Minerals, LLC*, Case No. 2018-SC-0001610-TG (Apr. 30, 2020) is unreported and reproduced at App. 14-15.

JURISDICTION

The Kentucky Supreme Court issued its Opinion on December 19, 2019, and denied Rehearing and/or Modification of Opinion on April 30, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1257. The

Petition for Writ of Certiorari has been timely filed in accordance with Rule 13.1 of the United States Supreme Court Rules.

STATUTORY AND RULE PROVISIONS INVOLVED

The Kentucky Revised Statutes, Chapter 418 provides in relevant part:

> **K.R.S. 418.040: Plaintiff may obtain declaration of rights if actual controversy exists**
>
> In any action in a court of record of this Commonwealth having general jurisdiction wherein it is made to appear that an actual controversy exists, the plaintiff may ask for a declaration of rights, either alone or with other relief; and the court may make a binding declaration of rights, whether or not consequential relief is or could be asked.

The Kentucky Rules of Civil Procedure provides in relevant part:

> **CR 60.03 Independent actions**
>
> Rule 60.02 shall not limit the power of any court to entertain an independent action to relieve a person from a judgment, order or proceeding on appropriate equitable grounds. Relief shall not be granted in an independent action if the ground of relief sought has been denied in a proceeding by motion under Rule 60.02, or would

be barred because not brought in time under the provisions of that rule.

The Revised Ohio Statutory Code, Chapter 5751 provides in relevant part:

O.R.C. 5751.01 Definitions

As used in this chapter:

(G) "Taxable gross receipts" means gross receipts situsedto this state under section 5751.033 of the Revised Code.

O.R.C. 5751.02 Commercial activity tax; commercial activities tax receipts fund . . .

(A) For the purpose of funding the needs of this state and its local governments, there is hereby levied a commercial activity tax on each person with taxable gross receipts for the privilege of doing business in this state. For the purposes of this chapter, "doing business" means engaging in any activity, whether legal or illegal, that is conducted for, or results in, gain, profit, or income, at any time during a calendar year. Persons on which the commercial activity tax is levied include, but are not limited to, persons with substantial nexus with this state. The tax imposed under this section is not a transactional tax and is not subject to Public Law No. 86-272, 73 Stat. 555. The tax imposed under this section is in addition to any other taxes or fees imposed under the Revised Code. The tax levied under this section is imposed on the person receiving the gross receipts and is not a tax imposed

directly on a purchaser. The tax imposed by this section is an annual privilege tax for the calendar year that, in the case of calendar year taxpayers, is the annual tax period and, in the case of calendar quarter taxpayers, contains all quarterly tax periods in the calendar year. A taxpayer is subject to the annual privilege tax for doing business during any portion of such calendar year.

O.R.C. 5751.033 Situs of gross receipts

For the purpose of this chapter, gross receipts shall be sitused to this state as follows:

(E) Gross receipts from the sale of tangible personal property shall be sitused to this state if the property is received in this state by the purchaser. In the case of delivery of tangible personal property by motor carrier or by other means of transportation, the place at which such property is ultimately received after all transportation has been completed shall be considered the place where the purchaser receives the property. For purposes of this section, the phrase "delivery of tangible personal property by motor carrier or by other means of transportation" includes the situation in which a purchaser accepts the property in this state and then transports the property directly or by other means to a location outside this state. Direct delivery in this state, other than for purposes of transportation, to a person or firm designated by a purchaser constitutes delivery to the purchaser in this state, and direct delivery

outside this state to a person or firm designated by a purchaser does not constitute delivery to the purchaser in this state, regardless of where title passes or other conditions of sale.

42 U.S.C.A. § 1983 provides in relevant part:

42 U.S.C.A. § 1983: Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

The Petitioner, Great Lakes Minerals, LLC (hereinafter referred to as "Great Lakes"), is a Kentucky company engaged in the business of mineral processing. App. 2, 22. Its office and mineral processing plant is located in Greenup County, Kentucky and it has no offices nor plants outside of the Commonwealth of Kentucky.[1] *Id.* Great Lakes conducts all of its business within the Commonwealth of Kentucky and it does not ship, deliver, or advertise any of its products outside of the Commonwealth of Kentucky. *Id.* If an individual or company wishes to purchase minerals from Great Lakes, they must physically travel to Great Lakes' plant in Greenup County, Kentucky; pay for the product in Greenup County, Kentucky; and take full physical possession of said product in Greenup County, Kentucky. *Id.* After a customer purchases and takes possession of the product in Kentucky, Great Lakes has no further property rights or interests in same, nor does it control, facilitate, or assist in the customers' transportation of their property after purchase. *Id.* Rather, the entirety of Great Lakes' business transactions begin and end within the borders of the Commonwealth of Kentucky.

In March 2016, the Revenue Department for the State of Ohio learned through an unaffiliated Ohio business' tax return that the third party Ohio business

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[1] Great Lakes was formed under the laws of the State of Delaware on March 10, 1999, but has operated in the Commonwealth of Kentucky since April 2, 1999 with its principle office in Wurtland, Greenup County, Kentucky since July 18, 2003.

traveled to Kentucky to purchase minerals from Great Lakes and later used the purchased minerals in its business in Ohio. App. 22. Thereafter, the Ohio Tax Commissioner, Joseph W. Testa, notified Great Lakes that the State of Ohio was assessing Great Lakes a Commercial Activities Tax (hereinafter the "CAT") based on the Kentucky company's entire gross receipts as though it was an Ohio business conducting all business in Ohio. App.20–31. In addition, the assessment was applied retroactively for the previous seven (7) years from January 1, 2009 until September 30, 2016, and included all penalties and interest in the assessment. App. 29-31.

Great Lakes objected to the assessment and maintained that it did not conduct any business in Ohio nor did it have the necessary, minimum contacts nor a substantial nexus with the State of Ohio to be subject to the Ohio CAT. App. 2–3, 20–28. Great Lakes maintained that there must be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Miller Brothers Co. v. Maryland*, 347 U.S. 340, 344–45 (1954); App. 22–25. The connection must be one in which the taxed entity has purposefully "availed" itself of the protection and services of the taxing state. *South Dakota v. Wayfair, Inc.*, 138 S.Ct. 2080 (2018); *International Harvester Co. v. Dept. of Treasury*, 322 U.S. 340 (1944); App. 22–25. Great Lakes contended that it was a Kentucky company conducting business exclusively in Kentucky and therefore did not meet this standard for taxation. App. 20–28. Great Lakes further argued that the Ohio CAT statutory scheme explicitly excludes its application to the Kentucky company

because all deliveries of the Kentucky company's products occur *outside* the State of Ohio, thus making the Ohio CAT inapplicable. *Id.* In fact, the Ohio CAT specifically acknowledges that a situation such as the case at bar is not taxable. O.R.C. 5751.033(E) states the following:

> **O.R.C. 5751.033: Situsing of gross receipts to Ohio**
>
> For the purposes of this chapter, gross receipts shall be sitused to this state as follows:
>
> (E) Gross receipts from the sale of tangible personal property shall be sitused to this state if the property is received in this state by the purchaser. In the case of delivery of tangible personal property by motor carrier or by other means of transportation, the place at which such property is ultimately received after all transportation has been completed shall be considered the place where the purchaser receives the property. For purposes of this section, the phrase "delivery of tangible personal property by motor carrier or by other means of transportation" includes the situation in which a purchaser accepts the property in this state and then transports the property directly or by other means to a location outside this state. Direct delivery in this state, other than for purposes of transportation, to a person or firm designated by a purchaser constitutes delivery to the purchaser in this state, and **direct delivery outside this state to a person or firm designated by a purchaser does not**

> **constitute delivery to the purchaser in this state, regardless of where title passes or other conditions of sale.** O.R.C. 5751.033(E) (emphasis added); App. 24–25.

Accordingly, as all of Great Lakes' products are subject to "direct delivery outside [the State of Ohio]" and "title passes" entirely within the Commonwealth of Kentucky, Great Lakes does not enjoy a "privilege of doing business in [the State of Ohio]" in order to be subject to the foreign, Ohio CAT. O.R.C. 5751.02, 5751.033; App. 23–25.

Despite these objections, the Ohio Tax Commissioner launched an aggressive campaign to force Great Lakes to pay the CAT tax. App. 22–24. Not only did the Tax Commissioner send aggressive letters and make phone calls to Great Lakes' facility in Greenup County, Kentucky, but the Commissioner also sent his agents physically across state lines to Great Lakes' property in Greenup County, Kentucky to demand payment of the CAT. *Id.* It was only then, after these aggressive and continuous tactics that Great Lakes reluctantly paid the CAT, a foreign tax the Kentucky company did not owe. *Id.*

On April 6, 2017 the State of Ohio issued a Notice of Assessment acknowledging Great Lakes' payment of the tax but claimed that it must also pay an "Assessment Penalty on Tax" (hereinafter the "Penalty"). App. 29-31. To date, the State of Ohio continues to seek recovery of this Penalty, and levies the CAT and all associated penalties and interest against Great Lakes each quarter of each year for those gross receipts sitused in the State of Ohio—despite

Great Lakes not having a nexus with the State of Ohio nor minimum contacts with the State. App. 20–28.

The State of Ohio certainly has the constitutional authority to tax businesses and business activities within its own borders, but it does not have the constitutional authority to tax a Kentucky company for conducting business exclusively in Kentucky. Unlike the Due Process the Commonwealth of Kentucky affords a Kentucky resident, the State of Ohio does not permit an out-of-state business to promptly assert its constitutional rights or challenges regarding minimum contacts nor present a nexus argument under the United States Constitution until after it endures several years of administrative litigation with the tax and penalties accruing throughout the process. *Compare Berthelsen v. Kane*, 759 S.W.2d 831 (Ky. App. 1988) (holding that an initial evidentiary hearing must occur to determine if an out-of-state resident is subject to jurisdiction), *with* O.R.C. 5751.09, et seq. (requiring an individual challenging the CAT to undergo several layers of administrative proceedings, including the Board of Tax Appeals), and *MCI Telecommunications Corp. v. Limbach*, 625 N.E.2d 597 (Ohio 1994) (holding that the Board of Tax Appeals may not determine the constitutional issues).

Under Ohio law, an out-of-state resident is required to undergo approximately five to six years of administrative appeals, through both the Tax Commissioner and the Board of Tax Appeals, before it can finally assert its constitutional minimum contacts defense before an Ohio court. O.R.C. 5751.09, et seq.; *see also MCI Telecommunications Corp.*, 625 N.E.2d

597. And while the matter is pending, the State of Ohio and its Tax Commissioner continue taxing the out-of-state business each year, including all penalties and interest, without ever offering the out-of-state business a hearing to determine if it had the sufficient minimum contacts necessary to be taxed in the first place. In contrast, the Commonwealth of Kentucky has a process for declaratory judgments to determine the rights of the parties immediately, which includes if there are sufficient minimum contacts. *See* K.R.S. 418.080. This process is fair and equitable to in-state and out-of-state businesses alike as K.R.S. 49.250 provides that a business aggrieved by a final order of the tax commission is entitled to a stay of collection until the issue is resolved by the Court. *See* K.R.S. 49.250.

On July 10, 2017, Great Lakes filed suit in Greenup County Circuit Court in Wurtland, Kentucky asserting three causes of action: (1) a Petition to the Kentucky Court for Declaratory Judgment declaring that Great Lakes did not have the necessary "minimum contacts" or a substantial nexus with the State of Ohio in order to be subject to the Ohio CAT and its Penalty under the United States Constitution; (2) a claim pursuant to CR 60.03 of the Kentucky Rules of Civil Procedure, that the Kentucky company should be relieved from having to participate in or be subject to the State of Ohio tax proceedings with respect to the CAT and its Penalty; and (3) a 42 U.S.C.A. 1983 claim against the State of Ohio's Tax Commissioner, Joseph W. Testa, in his individual capacity, for actions taken by him in the Commonwealth of Kentucky that were beyond the authority granted to him by the State of Ohio and the United States Constitution. App. 20–28. In response to

the suit, the State of Ohio and its Tax Commissioner filed a Motion to Dismiss the action on the basis of sovereign immunity, which the Greenup Circuit Court denied on February 16, 2018. App. 12–13.

The State of Ohio and Commissioner Testa then filed a Notice of Interlocutory Appeal to the Kentucky Court of Appeals on March 16, 2018 with respect to whether sovereign immunity barred Great Lakes' action against the State of Ohio and its Tax Commissioner in his official and individual capacities. App. 16–17. The interlocutory appeal was then transferred to the Kentucky Supreme Court on June 14, 2018. *Id.* After the parties briefed the interlocutory appeal issue of sovereign immunity, the Kentucky Supreme Court issued an Order on March 14, 2019 holding the matter in abeyance pending this Court's final determination of *Franchise Tax Bd. of California v. Hyatt*, 138 S.Ct. 2710, No. 17-1299 (2018). App. 18-19. On May 13, 2019, this Court issued its final Opinion in *Hyatt*, and the Kentucky Supreme Court granted the parties the right to file supplemental briefs with respect to the significance of *Hyatt*, if any, to the case at bar. *See Franchise Tax Bd. of California v. Hyatt*, 129 S.Ct. 1485 (2019).

Following the parties' supplemental briefing, the Kentucky Supreme Court issued an Opinion Reversing the denial of dismissal by the Greenup Circuit Court and remanded the above styled action back to said Court for dismissal. App. 1–11. The Kentucky Supreme Court held that pursuant to this Court's May 13, 2019 holding in *Hyatt*, the State of Ohio and its Tax Commissioner in his official capacity were protected

from all manner of suit based on sovereign immunity. As such, the Court ordered Great Lakes' 42 U.S.C.A. 1983 action against the State of Ohio and its Tax Commissioner in his official capacity, as well as the CR 60.03 claim, dismissed as barred by sovereign immunity.[2] *Id.* With respect to Great Lakes' 42 U.S.C.A. 1983 action against the Ohio Tax Commissioner, in his individual capacity, for actions taken within the Commonwealth of Kentucky, the Kentucky Supreme Court dismissed said claim on the basis of comity. *Id.*

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT REVIEW TO DETERMINE IF *HYATT* EXTENDS A STATE'S SOVEREIGN IMMUNITY TO DECLARATORY AND/OR OTHER EQUITABLE RELIEF AS WELL AS THE INDIVIDUAL ACTING IN HIS INDIVIDUAL CAPACITY.

Certiorari is warranted to determine if *Hyatt* bars an action for Declaratory and/or other equitable relief when Kentucky, Ohio and federal law all maintain that sovereign immunity does not apply to declaratory and injunctive relief, nor would it bar a claim against the Tax Commissioner in his individual capacity.

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[2] In accordance with Rules of the Supreme Court of the United States, Rule 35, Ohio Tax Commissioner Joseph W. Testa in his official capacity has been substituted with Ohio Tax Commissioner Jeff McClain, who was appointed to the office in January 2019. As there is a 42 U.S.C. 1983 claim against Joseph W. Testa in his individual capacity, he remains a party to the action.

A. Kentucky Law.

In the Commonwealth of Kentucky, K.R.S. 418.040 codifies Kentucky law with respect to Declaratory Judgments. It states the following:

> **K.R.S. 418.040: Plaintiff may obtain declaration of rights if actual controversy exists**
>
> In any action in a court of record of this Commonwealth having general jurisdiction wherein it is made to appear that an actual controversy exists, the plaintiff may ask for a declaration of rights, either alone or with other relief; and the court may make a binding declaration of rights, whether or not consequential relief is or could be asked. K.R.S. 418.040.

The Kentucky Legislature enacted K.R.S. 418.080 to clarify that the purpose of K.R.S. 418.040 is to "make courts more serviceable to the people by way of settling controversies, and affording relief from uncertainty and insecurity with respect to rights, duties and relations." K.R.S. 418.080. As such, K.R.S. 418.040 is to be "liberally interpreted and administered." K.R.S. 418.080.

The Kentucky Supreme Court held in *Commonwealth v. Kentucky Retirement Systems*, 396 S.W.3d 833 (Ky. 2013) that sovereign immunity is inapplicable to a petition for Declaratory Judgment. In doing so, the Court reasoned that the purpose of sovereign immunity was to protect the financial resources of a state and ensure that a states' resources

"cannot be compelled as recompense for state action." *Id.* at 836. A Declaratory Judgment action, however, is "not a claim for damages, but rather it is a request that the plaintiff's rights under the law be declared. There is no harm to state resources from a declaratory judgment." *Id.* at 838. As such, an action for Declaratory Relief is "qualitatively different" and "[s]overeign immunity does not apply." *Id.*; *see also Cty. Employees Retirement System v. Frontier Housing, Inc.*, 536 S.W.3d 712, 714 (Ky. App. 2017) ("We do not have a government that is beyond scrutiny. If sovereign immunity can be used to prevent the state, through its agencies, from being required to act in accordance with the law, then lawlessness results.") (citing *Kentucky Retirement Systems*, 396 S.W.3d at 839*).*

B. Ohio Law.

Similar to Kentucky law, Ohio courts also hold that sovereign immunity is not implicated with respect to Declaratory Judgment actions against the State of Ohio. *See Cirino v. Ohio Bureau of Workers' Compensation*, 106 N.E.3d 41, 47 (Ohio 2018); *Racing Guild, Local 304 v. Ohio State Racing Comm'n*, 503 N.E.2d 1025, 1028 (Ohio 1986); *Friedman v. Johnson*, 480 N.E.2d 82, 84 (Ohio 1985); *State ex rel. Gelesh v. State Med. Bd.*, 874 N.E.2d 1256, 1264 (Ohio App. 2007); *Oakar v. Ohio Dept. of Mental Retardation*, 623 N.E.2d 1296, 1299 (Ohio App. 1993); *Columbus Southern Power Co. v. Ohio Dept. of Transp.*, 579 N.E.2d 735, 739 (Ohio App. 1989); *see also Victorian's Midnight Café L.L.C. v. Goodman*, 2016 WL 6994983, at *2 (Ohio App. Nov. 29, 2016); *Cristino v. Ohio Bureau of Workers' Comp.*, 2014 WL 1347158, at *3

(Ohio App. Mar. 31, 2014); *Interim Healthcare of Columbus, Inc. v. State Dep't of Admin.*, 2008 WL 2025153, at *3 (Ohio App. May 6, 2008); *Help the Children v. Dep't of Liquor Control*, 1996 WL 11280 (Ohio App. Jan. 11, 1996); *Helms v. Ohio EPA*, 2015 WL 6549331 (Ohio Ct. Claims Oct. 23, 2015).

The Supreme Court of Ohio held in *Ohio Hosp. Assn. v. Ohio Dept. of Human Services*, 579 N.E.2d 695 (Ohio 1991*)* that a claim for equitable relief—including Declaratory, Injunctive, and monetary—against a state or state agency is not barred by the doctrine of sovereign immunity. The Ohio Supreme Court reasoned that "[d]amages are given to the plaintiff to *substitute* for a suffered loss, whereas specific remedies 'are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled.'" *Id.* at 700 (citing *Bowen v. Massachusetts*, 487 U.S. 879 (1988)). The Court held that "sovereign immunity is not applicable" to claims for equitable relief. *Id.*; *see also Santos v. Ohio Bureau of Workers' Compensation*, 801 N.E.2d 441, 445 (Ohio 2004). In February 2020, the Ohio Supreme Court again held that "sovereign immunity does not bar claims for equitable relief, only for legal relief." *Cleveland v. Ohio Bureau of Workers' Compensation*, 2020 WL 557311, at *2 (Ohio Feb. 5, 2020).

C. Federal Law.

The Court has long recognized that sovereign immunity does not bar a private action against a state and/or its entities for abusive state action. Under federal law, a state or state official may be sued pursuant to 42 U.S.C.A. 1983 for both declaratory and

injunctive relief. *See Timmerman v. Brown*, 528 F.2d 811, 814 (1975)*, rev'd on other grounds sub nom. Leeke v. Timmerman*, 454 U.S. 83 (1981); *Hafer v. Melo*, 502 U.S. 21 (1991); *Kentucky v. Graham*, 473 U.S. 159, 165 (1985). A state official may also be sued in their individual capacity for monetary damages. *Lewis v. Clarke*, 137 S.Ct. 1285 (2017) ("Nor have we ever held that a civil rights suit under 42. U.S.C. 1983 against a state officer in his individual capacity implicates the Eleventh Amendment and a State's sovereign immunity from suit."). Both causes of action indisputably may be brought in a state court. *See Howlett v. Rose*, 496 U.S. 356 (1990); *Zinermon v. Burch*, 494 U.S. 113 (1990) (holding that the existence of a concurrent state remedy is not a bar to a 1983 claim).

Like Ohio and Kentucky, federal law also prohibits 42 U.S.C. 1983 suits for monetary damages against a sovereign because of the threat to "public funds in the state treasury." *Hafer*, 502 U.S. at 29. Declaratory and/or other equitable relief, however, are fundamentally different remedies than monetary damages and they pose no threat to the state treasury. *Perez v. Ledesma*, 401 U.S. 82, 124 (1971) (J. Brennan, concurrence) ("A declaratory judgment, on the other hand, is merely a declaration of legal status and rights; it neither mandates nor prohibits state action."); *see also Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671–72 (1950) ("The Declaratory Judgment Act allowed relief to be given by way of recognizing the plaintiff's right even though no immediate enforcement of it was asked."). This is precisely why, under federal law, an individual can petition for both Declaratory and

Injunctive Relief against a state and its officials in their official capacity, as well as a claim for monetary damages against a state official in his individual capacity.

D. *Franchise Tax Board of California v. Hyatt*

Under Kentucky, Ohio and federal law sovereign immunity cannot bar a petition for Declaratory and/or other equitable relief against a state and its officials in their official capacity. The question before the Court then, is whether the Court's decision in *Franchise Tax Board of California v. Hyatt*, 139 S. Ct. 1485 (2019) now overrules prior Kentucky, Ohio and federal law to bar the entirety of Great Lakes' action.

In *Hyatt*, the Court explicitly overruled *Nevada v. Hall*, 440 U.S. 410 (1979) and held that "States retain their sovereign immunity from private suits brought in the courts of other States." 139 S.Ct. at 1492. In doing so, the Court dismissed a private, Nevada action against California because California—under its own laws—was sovereignly immune from suit. *Id.* at 1499.

On a basic level, the case at hand is similar to *Hyatt* by reason of the fact that a private individual or company alleges tortious conduct by a state agency in collection a tax. *Hyatt*, 139 S.Ct. 1485 (2019). The distinction, however, arises from the type of relief sought and the extent to which the parties herein recognize sovereign immunity as a bar to same. While in *Hyatt* the plaintiff sought compensatory damages against a state, the Petitioner in the case at bar seeks Declaratory and equitable relief against the State of

Ohio and its Tax Commissioner in his official capacity—claims that under Kentucky, Ohio and federal law are not barred by sovereign immunity because they do not threaten the states' treasury. Accordingly, the Court's decision in *Hyatt* cannot serve as a bar to same.

Allowing a Kentucky court to determine whether Great Lakes has minimum contacts or a substantial nexus with the State of Ohio is the equitable, expedient ruling. This is particularly equitable given that the agents for the State of Ohio physically ventured into the sovereignty of the Commonwealth of Kentucky to collect the tax. App. 23. It is simply not equitable for Ohio agents to come to Kentucky for what benefits them, but then claim that it is unfair to require them to come to Kentucky to determine if their actions are constitutional.

Moreover, neither the State of Ohio nor its Tax Commissioner in his official or individual capacity are prejudiced by allowing a Kentucky court to determine the issue of minimum contacts because Kentucky courts will serve as the ultimate adjudicator of this question. Any judgment obtained by the State of Ohio and its Tax Commissioner will have to be brought to Kentucky and enforced under Kentucky law as valid. The sole issue is whether Kentucky courts can decide the minimum contacts question now or years from now.

During the Court's oral argument in *Franchise Tax Board of California v. Hyatt*, 139 S.Ct. 1485 (2019), the Court posed the question of whether Hyatt could have brought an action in his home state of Nevada to determine the factual premises of his case, i.e. whether

or not he was a resident of California, or whether he had tax liability to California: "Justice Sotomayor: Could the Nevada court have adjudicated the factual premises? Could he have brought some sort of suit in Nevada to adjudicate whether he was a resident of California or not or to find that he has no tax liability?" Transcript of Oral Argument at 47–48, *Franchise Tax Board of California v. Hyatt*, 139 S.Ct. 1485 (2019) (17-1299). Counsel of record, however, only responded with respect to Nevada federal courts and the Tax Injunction Act, which is not applicable to the case at bar. *Id.* Counsel did not respond as related to state court. *Id.*

The case at hand is the situation the Court posed in its question to counsel in *Hyatt*, however, this action was brought in state court. It is a Kentucky action for Declaratory and other equitable relief to determine whether a Kentucky company has minimum contacts or a substantial nexus with the State of Ohio to be subject to a foreign tax. The Tax Injunction Act has no applicability to the case at bar, nor does Kentucky, Ohio and federal law prohibit this action on the basis of sovereign immunity. To allow a Kentucky court to determine the minimum contacts issue now, rather than years from now, benefits all parties by preventing unnecessary years of litigation costs. If Respondents do not want to participate in a timely hearing now to adjudicate the matter, they should not be allowed to try to do so in the future by bringing their own action in the Commonwealth of Kentucky.

E. Kentucky Civil Rule 60.03.

Much like Declaratory Relief, Kentucky Rule of Civil Procedure 60.03 provides another form of equitable relief. CR 60.03 states the following:

> **Rule 60.03 Independent Actions**
>
> Rule 60.02 shall not limit the power of any court to entertain an independent action to relieve a person from a judgment, order or proceeding on appropriate equitable grounds. Relief shall not be granted in an independent action if the ground of relief sought has been denied in a proceeding by motion under Rule 60.02, or would be barred because not brought in time under the provisions of that rule. CR 60.03.

By this language, CR 60.03 provides for an equitable proceeding where the focus of the independent action is on the equitable rights of the person or entity being relieved of the proceeding. *Id.* A claim of sovereign immunity should have no effect on an action under CR 60.03, because it does not threaten a state's public treasury and only seeks to determine the rights of a given petitioner. This is a Kentucky matter, involving a Kentucky business, concerning entirely Kentucky transactions that occur within the borders of the Commonwealth of Kentucky. As such, the action should go forth and be decided by a Kentucky court.

II. THE COURT SHOULD GRANT REVIEW BECAUSE A STATE MAY NOT REFUSE TO ENTERTAIN A PROPERLY PLEAD FEDERAL CLAIM.

In addition to its equitable claims, Great Lakes brought a federal cause of action pursuant to 42 U.S.C.A. 1983 against Commissioner Testa in his individual capacity for monetary relief. App. 20–28. Great Lakes alleged that by crossing state lines to physically enter Great Lakes' property and demand payment of a foreign tax that Testa knew or should have known was not owed, Commissioner Testa exceeded the authority of his office and violated Great Lakes' rights guaranteed under federal law, the United States Constitution and applicable state law. App. 25–26. The Kentucky Supreme Court, however, dismissed the 42 U.S.C. 1983 claim on principles of comity.[3] App. 7–11. Certiorari is warranted because a state may not refuse to entertain a properly plead federal claim.

A 42 U.S.C. 1983 federal cause of action can be asserted in both federal and state courts. *Howlett v. Rose*, 496 U.S. 356 (1990); *see also Haywood v. Drown*, 556 U.S. 729 (2009); *Nevada v. Hicks*, 533 U.S. 353 (2001); *Zinermon v. Burch*, 494 U.S. 113 (1990); *Felder v. Casey*, 487 U.S. 141 (1988). Pursuant to the

[3] The Kentucky Supreme Court could not explicitly dismiss the 42 U.S.C. 1983 claim against the Ohio Tax Commissioner on the basis of sovereign immunity. *Lewis v. Clarke*, 137 S.Ct. 1285 (2017) ("Nor have we ever held that a civil rights suit under 42 U.S.C. 1983 against a state officer in his individual capacity implicates the Eleventh Amendment and a State's sovereign immunity from suit.").

Supremacy Clause of the United States Constitution, States cannot refuse to entertain a properly plead federal claim. *Haywood*, 556 U.S. at 734–35, 741–42; *Felder*, 487 U.S. at 153; *see also Johnson v. Fankell*, 520 U.S. 911 (1997); *Martinez v. State of California*, 444 U.S. 277 (1980). This is true regardless of existing state laws, rules or policies that conflict with a federal cause of action. *See Haywood*, 556 U.S. at 734–35, 741–42.

In the case at hand, the Kentucky Supreme Court cited to this Court's decision in *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100 (1981) to support its dismissal of Great Lakes' 42 U.S.C. 1983 action against Commissioner Testa in his individual capacity on principles of comity. The *McNary* decision, however, held that 42 U.S.C. 1983 actions were barred *in federal courts* on principles of comity, so long as the state court provided a plain, adequate, and complete remedy to assert federal rights. 454 U.S. at 116.

For the case at bar, it is clear that the State of Ohio does not provide such a remedy for Great Lakes' 42 U.S.C. 1983 claim. In fact, under the Ohio statutory scheme the Kentucky company is unable to assert its constitutional minimum contacts defense until after several years of litigating through the entirety of Ohio's administrative appeals process. *See* O.R.C. 5751.09 (requiring an individual challenging the CAT to undergo several layers of administrative proceedings, including the Board of Tax Appeals); *MCI Telecommunications Corp. v. Limbach*, 625 N.E.2d 597 (Ohio 1994) (holding that the Board of Tax Appeals may not determine constitutional issues). It would take

approximately five to six years to fully complete the State of Ohio's administrative proceedings to then be able to assert the first constitutional challenge to the lowest Ohio court. See Trial Ct. R. DVD, dated January 11, 2018. As such, the Kentucky Supreme Court cannot employ principles of comity to dismiss a properly plead cause of action, especially when there is no adequate alternative. *Supra.*

III. THE COURT SHOULD GRANT REVIEW BECAUSE THE STATE OF OHIO AND ITS TAX COMMISSIONER'S ACTIONS WILL DETRIMENTALLY AFFECT BUSINESSES ACROSS THE UNITED STATES.

Certiorari is warranted because the State of Ohio's unique taxing scheme that unduly taxes businesses outside of Ohio creates an unfair economic advantage for businesses within the state and for the state itself. The rationale that if a product ultimately ends up in the State of Ohio, then Ohio can tax the entire gross sales of every business that touched the product and/or had a hand in the distribution, creates a practical absurdity. While currently only a few states have a CAT tax, if they began applying Ohio's rationale, as a practical matter no business in the United States could survive as they could be taxed by every state—regardless of whether the business had minimum contacts or a substantial nexus with each taxing state.

The State of Ohio and Commissioner Testa levied the CAT against the gross receipts of Great Lakes for 2009–2016, then continues to levy the tax each year thereafter. *See* O.R.C. 5751.02(A). From a business

standpoint, Ohio's taxing of "gross receipts" means that when a company purchases materials and sells them, the company is taxed on the sale instead of the profit of the sale for the "privilege of doing business in the State of Ohio." This is so in Ohio even when the taxed company does not enjoy such a privilege. *See id.* For an in-state business the tax is understandable, but for an out-of-state business, this is simply an additional cost without any benefit. For companies that profit on the remarketing or margin of their sales, the added tax on the gross receipts becomes far more pronounced and creates a nearly unsurmountable business disadvantage to the out-of-state business. Such an application of the Ohio CAT simply cannot be constitutional.

In fact, the very language of the Ohio CAT implies that it seeks to tax out-of-state businesses beyond its constitutional limits. O.R.C. 5751.02 states that: "Persons on which the commercial activity tax is levied **include, but are not limited to,** persons with substantial nexus with this state." O.R.C. 5751.02(A) (emphasis added). In actuality, the law requires that Ohio may only levy its CAT against those businesses with a substantial nexus to the State of Ohio. *Miller Brothers Co. v. Maryland*, 347 U.S. 340, 344–45 (1954); *see also South Dakota v. Wayfair, Inc.*, 138 S.Ct. 2080, 2093 (2018); *International Harvester Co. v. Dept. of Treasury*, 322 U.S. 340 (1944). To the extent that Ohio levies the CAT against businesses without a "substantial nexus" to Ohio—as is the case here with Great Lakes—the State of Ohio and its Tax Commissioner have exceeded their authority under the

Constitution and are detrimentally affecting businesses across the United States.

IV. THE COURT SHOULD GRANT REVIEW BECAUSE THE OHIO CAT IS UNCONSTITUTIONALLY LEVIED ON GREAT LAKES.

It is a fundamental tenant of American jurisprudence that in order to constitutionally tax and not violate the Due Process Clause of the United States Constitution, a state may *only* tax a foreign business that has "some definite link, some minimum connection between [said taxing] state and the person, property or transaction it seeks to tax." *Miller Brothers Co. v. Maryland*, 347 U.S. 340, 344–45 (1954); *see also North Carolina Dept. of Revenue v. The Kimberley Rice Kaestner 1992 Family Trust*, 139 S.Ct. 2213, 2220 (2019); *MeadWestvaco Corp. ex rel. Mead Corp. v. Illinois Dept. of Revenue*, 553 U.S. 16, 24 (2008); *American Oil Co. v. Neill*, 380 U.S. 451, 458 (1965); *Scripto, Inc. v. Carson*, 362 U.S. 207, 210–11 (1960). When determining whether a tax is constitutionally levied, the Court "concerns itself with the practical operation of the tax, that is, substance rather than form [and] requires [the court] to determine the ultimate effect of the law as applied and enforced by a State." *American Oil Co.*, 380 U.S. at 455.

In the case at bar, the entirety of Great Lakes' business transactions begin and end within the borders of the Commonwealth of Kentucky. App. 2, 20–28. The Kentucky company conducts all of its business within the Commonwealth of Kentucky and does not ship, deliver, or advertise any of its products outside of its

home state of Kentucky. *Id.* If an individual or company wishes to purchase minerals from Great Lakes, they must physically travel to Great Lakes' plant in Greenup County, Kentucky themselves; pay for the product in Greenup County, Kentucky; and take full physical possession of said product in Greenup County, Kentucky. *Id.* Thereafter, Great Lakes loses all legal title to said product and the customer is free to deliver their own property wherever they choose. *See id.* Even if Great Lakes knew or was able to determine if its customers would transport their purchased product back to Ohio, the Court has long held that knowledge that a product may ultimately end up in a foreign state is *not* enough to meet the burden of due process. *See, e.g.*, *American Oil Co.*, 380 U.S. at 457. ("The mere fact that [the taxed party] knew that [the product] was to be imported into Idaho merits little discussion."). Therefore, the basic right that is sought to be protected is to be able to defend yourself from unlawful acts in your own state.

The Court's decision in *Franchise Tax Bd. of California v. Hyatt*, 129 S.Ct. 1485 (2019) clearly prohibits an individual or business from using the courts of its home state to offensively seek monetary redress against another state, but the question in this case is whether an individual or business can file a defensive equitable action to prohibit unconstitutional wrongs being committed against it in its home state. The equitable resolution and decision based upon the precedent of each of the states involved and the federal courts, is that Great Lakes should be permitted to defend itself in Wurtland, Kentucky.

CONCLUSION

For the foregoing reasons, the Petitioner, Great Lakes Minerals, LLC, respectfully requests that the Court grant the Petition for Certiorari.

Respectfully submitted,

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